

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Charles & Gladys Malone :  
for Redetermination of a Deficiency or for Refund :  
of New York State Personal Income Tax under Article :  
22 of the Tax Law and New York City Nonresident :  
Earnings Tax under Chapter 46, Title U of the :  
Administrative Code of the City of New York for :  
Year 1977. :  
:

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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 6th day of March, 1985, he served the within notice of Decision by certified mail upon Charles & Gladys Malone, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles & Gladys Malone  
38 Truman St.  
Norwalk, CT 06854

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  
6th day of March, 1985.

David Parchuck

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

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

March 6, 1985

Charles & Gladys Malone  
38 Truman St.  
Norwalk, CT 06854

Dear Mr. & Mrs. Malone:

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 & 1312 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York, 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
CHARLES MALONE and GLADYS MALONE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Year 1977.	:	

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Petitioners, Charles Malone and Gladys Malone, 38 Truman Street, Norwalk, Connecticut 06854, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1977 (File No. 42537).

A small claims 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 August 23, 1984 at 1:15 P.M., with all briefs to be submitted by September 24, 1984. Petitioner Charles Malone appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioners are properly entitled to the refund shown on their late filed return for the year 1977.

FINDINGS OF FACT

1. On October 19, 1981, Charles Malone and Gladys Malone (hereinafter "petitioners") late filed a joint New York State Income Tax Nonresident Return (with City of New York Nonresident Earnings Tax) for the calendar year 1977.

Said return showed a combined New York State and New York City refund due petitioners of \$1,095.00.

2. All New York State and New York City personal income taxes paid during 1977 were so paid through withholding tax deductions against petitioner Charles Malone's salary income.

3. On February 28, 1983, the Audit Division issued a Notice of Disallowance to petitioners wherein they were advised that their claim for refund was disallowed in full. The basis for such disallowance was that petitioners' claim (1977 return) was not timely filed pursuant to section 687(a) of the Tax Law.

4. Petitioner Charles Malone stated that he late filed his return because he "really didn't need the money". He claimed "I had a refund coming, so I figured when I need the money, I can file for the money and get it."

5. Petitioner Charles Malone argued that section 687(a) of the Tax Law is "vague and indefinite" and, accordingly, he should be granted the refund as shown on the return.

#### CONCLUSIONS OF LAW

A. That section 687(a) of the Tax Law and section U46-37.0(a) of the Administrative Code of the City of New York provide, in pertinent part, that:

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the latter, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return."

B. That section 687(i) of the Tax Law and section U46-37.0(h) of the Administrative Code of the City of New York provide that:

"For purposes of this section, any tax paid by the taxpayer before the last day prescribed for its payment, any income tax withheld from the taxpayer during any calendar year, and any amount paid by the taxpayer as estimated income tax for a taxable year shall be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year with respect to which such amount constitutes a credit or payment."

C. That petitioner's claim for refund (1977 return showing a refund due) was filed within the three year period. Accordingly, the amount of refund is limited to the portion of the tax paid within the three years immediately preceding October 19, 1981. Since all of petitioner's tax was deemed to have been paid on April 15, 1978, which is without the three year period, they are not properly entitled to receive any portion of the refund as claimed on their late filed 1977 return within the meaning and intent of sections 687(a) and 687(i) of the Tax Law and sections U46-37.0(a) and U46-37.0(h) of the Administrative Code of the City of New York.

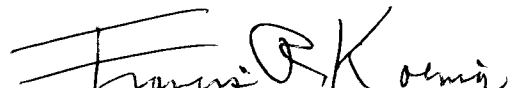
D. That the petition of Charles Malone and Gladys Malone is denied and the Notice of Disallowance issued February 28, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 06 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER