

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Frederick & Emily Toohey :  
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 :  
1977 & 1978. :  
:

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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 29th day of May, 1985, he served the within notice of Decision by certified mail upon Frederick & Emily Toohey, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frederick & Emily Toohey  
602 North Street  
Greenwich, CT 06830

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  
29th day of May, 1985.

David Parchuck

Carroll O'Day  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
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Frederick & Emily Toohey :  
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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 29th day of May 1985, he served the within notice of Decision by certified mail upon Lee R. Hessberg the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lee R. Hessberg  
Hiscock & Barclay  
60 State St., Suite 755  
Albany, NY 12207

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  
29th day of May, 1985.

David Parchuck

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

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

May 29, 1985

Frederick & Emily Toohey  
602 North Street  
Greenwich, CT 06830

Dear Mr. & Mrs. Toohey:

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  
Lee R. Hessberg  
Hiscock & Barclay  
60 State St., Suite 755  
Albany, NY 12207  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
FREDERICK W. AND EMILY G. TOOHEY  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1977 and 1978.

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DECISION

Petitioners, Frederick W. and Emily G. Toohey, 602 North Street, Greenwich, Connecticut, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1977 and 1978 (File No. 46896).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on November 28, 1984 at 10:30 A.M., with all briefs to be submitted by March 4, 1985. Petitioners appeared by Lee R. Hessberg, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUES

I. Whether petitioners are entitled to a refund for the taxable years 1977 and 1978 under the special refund authority of the State Tax Commission under section 697(d) of the Tax Law.

II. Whether petitioners filed their 1978 New York State Income Tax Nonresident Return containing a claim for refund more than three years after the date the tax was paid, thus precluding any refund of tax paid.

FINDINGS OF FACT

1. Petitioners, Frederick W. and Emily G. Toohey, filed New York State income tax nonresident returns for taxable years 1977 and 1978. On their 1977 return, petitioners claimed a refund of \$4,533.00. On their 1978 return, they claimed a refund of \$4,720.00.

2. Petitioners are residents of Greenwich, Connecticut. Early in 1981, petitioners became aware that they were required to file New York State nonresident returns for wages earned in New York from which New York taxes had been withheld. Mr. Toohey telephoned his cousin, John X. Healey, who lived in Topsfield, Massachusetts, and informed him that New York returns were due for the years 1977 through 1980 and requested that Mr. Healey assist him in the preparation of his tax returns.

3. On or about January 3 or 4, 1982, Mr. Healey went to Greenwich, Connecticut and remained there until the morning of April 15, 1982 helping petitioners to prepare both their State and Federal returns. Mr. Healey was not an accountant or professional tax preparer and petitioners did not pay him for his work. During the period he was in Greenwich, Mr. Healey prepared the nonresident returns for 1977 and 1978 at issue herein. As Mr. Healey completed a return, he would have petitioners sign it. He then mailed the returns individually rather than enclosing more than one return in a single envelope. He addressed New York State returns to the Albany, New York address shown in the instruction booklet. Mr. Healey brought the returns in sealed envelopes to the Cos Cob Post Office where he had the envelopes weighed and postage affixed, following which he mailed the returns. Mr. Healey did not remember the exact date that he mailed the returns in issue because he mailed numerous returns during the period he was in Greenwich. Mr. Healey did, however, leave Greenwich

on the morning of April 15, 1982 and returned to Topsfield, Massachusetts. On that morning, he mailed the last of petitioners' tax returns. Mr. Healey did not return to Greenwich until late 1982 and he did not mail any returns for petitioners during the remainder of the year.

4. The Processing Division stamped the 1977 return with a date received of April 16, 1982. Since the return was delinquent, it was then sent to the irregular returns unit where it was stamped with a receipt date of May 13, 1982. The Processing Division stamped the 1978 return with a receipt date of May 10, 1982 and the irregular returns unit stamped the return with a May 11, 1982 receipt date.

