

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
N. Pierre Helou :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Year :  
1978. :  
:

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AFFIDAVIT OF MAILING

State of New York :

SS.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of April, 1985, he served the within notice of Decision by certified mail upon N. Pierre Helou, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

N. Pierre Helou  
163 Oxford Blvd.  
Garden City, NY 11530

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
29th day of April, 1985.

David Parchuck

Annunzio Orsini  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
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N. Pierre Helou :  
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:

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AFFIDAVIT OF MAILING

State of New York :  
ss.:  
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of April, 1985, he served the within notice of Decision by certified mail upon Leonard Bailin, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard Bailin  
299 Broadway  
New York, NY 10007

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
29th day of April, 1985.

David Parchuck

William A. Hegelund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

April 29, 1985

N. Pierre Helou  
163 Oxford Blvd.  
Garden City, NY 11530

Dear Mr. Helou:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Leonard Bailin  
299 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
N. PIERRE HELOU	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1978.	:	

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Petitioner, N. Pierre Helou, 163 Oxford Boulevard, Garden City, New York 11530, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1978 (File No. 38331).

A formal hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 8, 1984 at 1:15 P.M., with all briefs to be submitted by July 16, 1984. Petitioner appeared by Leonard Bailin, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUES

I. Whether petitioner is not required to make the modifications provided for in sections 612(b)(7), (b)(8) and (b)(9) of the Tax Law based on the contention that he was not a shareholder-employee of a professional service corporation at the end of his tax year (December 31, 1978) or at the end of the corporation's fiscal year (June 30, 1978).

II. Whether it is proper for petitioner to reclassify certain amounts originally reported by a professional service corporation as section 612(b)(9) modifications (for corporate contributions to purchase life, accident, health

or other insurance) to section 612(b)(7) modifications (for excess contributions to a pension plan).

III. Whether petitioner is entitled to claim a modification, pursuant to section 612(c)(12) of the Tax Law, reducing Federal adjusted gross income for amounts included in income, or required to be included in income, pursuant to section 612(b)(7) of the Tax Law (for excess contributions to a pension plan), where a substantial portion of the benefits under said pension plan were forfeited by petitioner due to termination of employment.

#### FINDINGS OF FACT

1. Petitioner herein, N. Pierre Helou, timely filed a New York State Income Tax Resident Return for 1978, reporting thereon total income of \$150,042.00, less total subtractions of \$21,903.00, for total New York income of \$128,139.00. In a schedule attached to his return, petitioner explained the total subtraction figure of \$21,903.00 as consisting of "other subtractions" totalling \$19,523.00 and "new jobs credit" totalling \$2,380.00.

2. Also attached to petitioner's return was an amended Form IT-2102.1-PC, New York State Professional Service Corporation Information Return. Said amended Form IT-2102.1-PC was issued to petitioner by Sherwood W. Greiner, M.D., P.C. and was for the taxable year ended June 30, 1978. The amended information return indicated that \$11,964.00, \$1,071.00 and \$10,370.00 were amounts "required to be added to total Federal income" by sections 612(b)(7), (b)(8) and (b)(9) of the Tax Law, respectively. Petitioner did not add the aforementioned amounts to total Federal income as reported on his 1978 New York State income tax return.

3. On April 14, 1982, the Audit Division issued a Notice of Deficiency to petitioner for 1978, asserting additional tax due of \$5,153.58, plus interest

of \$1,511.44, for a total allegedly due of \$6,665.02. The aforementioned Notice of Deficiency was premised on a Statement of Audit Changes dated November 4, 1981, wherein petitioner was offered the following explanation and computation.

"Modification of \$19,523.00 included at Line 2, Page 1, of your return was improperly reported.

Section 612(b) modifications for 1978 are corrected and added to the total Federal income as required by the New York State Tax Law.

Section 612(b)(7) modification	\$11,964.00 <sup>1</sup>
Section 612(b)(8) modification	894.00 <sup>1</sup>
Section 612(b)(9) modification	<u>10,370.00</u>
Total	\$23,228.00
Less: New jobs credit	<u>2,380.00</u>
Adjustment	\$20,848.00"

The adjustments proposed by the Audit Division resulted in the complete disallowance of petitioner's claimed subtraction modification of \$21,903.00 and instead produced the addition modification of \$20,848.00 shown in the above computation.

4. Petitioner was employed by Sherwood W. Greiner, M.D., P.C. (hereinafter "professional service corporation") during the years 1974 through June 30, 1978. Effective July 1, 1976, Dr. Helou became a shareholder-employee of the professional service corporation. Petitioner, as both an employee and as a shareholder-employee, participated in the professional service corporation's pension plan. The following chart represents amounts contributed to said pension plan on petitioner's behalf for the years 1974 through June 30, 1978 and the amount of petitioner's Tax Law sections 612(b)(7), (b)(8) and (b)(9) modifications, as reported by the professional service corporation:

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1 The amount shown on the Statement of Audit Changes differs slightly from the amount reported on the amended Form IT-2102.1-PC since the Audit Division excluded the portion contributed for Medicare.

Year	Amount Paid to Pension Plan	Less: IRC §62(7) Deduction	Section 612(b)(7) Modification	Section 612(b)(8) Modification	Section 612(b)(9) Modification
1974	\$ 6,503.00	N/A	N/A <sup>2</sup>	N/A <sup>2</sup>	N/A <sup>2</sup>
1975	\$ 6,170.00	N/A	N/A <sup>2</sup>	N/A <sup>2</sup>	N/A <sup>2</sup>
1976	\$ 7,798.00	(\$7,500.00)	\$ 298.00 <sup>3</sup>	\$ 757.00 <sup>3</sup>	\$ 5,198.00 <sup>3</sup>
1977	\$14,628.00	(\$7,500.00)	\$ 7,128.00 <sup>3</sup>	\$ 965.00 <sup>3</sup>	\$ 7,102.00 <sup>3</sup>
1978	\$19,464.00	(\$7,500.00)	\$11,964.00	\$1,071.00	\$10,370.00

5. The professional service corporation was on a fiscal year ended June 30, 1978. On February 16, 1979, petitioner, the professional service corporation and Sherwood W. Greiner executed a Share Redemption Agreement which provided, in part, as follows:

"1. Redemption. Effective June 30, 1978, the Corporation hereby redeems the Shares of the Withdrawing Shareholder (petitioner N. Pierre Helou) for the sum of \$67,449.00 payable to the Withdrawing Shareholder herewith, which sum the parties recognize constitutes the Withdrawing Shareholder's Book Value of the Shares in the Corporation.

2. Resignation of Withdrawing Shareholder. The Withdrawing Shareholder herewith submits his resignation as a Director and a Vice President of the Corporation and as a Trustee of the Corporation's Pension Plan (as hereinafter defined). The resignations shall be effective as at June 30, 1978.

3. Surrender of Shares. The Withdrawing Shareholder herewith delivers and surrenders to the Corporation all his right, title and interest in the certificates representing the Shares owned by him, each certificate duly endorsed in blank for transfer, with appropriate tax stamps."

6. Petitioner maintains that he was not a shareholder-employee of the professional service corporation effective June 30, 1978. Petitioner argued

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2 No Tax Law sections 612(b)(7), (b)(8) and (b)(9) modifications were required to be made by petitioner for the years 1974 and 1975 since he was not a shareholder-employee during said years.

3 These amounts were properly reported as addition modifications on petitioner's 1976 and 1977 New York State tax returns.

that since he was not a shareholder-employee as of the close of the professional service corporation's fiscal year (June 30, 1978) or as of the close of his tax year (December 31, 1978), that he is not required to make the Tax Law sections 612(b)(7), (b)(8) and (b)(9) modifications. No evidence was presented to show the date that petitioner endorsed the certificates which were redeemed pursuant to the Stock Redemption Agreement executed on February 16, 1979. Petitioner received payment for the redeemed certificates on February 16, 1979.

