

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Gerard & Nancy Runser :

: AFFIDAVIT OF MAILING

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 1980.

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 3rd day of October, 1985, he served the within notice of Decision by certified mail upon Gerard & Nancy Runser, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerard & Nancy Runser
21 Brookside Dr.
Fairport, NY 14450

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
3rd day of October, 1985.

David Parchuck

William O. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 3, 1985

Gerard & Nancy Runser
21 Brookside Dr.
Fairport, NY 14450

Dear Mr. & Mrs. Runser:

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

GERARD RUNSER and NANCY RUNSER

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1980.

DECISION

Petitioners, Gerard Runser and Nancy Runser, 21 Brookside Drive, Fairport, New York 14450, 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 1980 (File No. 52366).

On May 9, 1985, petitioners advised the State Tax Commission, in writing, that they desired to waive a formal hearing and to submit the case to the State Tax Commission. After due consideration of the entire file, the State Tax Commission renders the following decision.

ISSUES

I. Whether the State Tax Commission can be estopped from collecting taxes lawfully due on the grounds that instructions promulgated by the Department of Taxation and Finance were ambiguous.

II. Whether petitioners are entitled to a refund of the interest paid under protest.

FINDINGS OF FACT

1. Petitioners, Gerard Runser and Nancy Runser, filed separate New York State income tax resident returns for 1980 on a combined form. Each claimed the special additional mortgage recording tax credit in the amount of \$164.00.

2. Petitioners' decision to claim the mortgage recording tax credit was pursuant to instructions that accompanied the 1980 New York State Income Tax Resident Return which stated, in part:

"Mortgage Recording Tax Credit. Enter on this line the amount of mortgage recording tax credit you are claiming. If you paid a special additional mortgage recording tax, you may claim a New York State credit for that amount."

In addition, the form IT-201-ATT encaptioned "Summary of Other Credits and Taxes" for the year 1980 called for the reporting of a "Mortgage recording tax credit."

3. On February 17, 1984, the Audit Division issued a Statement of Audit Adjustment dated February 7, 1984 to petitioners explaining that additional tax was due because the mortgage recording tax paid in conjunction with the purchase of a personal residence did not qualify for the special additional mortgage recording tax credit. The Statement of Audit Adjustment stated that the following amounts were due:

	<u>Gerard Runser</u>	<u>Nancy Runser</u>
Personal income tax	\$164.15	\$163.73
Interest	55.41	55.27
Total	<u>\$219.56</u>	<u>\$219.00</u>

3. On March 7, 1984, petitioners remitted a check in satisfaction of the total amount stated to be due in the Statement of Audit Adjustment.

4. On April 5, 1984, the Audit Division issued a Notice of Deficiency to Gerard and Nancy Runser asserting a deficiency of personal income tax in the amount of \$163.73, plus interest of \$56.87, for an amount due of \$220.60. The amount due was reduced by an amount paid and/or credit of \$217.00 resulting in a balance due of \$3.60.

5. The Notice of Deficiency contained the statement that "[t]he Statement previously sent to you, shows the computation of the deficiency." However, it

is clear that neither the amount stated as "additional tax due or tax deficiencies" nor the amount stated as "total amount paid and/or credit" reflected the liability of Gerard and Nancy Runser or the amount they had paid per Finding of Fact "3".

6. On April 9, 1984, petitioners remitted a check for \$3.60 as payment in full of the Notice of Deficiency dated April 5, 1984.

7. On May 7, 1984, petitioners filed a petition seeking a refund of the entire amount paid on the ground that no tax was due. In the alternative, petitioners sought a refund of the \$110.68 paid in accordance with the Statement of Audit Adjustment on the ground that the instructions for 1980 and the form IT-201-ATT were misleading in that they refer to a "mortgage recording tax credit" and not a "special additional mortgage recording tax credit." Lastly, petitioners sought a refund of the \$3.60 interest asserted to be due in the Notice of Deficiency dated April 5, 1984.

CONCLUSIONS OF LAW

A. That, in general, Tax Law §606(f) provides for a personal income tax credit for the special additional mortgage recording tax paid by a taxpayer pursuant to Tax Law §253(1-a). The special additional mortgage recording tax imposed by Tax Law §253(1-a) is, with certain limited exceptions, not imposed upon the mortgagor making a purchase of a dwelling unit containing six dwelling units or less. Since petitioners have not submitted any evidence to refute the premise that they did not pay the special additional mortgage recording tax imposed by Tax Law §253(1-a), petitioners have failed to sustain their burden of proof of establishing that they were entitled to claim a credit for the special additional mortgage recording tax on their New York State personal income tax return for 1980 (Tax Law §689(e)).

B. That although petitioners contended that the description of the credit at issue in the instructions and on the tax return for 1980 could have been clearer, neither the instructions nor the form can estop the State Tax Commission from collecting taxes lawfully imposed (see Matter of Grand Union Co. v. Tully, 94 A.D.2d 509, 510; Matter of Burton A. Finberg and Irma Finberg, State Tax Commission, August 31, 1979).

C. That there is no provision in the Tax Law for remitting the statutory interest asserted based upon a deficiency of tax from the date the tax is due to the date the tax is paid (see Tax Law §684[a]).

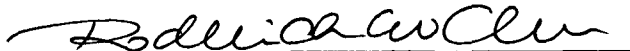
D. That since petitioners made payment within thirty days of the mailing of the Statement of Audit Adjustment, the additional interest of \$3.60 was improperly asserted (Tax Law §684[i]). Accordingly, petitioners are entitled to a refund of \$3.60.

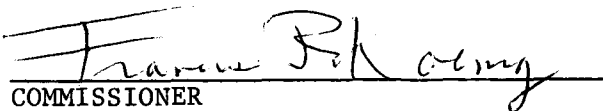
E. That the petition of Gerard Runser and Nancy Runser is granted only to the extent of Conclusion of Law "D" and the Notice of Deficiency dated April 5, 1984 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 03 1985


PRESIDENT


COMMISSIONER


COMMISSIONER