5. When mail first arrives at the Department of Taxation and Finance, it is received in the mail room. During 1982, the mail room personnel had the responsibility for opening the mail, attaching the envelopes to the returns and forwarding the mail to the proper division or bureau. At the time of the hearing, neither the 1977 nor 1978 return had an envelope attached so that it was impossible to determine the exact mailing date from the postmark. The head clerk of the irregular returns unit testified that this occurred very rarely since the returns were usually stapled to the envelopes immediately upon receipt. The only dates available were the aforementioned dates stamped by the Processing Division. The head clerk explained that it was impossible to determine the length of time it took for a return to travel from the mail room to Processing and then receive a date stamp. The time varied depending on the volume of mail received and whether it was properly sorted and, additionally, the mail could be stacked up in Processing awaiting a date stamp.

6. By letters dated August 23, 1982 and January 11, 1983, the Audit Division notified petitioners that the refund claims could not be allowed

because the deadline for filing for a refund or credit had expired before petitioners filed. On March 28, 1983, the Audit Division issued a formal disallowance in full of refund claims for the taxable years 1977 and 1978.

7. Petitioners maintain that even if the returns were filed late, there are no questions of fact or law involved in whether petitioners are entitled to a refund and, therefore, the refunds for both years should be granted under the special refund authority of section 697(d) of the Tax Law.

#### CONCLUSIONS OF LAW

A. That section 697(d) of the Tax Law provides:

"Special refund authority. -- Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

B. That the tax in question was neither erroneously nor illegally collected from petitioners, nor was it paid under a mistake of fact. It was properly withheld from Mr. Toohey's wages by his employer under procedures established by the Tax Law. To hold that the special refund authority applies in such cases would render section 687 of the Tax Law, which places limitations on refund claims, virtually meaningless. Therefore, no refund claim is due based upon section 697(d) of the Tax Law.

C. That section 687(a) of the Tax Law, in effect during the years in issue, provided:

"Claim for credit or refund 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. 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 three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return. If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim. Except as otherwise provided in this section, if no claim is filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed."

Section 691(a) of the Tax Law provides:

"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, with respect to the refund claim for 1977, it is admitted by petitioners that the return was filed more than three years after the tax was paid thus precluding any refund for such year.

E. That, with respect to the refund claim for 1978, since the envelope in which the return was mailed is not part of the record herein, the return is treated as if the postmark were 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.) Credible testimony concerning the date of mailing is sufficient to prove that mailing was timely and that the postmark



was timely. (See Krellman v. Commissioner, 39 T.C.M. 95. See also Ruegsegger v. Commissioner, 68 T.C. 463; Menard, Inc. v. Commissioner, 41 T.C.M. 1279.)

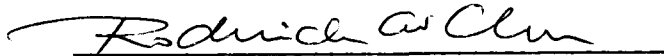
F. That Mr. Healey's testimony concerning the mailing of the returns was very credible. He has no pecuniary interest in the outcome of this case and he clearly remembered leaving Greenwich, Connecticut and mailing the last return on April 15, 1982. The only logical conclusion to be drawn is that both returns in issue were mailed during the period January 4, 1982 through April 15, 1982 and thus the 1978 return was timely filed for refund claim purposes. Although the 1978 return had a receipt date of May 10, 1982, it is impossible to tell from such a stamp the exact date of arrival or the date of mailing. The testimony of Mr. Healey was sufficient to overcome the presumption raised by the date stamp in the absence of an envelope with a postmark.

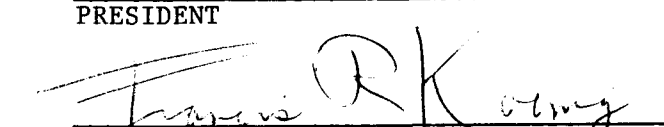
G. That the petition of Frederick W. and Emily G. Toohey is granted to the extent that the Audit Division is directed to refund the sum of \$4,720.00, together with such interest as may be lawfully owing; that, except as so granted, the petition is in all other respects denied and the disallowance of refund claim issued March 28, 1983 is sustained with respect to the refund claim for taxable year 1977.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER