

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Peter & Gail Stemkowski

: 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 Years :
1973, 1974 & 1978.

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 10th day of May, 1985, he served the within notice of Decision by certified mail upon Peter & Gail Stemkowski, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter & Gail Stemkowski
43 Dutchess Ave.
Atlantic Beach, NY 11509

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
10th day of May, 1985.

David Parchuck

Annie O'Hagan

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
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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 Years :
1973, 1974 & 1978.

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 10th day of May, 1985, he served the within notice of Decision by certified mail upon Fred Geller, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred Geller
Fred Geller & Co.
290 Central Ave.
Lawrence, NY 11559

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
10th day of May, 1985.

David Parchuck

Ann M. P. Hapland

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 10, 1985

Peter & Gail Stemkowski
43 Dutchess Ave.
Atlantic Beach, NY 11509

Dear Mr. & Mrs. Stemkowski:

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
Fred Geller
Fred Geller & Co.
290 Central Ave.
Lawrence, NY 11559
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
PETER STEMKOWSKI AND GAIL STEMKOWSKI	:	DECISION
for Redetermination of Deficiencies or for	:	
Refunds of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1973, 1974 and	:	
1978.	:	

Petitioners, Peter Stemkowski and Gail Stemkowski, 43 Dutchess Avenue, Atlantic Beach, New York 11509, filed petitions¹ for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1973, 1974 and 1978 (File Nos. 29933, 29934 and 41739).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 24, 1984 at 9:15 A.M. Petitioners appeared by Fred Geller, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the consent, extending the period of limitation for assessment of tax for tax years 1973 and 1974, was valid when signed by a representative

¹ The petition for the 1973 and 1974 tax years was perfected pursuant to a letter dated April 22, 1981 of Aloysius J. Nendza, Assistant Director of the Tax Appeals Bureau. The petition for the 1978 tax year was never perfected.

who, at the time he signed the consent, was not authorized to do so by a power of attorney properly executed by petitioners.

II. Whether there is jurisdiction to determine that petitioners are liable for a 1978 tax deficiency.

III. Whether, during the years 1974 and 1978, petitioners were resident individuals of New York on the basis that they maintained a permanent place of abode in New York and spent in the aggregate more than one hundred eighty-three days in the State.

IV. Whether petitioners are entitled to deduct travel expenses to training sites from the New York wages of petitioner Peter Stemkowski for 1973 and 1974.

V. Whether the Audit Division properly disallowed certain itemized deductions for the year 1974.

FINDINGS OF FACT

1. Petitioner Peter Stemkowski filed a New York State Income Tax Nonresident Return as a single individual for 1973. For 1974, petitioners filed a joint New York State Income Tax Nonresident Return. Petitioners did not file a New York State income tax return for 1978. On the 1973 and 1974 tax returns, Peter Stemkowski's occupation was described as "Pro Athlete." He played professional hockey for the New York Rangers of the National Hockey League.

2. On or about March 15, 1977, petitioners signed a consent which extended the period of limitation for assessment of personal income tax for 1973 until April 15, 1978. On or about March 7, 1979, an additional consent was signed by Charles L. Abrahams on behalf of petitioners for the years 1973 and 1974 which extended the period of assessment until April 15, 1980. Petitioners' position

is that the notices of deficiency for 1973 and 1974 were barred by the period of limitations because Charles Abrahams did not have authority to sign the additional consent. The "Instructions" on the back of Form IT-75, the consent which Charles L. Abrahams signed on or about March 7, 1979, state as follows:

"This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent."

The only power of attorney authorizing Charles L. Abrahams to represent petitioners was signed by petitioners on March 22, 1979 and received by the Audit Division on March 26, 1979 approximately three weeks after the filing of the consent. Furthermore, such power of attorney was incomplete because Charles Abrahams failed to complete the section entitled "Notice of Appearance" on the power of attorney.

3. On August 10, 1979, the Audit Division issued Statements of Audit Changes to petitioners for the years 1973 and 1974 alleging personal income tax deficiencies in the amounts of \$31.33 and \$4,972.30, respectively. The Statement for 1973 contained the following explanation:

"Based upon Federal audit changes adjustments have been made as per attached schedules."

The Statement of Audit Changes for 1974 contained the following explanation:

"As a result of conference additional tax is due in accordance with attached schedules."

On January 25, 1980, two Notices of Deficiency were issued against petitioners alleging personal income tax due of \$31.33 plus interest and \$4,972.30 plus interest for 1973 and 1974, respectively.

4. On July 29, 1981, the Audit Division issued to petitioners a Statement of Audit Changes for the year 1978 alleging personal income tax due of \$5,674.35 plus interest. The following explanation was provided:

"Since you failed to reply to our previous letter(s), your 1978 personal income tax liability has been computed from information obtained from the Internal Revenue Service under authorization of Federal Law [section 6103(d) of the Internal Revenue Code]."

Information obtained from the Internal Revenue Service disclosed, in part, that the address shown on petitioners' U.S. Individual Income Tax Return for the year 1978 was Atlantic Beach, New York. On November 18, 1982, a Notice of Deficiency was issued against petitioners alleging income tax due of \$5,674.35 plus interest.

5. At the hearing held herein, the representative of the Audit Division, in response to a question by the hearing officer concerning why the jurisdictional documents for the 1978 tax year were not introduced into evidence, stated that such year was not at issue. The Audit Division's representative was then given approximately twenty-five minutes to search his records in order to substantiate his position that the 1978 tax year was not at issue. He could not find a perfected petition and an answer in his records for such year and stated that, as a result, there was no jurisdiction to have a hearing on the 1978 tax year. The taxpayer's representative argued that the alleged deficiency for 1978 should be cancelled because the Audit Division was not prepared to go forward concerning the 1978 tax year. In response, the Audit Division's representative submitted the Notice of Deficiency for 1978 and a petition for 1978 (which was never perfected) into the record.

CONCLUSIONS OF LAW

A. That petitioner Gail Stemkowski's name is to be removed from the Notice of Deficiency for 1973 because petitioner Peter Stemkowski was a single taxpayer during the entire year 1973.

B. That the consent signed by Charles Abrahams extending the period of limitation for assessment of personal income taxes for 1973 and 1974 was not valid because there was not a valid power of attorney on file with the Audit Division authorizing Mr. Abrahams to act on behalf of petitioners. Neither was a valid power of attorney filed along with such consent. Furthermore, the power of attorney subsequently submitted by petitioners, as noted in Finding of Fact "2", supra, was incomplete.

C. That the State Tax Commission has no jurisdiction at the present time to issue a determination concerning the 1978 tax year because there is no perfected petition and answer for such year. See 20 NYCRR 601.5 and 601.6 (effective July 1, 1976).

D. That the issues numbered III through V, supra, are moot.

E. That the petition of Peter and Gail Stemkowski concerning the 1973 and 1974 tax years is granted to the extent that the Notices of Deficiency for 1973 and 1974 are cancelled. However, petitioner's request that the Notice of Deficiency for 1978 be cancelled is denied, because, as noted in Conclusion of Law "C", supra, the State Tax Commission has no jurisdiction at the present time to rule on such request.

DATED: Albany, New York

MAY 10 1985

STATE TAX COMMISSION

Richard A. Can
PRESIDENT
Francis R. Koemig
COMMISSIONER
Michael J. [Signature]
COMMISSIONER