7. On June 30, 1978, the date petitioner terminated his employment with the professional service corporation, the value of the contributions made on petitioner's behalf to the professional service corporation's pension plan amounted to \$73,834.00. In accordance with the terms of the pension plan agreement, petitioner was vested in said plan only in the amount of \$16,871.00. The balance, i.e. \$56,963.00, was forfeited by petitioner. The Share Redemption Agreement executed on February 16, 1979 contained the following provision with respect to the pension plan:

"8. Pension Plan. The parties acknowledge that the Withdrawing Shareholder as at June 30, 1978 is entitled to the sum of \$16,871.00 as his vested balance of the Sherwood W. Greiner, M.D., P.C. Employees' Pension Plan and Trust (hereinafter the "Pension Plan"), and the Corporation shall cause the Trustees of such Pension Plan to pay such amount to the Withdrawing Shareholder herewith in full satisfaction of his interest under such Pension Plan."

By check dated February 15, 1979, petitioner received the sum of \$16,871.00 representing his vested interest in the pension plan.

8. The \$19,523.00 subtraction modification claimed by petitioner on his return, and disallowed by the Audit Division, represents a modification petitioner asserts he is entitled to claim pursuant to section 612(c)(12) of the Tax Law for amounts previously included in New York income by virtue of section 612(b)(7) of the Tax Law which were subsequently forfeited due to termination of employment.



The record herein does not disclose how the \$19,523.00 subtraction modification was computed.

9. At the hearing held herein, petitioner asserted that certain amounts reported by the professional service corporation as section 612(b)(9) modifications (for corporate contributions to purchase life, accident, health or other insurance) should actually have been reported as section 612(b)(7) modifications (for corporate contributions to the pension plan). The following chart represents those amounts which petitioner asserts should be reclassified from section 612(b)(9) modifications to section 612(b)(7) modifications:

<u>Year</u>	<u>Amount to be Reclassified</u>	<u>Amount Originally Reported as Pension Contributions</u>	<u>Revised Pension Contributions</u>
1974	\$3,700.00	\$ 6,503.00	\$10,203.00
1975	\$3,700.00	\$ 6,170.00	\$ 9,870.00
1976	\$3,767.00	\$ 7,798.00	\$11,565.00
1977	\$5,204.00	\$14,628.00	\$19,832.00
1978	\$8,472.00	\$19,464.00	\$27,936.00

10. The only evidence submitted to support that the above-quoted amounts (Finding of Fact "9", supra) should be reclassified from section 612(b)(9) modifications to section 612(b)(7) modifications was an undated letter from the professional service corporation's accountant (received in evidence as petitioner's exhibit "3") which stated that:

"Since these payments were for the life insurance owned by the pension plan, they should have been included in Col. 1 (of Form IT-2102.1-PC) as pension plan contributions in behalf of Dr. Helou."

No documentary or other evidence was presented to support the accountant's statement nor was any evidence presented to show that the amounts which petitioner attempts to reclassify were deductible by the professional service corporation under sections 404(a)(1), (2) or (3) of the Internal Revenue Code and thereby properly considered as section 612(b)(7) modifications.

11. Petitioner maintains, pursuant to computational schedules attached to his representative's letter dated June 4, 1984, that if, for 1978, he is not required to make the modifications provided for in sections 612(b)(7), (b)(8) and (b)(9) of the Tax Law, based on his assertion that he was not a shareholder-employee, that the proper amount of his Tax Law section 612(c)(12) subtraction modification would equal \$10,967.00.<sup>4</sup> Petitioner alternatively argues that if he is required to make the Tax Law sections 612(b)(7), (b)(8) and (b)(9) modifications for 1978, that his Tax Law section 612(c)(12) subtraction modification would increase to \$24,635.00.<sup>4</sup>

12. The Audit Division asserts that since there were no amounts included in 1978 Federal adjusted gross income which were taxed in previous years due to the Tax Law section 612(b)(7) addition modifications, that no subtraction modification is permitted under section 612(c)(12) of the Tax Law.

#### CONCLUSIONS OF LAW

A. That during the tax year in question, petitioner was a shareholder of a professional service corporation organized under Article 15 of the Business Corporation Law. The professional service corporation in 1978, as a direct result of petitioner being one of its shareholder-employees: (1) contributed certain amounts to a pension plan on petitioner's behalf; (2) paid the Federal excise tax for old age, survivors and disability insurance on petitioner's wages; and (3) purchased life, accident or health or other insurance for petitioner. Accordingly, petitioner is required to make the modifications

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<sup>4</sup> This amount was computed making the assumption that it was proper to reclassify certain amounts from section 612(b)(9) modifications to section 612(b)(7) modifications. See Findings of Fact "9" and "10", supra.

provided for in subsections (b)(7), (b)(8) and (b)(9) of section 612 of the Tax Law. Petitioner's argument that he is not required to make said modifications because he was not a shareholder-employee at the close of his tax year (December 31, 1978) or at the close of the professional service corporation's fiscal year (June 30, 1978) is without merit. The record herein supports the premise that petitioner did not surrender his shares in the professional service corporation until February 16, 1979, the date the Share Redemption Agreement was executed and the date he received payment for said shares.

B. That petitioner has failed to sustain the burden of proof [Tax Law section 689(e)] to show that certain amounts should be reclassified from section 612(b)(9) modifications to section 612(b)(7) modifications. The evidence submitted by petitioner was insufficient to show that the amounts which he wishes to reclassify (Finding of Fact "9", supra) constitute amounts deductible by the professional service corporation under sections 404(a)(1), (2) or (3) of the Internal Revenue Code as mandated by section 612(b)(7) of the Tax Law.

C. That section 612(c) of the Tax Law provides, in part, that:

"Modifications reducing federal adjusted gross income. -- There shall be subtracted from federal adjusted gross income:

\* \* \*

(12) The amount necessary to prevent the taxation of amounts properly included in New York adjusted gross income in prior taxable years in accordance with paragraph seven of subsection (b)."

D. That in order to be entitled to the subtraction modification provided for in section 612(c)(12) of the Tax Law, supra, there must first be an inclusion in Federal adjusted gross income of the amount which is subsequently subtracted out of Federal adjusted gross income pursuant to said section 612(c)(12). This interpretation is supported by regulation 20 NYCRR 116.3(m), effective subsequent

to the year at issue, which provides that the following is one of the items to be subtracted from Federal adjusted gross income:

"(m) That portion of pension and annuity income and other income or gain, included in Federal adjusted gross income, which was properly included in total New York income in prior years pursuant to paragraph (1) of subdivision (g) of section 116.2 of this Part." (emphasis added).

E. That legislative intent with respect to the passage of section 612(c)(12) can be found in the supporting memorandum of Senator Anthony B. Gioffre, the bill's sponsor, who stated, in part, that:

"In order to prevent double taxation of pension or profit-sharing plan contributions made by a professional service corporation on behalf of a shareholder when such contributions are finally distributed to such person, the bill amends subsection (c) of Section 612 of the Tax Law to require subtraction from such person's New York income of that amount properly included in his New York income as a result of such contributions in prior years." (emphasis added) (N.Y. Legis. Ann., 1970, p. 131).

F. That in the instant matter, no amounts were included in petitioner's 1978 Federal adjusted gross income or New York income which were previously included in New York income by virtue of section 612(b)(7) of the Tax Law. Furthermore, there exists no double taxation in the instant matter. Accordingly, petitioner is not entitled to claim a subtraction modification, pursuant to section 612(c)(12) of the Tax Law, for amounts which were previously included in New York income by virtue of section 612(b)(7) of the Tax Law, where petitioner's right to receive said amounts previously included in New York income was forfeited due to termination of employment.

Assuming, arguendo, that the subtraction modification provided for in section 612(c)(12) of the Tax Law is applicable to amounts which were forfeited, the year that said amounts were forfeited would be the year in which any Tax Law section 612(c)(12) modification would have to be claimed. In the instant

matter, it is clear that forfeiture occurred in 1979 and not 1978, the year at issue herein.

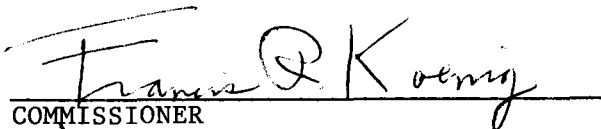
G. That the petition of N. Pierre Helou is denied in full; and that the Notice of Deficiency dated April 14, 1982 is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

APR 29 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER