

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

SS.:

Authorized to administer oaths
pursuant to Tax Law section 174

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

December 13, 1985

George & Janet Smith
43 Fairway Ave.
Delmar, NY 12054

Dear Mr. & Mrs. Smith:

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	:	
GEORGE SMITH and JANET SMITH	:	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, George Smith and Janet Smith, 43 Fairway Avenue, Delmar, New York 12054, 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. 45285).

A formal hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on April 25, 1985 at 10:45 A.M., with additional evidence to be submitted by May 23, 1985. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether petitioners filed their amended New York State Resident Income Tax Return for the year 1978, containing a claim for refund, more than three years after said return was due, thus precluding their claim for refund.

II. Whether petitioners may properly allocate all interest from joint bank accounts to petitioner Janet Smith on their amended New York State Resident Income Tax Return for the year 1978.

FINDINGS OF FACT

1. Petitioners, George Smith and Janet Smith, filed amended New York State resident income tax returns for taxable years 1978, 1979 and 1980. On their 1978 amended return, under Part III (Explanation of Changes to Income, Deductions and Credits) thereof, petitioners stated that they changed their filing status from "joint return with spouse to separate returns on the same form" and also stated that, "All interest income, which is in both names or her name alone is credited to her." As a result of these changes made on their 1978 amended return, petitioners claimed a refund of \$378.00.

2. Petitioner George Smith testified that he was aware of the fact that the claim for refund for the year 1978 had to be filed by April 15, 1982, said date being within three years from the date on which the original return for 1978 was deemed filed. Petitioner George Smith further testified that, in view of said deadline, he mailed the 1978 amended return in one envelope and, at a later date, mailed the 1979 and 1980 amended returns together in another envelope.

3. The 1978 amended return was signed by petitioners on April 14, 1982. The Processing Division stamped this return with a date received of May 7, 1982. The Audit Division either lost or did not retain the envelope containing the 1978 amended return of petitioners. The 1979 amended return was signed by petitioners on May 7, 1982 and the envelope containing this return bore a postmark of May 24, 1982. The 1979 amended return was stamped by the Processing Division with a date received of May 25, 1982.

4. By a notice dated May 23, 1983, the Audit Division denied in full petitioners' claim for a refund of \$378.00 for the taxable year 1978.

5. Petitioner George Smith stated that he does most of his mailing from his office which is at the New York State Department of Civil Service, but that

he may have mailed the return at a mailbox in Delmar. He stated that he has no specific recollection as to where he mailed the 1978 amended return.

CONCLUSIONS OF LAW

A. That section 687(a) of the Tax Law, in effect during the year at issue, provides, in relevant part:

"(a) General. -- 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 later, or if no return was filed, within two years from the time the tax was paid."

B. That section 687(e) of the Tax Law, in effect during the year at issue, provides:

"(e) Failure to file claim within prescribed period. -- No credit or refund shall be allowed or made, except as provided in subsection (f) of this section or subsection (d) of section six hundred ninety, after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article."

C. That section 691(a) of the Tax Law provides, in relevant part:

"(a) Timely mailing. -- If any return, declaration of estimated tax, claim, statement, notice, petition, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the tax commission, bureau, office, officer or person with which or with whom such document is required to be filed, or to which or to whom such payment is required to be made, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of such document, or for making the payment, including any extension granted for such filing or payment, and only if such document or payment was deposited in the mail, postage prepaid, properly addressed to the tax commission, bureau, office, officer or person with which or with whom the document is required to be filed or to which or to whom such payment is required to be made."

D. That since the envelope in which the amended return was mailed is not part of the record herein, the return is treated as if the postmark was missing and the burden of proving the presumed date of the postmark is on petitioners (Matter of J. J. Longley, State Tax Commission, September 28, 1983; Jacobson v. Commissioner, 73 T.C. 610, 616).

E. That petitioners have not presented sufficient evidence to establish that they mailed their 1978 amended New York State income tax return prior to or on the date the return was required to be filed (April 15, 1982) in order to be entitled to a refund. The signing and dating of the return prior to the due date is not sufficient to show timely mailing.

F. That in view of Conclusion of Law "E", supra, Issue II herein is rendered moot.

G. That the petition of George Smith and Janet Smith is denied and the denial of petitioners' claim for refund of New York State personal income tax for the year 1978 is hereby sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER