

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Richard C. & Susan M. Bezemer : 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 1977. :

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 January, 1986, he served the within notice of Decision by certified mail upon Richard C. & Susan M. Bezemer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard C. & Susan M. Bezemer
110 Farmington Rd.
Williamsville, NY 14221

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 January, 1986.

David Parchuck

James A. Hegland
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 3, 1986

Richard C. & Susan M. Bezemer
110 Farmington Rd.
Williamsville, NY 14221

Dear Mr. & Mrs. Bezemer:

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	:	
	:	
RICHARD C. & SUSAN M. BEZEMER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1977.	:	

Petitioners, Richard C. and Susan M. Bezemer, 110 Farmington Road, Williamsville, New York 14221, 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 1977 (File No. 42694).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on July 23, 1985 at 1:15 P.M. Petitioner Richard C. Bezemer appeared pro se and for his wife, petitioner Susan M. Bezemer. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether petitioners timely filed an amended personal income tax return for the year 1977.

FINDINGS OF FACT

1. On November 29, 1982, the Audit Division notified petitioners that their claim for refund for the year 1977 was disallowed in full. An undated "Voucher for Income Tax Refund" issued to petitioners by the Audit Division with respect to claimed refunds for the years 1977 and 1978, insofar as is pertinent hereto with respect to the year 1977, provided the following explanation:

"I am sorry, but there is a deadline for filing for a refund or credit, and that date, April 17, 1981, had expired before you filed your 1977 amended return. You should have filed your claim within three years from the due date of the return."

2. Petitioners assert that the amended return for the year 1977 was filed on or about April 12, 1981 by placing the envelope in which the return was enclosed into the mail "chute" at petitioner Richard Bezemer's business location.

3. Correspondence from petitioner Richard Bezemer's landlord, dated February 23, 1983, provided:

"This will confirm our discussions regarding the question which has been raised concerning your mailing of certain correspondence to Internal Revenue Service on Monday, April 13, 1981, via the mail chute in our building at 237 Main Street.

The building mail chute was maintained until recently for the convenience of tenants, but proved to be a problem, as it would sometimes get jammed, usually because of someone's inserting an oversized letter. Also the fact that the chute was jammed would sometimes not become known until a tenant received a complaint that the correspondence had not been received by the addressee.

As a result of the recurrence of such problems, we had the mail chute sealed off at each floor of the building several months ago."

4. Petitioners' letter to the Audit Division of March 17, 1982 arguing timely mailing provided the following postscript:

"P.S. I received a similar note from the Federal IRS relative to a late postmark on their 1977 amended return."

The signature line of the letter was: "Action Plan Travel of Buffalo, Inc., Richard Bezemer, President."

5. Petitioners, in 1981, filed amended State returns for the years 1977 and 1978.

6. The amended return for the year 1977 is dated April 13, 1981.

7. The amended return for the year 1978 is dated April 15, 1981.

8. The back pages (page 2) of each of those amended returns for 1977 and 1978 bear "indate" stamps showing they were each received in "N.Y.S. Proc. Div." on "May 21, '81."

9. The front of the amended return for the year 1978 bears an "indate" stamp showing that it was received in the Department of Taxation and Finance's mailroom on May 7, 1981.

10. There is no mailroom "indate" stamp on the 1977 amended return.

11. The amended returns for 1977 and 1978 each bear the same imprinted file number which number is identical to the "file number" referenced on the notice of disallowance and the voucher for income tax refund (see Findings of Fact "1" and "2").

12. The envelope attached to the amended return for the year 1977 bears:

- a) an illegible postmark;
- b) a stamped notice "Postage Due";
- c) a handwritten entry "Attention: (Refund - Amended Returns)"; and
- d) imprinted letterhead indicating that the envelope was from Action Plan Travel of Buffalo, Inc.

CONCLUSIONS OF LAW

A. That section 691(a) of the Tax Law, in pertinent part for the periods at issue, provides:

"If any return...required to be filed...within a prescribed period or on or before a prescribed date...is after such period or such date delivered by the United States mail to the [place where] such document is required to be filed...the date of the 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...and only if such document...was deposited in the mail, postage prepaid, properly addressed..."

B. That the postmark on the envelope in which petitioner's return was enclosed is not legible. However, it is apparent that petitioner's amended federal and amended state personal income tax returns were posted at the same time and that the federal return was "late" (Findings of Fact "3" and "4"), thus, were it legible, the postmark with respect to petitioners' state return would likewise be "late".

C. That petitioners have failed to prove that their amended return was timely deposited for posting with the United States Postal Service with proper postage prepaid.

D. That giving petitioners the benefit of the doubt that the 1977 and 1978 amended state returns may have been filed together, the earliest they could be considered as having been received is May 7, 1981, which date may be timely as to petitioners' 1978 return but is not timely as to petitioners' 1977 return.


E. That petitioners' amended return for the year 1977, not being properly deposited and posted (Conclusion of Law "C") nor postmarked or received within the applicable time periods (Conclusions of Law "B" and "D"), was not timely filed. Petitioners failed to avail themselves of the provisions of section 691 of the Tax Law concerning registered mail by which they may have preserved their claim.


F. That the denial of petitioners' claim for refund of personal income tax for the year 1977 is sustained and the petition herein is denied.


DATED: Albany, New York

JAN 03 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER