

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Frank W. & Louise O'Gorman :
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. :
:

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 4th day of April, 1985, he served the within notice of Decision by certified mail upon Frank W. & Louise O'Gorman, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank W. & Louise O'Gorman
444 Saratoga Ave. #23L
Santa Clara, CA 95050

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
4th day of April, 1985.

David Parchuck

Connie G. Hays

Authorized to administer oaths
pursuant to Tax Law section 174

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

April 4, 1985

Frank W. & Louise O'Gorman
444 Saratoga Ave. #23L
Santa Clara, CA 95050

Dear Mr. & Mrs. O'Gorman:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FRANK W. and LOUISE O'GORMAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1978.	:	

Petitioners, Frank W. and Louise O'Gorman, 444 Saratoga Avenue #23L, Santa Clara, California 95050, 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. 33988).

On September 18, 1984, petitioners waived a hearing before the State Tax Commission and requested the Commission to render its decision, based on the Department of Taxation and Finance file as presently constituted.

ISSUE

Whether the Audit Division properly subjected to personal income tax a lump-sum distribution made to petitioner Frank W. O'Gorman from a retirement plan.

FINDINGS OF FACT

1. Petitioners, Frank W. and Louise O'Gorman, timely filed a joint New York State Income Tax Resident Return for the taxable year 1978, whereon they indicated their address as 15 Frontier Lane, East Northport, New York and reported total New York income of \$3,832.50 consisting entirely of Mrs. O'Gorman's wages from J & R Vending Corp. In addition, petitioners submitted a form IT-230, Separate Tax on Lump Sum Distributions, reflecting a distribution from a qualified retirement plan in the total amount of \$73,549.24; \$63,042.21 of

such amount represented the capital gains portion thereof and the remainder was ordinary income.

2. On June 8, 1981, the Audit Division issued to petitioners a Notice of Deficiency, asserting personal income tax under Article 22 of the Tax Law for the year 1978 in the amount of \$2,725.30, plus interest. The Audit Division subjected the lump-sum distribution of \$73,549.24 to tax as a retirement benefit, which was attributable to Mr. O'Gorman's prior services rendered for his New York employer and which did not qualify as an annuity. The Audit Division treated the entire amount of the distribution as ordinary income because such treatment resulted in a lower tax liability, and afforded petitioners credit for tax withheld of \$87.70 from Mrs. O'Gorman's wages.

3. Mr. O'Gorman was employed by Abraham & Strauss in New York for over 30 years. During the period of his employment, he contributed a total of \$24,871.63 to a qualified plan maintained by Federated Department Stores, Inc., the parent company of Abraham & Strauss; the largest portion (if not all) of the employee and employer contributions was apparently invested in employer stock.

4. The Statement for Recipients of Lump-Sum Distributions from Profit-Sharing and Retirement Plans (federal form 1099R) issued to Mr. O'Gorman for 1978 by the First National Bank of Chicago as trustee of the Federated Department Stores, Inc. plan reflected the following information:

Amount includible as income	\$73,549.24
Capital gain	63,042.21
Ordinary income	10,507.03
Employee contributions	836.04*
Net unrealized appreciation in employer's securities	29,824.24

* This amount apparently represents Mr. O'Gorman's contributions during 1978.

5. Sometime in December, 1978, petitioners moved to California. The file does not disclose whether Mr. O'Gorman received the distribution prior or subsequent to the relocation.

CONCLUSIONS OF LAW

A. That petitioners failed to establish that Mr. O'Gorman received the lump-sum distribution other than during the period of their New York residency; accordingly, the distribution was properly includible in their 1978 New York adjusted gross income. Even assuming he received the distribution after petitioners' move to California, it would nonetheless be taxable for New York personal income tax purposes, inasmuch as it constituted compensation for services rendered by Mr. O'Gorman for his employer wholly within this state. (Tax Law section 632[b][1][B]; 20 NYCRR 131.4[c].) Finally, as evidenced by the federal form 1099R issued to Mr. O'Gorman, the Audit Division did not subject to tax that portion of the distribution which constituted Mr. O'Gorman's own contributions to the plan.

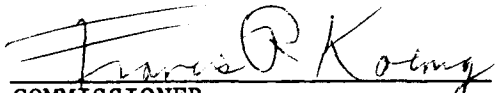
B. That the petition of Frank W. and Louise O'Gorman is denied, and the Notice of Deficiency issued on June 8, 1981 is sustained.

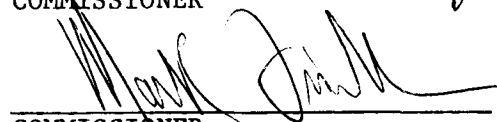
DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1985


PRESIDENT


COMMISSIONER


COMMISSIONER