

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Richard & Josephine Henry :
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 - 1979. :

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of February, 1986, he/she served the within notice of Decision by certified mail upon Richard & Josephine Henry, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard & Josephine Henry
651 Hillside Ave.
N. White Plains, NY 10603

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
18th day of February, 1986.

Doris E. Steinhardt

Alan C. Cray
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Richard & Josephine Henry :
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1977 - 1979. :
_____:

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of February, 1986, he served the within notice of Decision by certified mail upon Jack Smolen, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Smolen
163-07 Depot Road
Flushing, NY 11358

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
18th day of February, 1986.

Doris E. Steinhardt

John Conry
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 18, 1986

Richard & Josephine Henry
651 Hillside Ave.
N. White Plains, NY 10603

Dear Mr. & Mrs. Henry:

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
Jack Smolen
163-07 Depot Road
Flushing, NY 11358
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
RICHARD HENRY AND JOSEPHINE HENRY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1977, 1978 and	:	
1979.	:	

Petitioners, Richard Henry and Josephine Henry, 651 Hillside Avenue, North White Plains, New York 10603, 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, 1978 and 1979 (File No. 45694).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 12, 1985 at 9:15 A.M., with all briefs to be submitted by September 19, 1985. Petitioners appeared by Jack Smolen, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether petitioner Richard Henry's income derived from Equitable Life Insurance Company during his nonresident periods constituted New York source income, thus rendering such income taxable to New York.

II. Whether the deficiency asserted with respect to a capital gain derived from the sale of petitioners' New York residence is barred by the period of limitations on assessment.

FINDINGS OF FACT

1. Petitioners, Richard Henry and Josephine Henry, filed a 1977 New York State Income Tax Resident Return for the three (3) month period, January 1 to March 31. Although filing status "Married filing joint Return" was checked, said return was actually prepared based on the filing status "Married filing separately on one Return". On such return, petitioner Richard Henry's income from insurance sales was reported as employee compensation. Petitioners did not file a New York State nonresident income tax return for the balance of taxable year 1977. For 1978, they did not file a New York State personal income tax return. For 1979, petitioner Richard Henry filed a New York State Income Tax Resident Return for the period January 1 to March 29 under filing status "Single". As in 1977, his income from insurance sales was reported as employee compensation. He did not file a New York State nonresident income tax return for the balance of taxable year 1979.

2. On December 24, 1982, the Audit Division issued a Statement of Personal Income Tax Audit Changes to petitioners wherein the income earned by Richard Henry (hereafter "petitioner") from Equitable Life Insurance Company was held to be New York source income, and as such, taxable to petitioner for both his resident and nonresident periods of each year at issue. Said adjustment was made "since Equitable Life Insurance Company provides office space in New York State". Additionally, a long term capital gain derived from the sale of their New York residence was held taxable during their 1977 nonresident period. Accordingly, three (3) notices of deficiency were issued on May 25, 1983 as follows:

(a) Against petitioner for 1977 asserting additional personal income tax \$832.52, plus interest of \$428.01, for a total due of \$1,260.53.

(b) Against Josephine Henry for 1977 asserting additional personal income tax of \$240.48, plus interest of \$123.64, for a total due of \$364.12.

(c) Against petitioner for 1978 and 1979 asserting additional personal income tax of \$4,633.04, plus penalties of \$1,412.14 and interest of \$1,847.02, for a total due of \$7,892.20.

Said penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to file a 1978 return and failure to pay the tax determined to be due, respectively.

3. Petitioners' reported periods of New York residence were accepted by the Audit Division.

4. Petitioner and his wife changed their residence from New York to Connecticut on April 1, 1977. They remained Connecticut residents through taxable year 1978. In early 1979 petitioner separated from his wife and moved back to New York State. He remained a New York resident for approximately three months and then moved back to Connecticut.

5. During the hearing it was stipulated that petitioner and his wife sold their New York home subsequent to their change of residence to Connecticut in 1977. However, petitioner argued that the gain derived from such sale was accruable to the 1977 resident return and the period of limitations on assessment (for such return) had expired prior to the issuance of the 1977 notices of deficiency. Accordingly, he argued that assessment on said gain is prohibited.

6. Petitioner contended that during his nonresident periods of 1977 and 1979, and for the entire year 1978, during which he was a nonresident of New York, he worked as a life insurance salesman for Equitable Life Insurance Company ("Equitable") solely from offices in Connecticut and was not attached to any New York offices. Accordingly, he argued that his returns were properly filed since he had no New York source income during his nonresident periods.

7. Prior to the years at issue petitioner was a New York resident for approximately thirteen (13) years. During such period of New York residence he was attached to Equitable's White Plains, New York office and utilized office space there.

8. Petitioner alleged that since 1964 he had continuously maintained an office in Connecticut and he derived approximately 90 percent of his insurance sales income from such Connecticut office.

9. To support his allegation that Equitable did not provide him with office space in New York during his periods of Connecticut residence, petitioner submitted two (2) letters as follows:

(a) From Donald E. Wilson, District Manager of White Plains, New York office dated January 12, 1984, wherein it was stated that:

"Please be advised that Agent, R.F. Henry, Code #59409, was assigned to my District from 1/2/80 to 6/1/83. Prior to this period, Mr. Henry was a Connecticut resident and did business through his Connecticut office."

(b) From Thomas G. Grant, Agency Manager of White Plains, New York office dated January 12, 1984, wherein it was stated that:

"This is to confirm that Agent #59409, Richard F. Henry, was unassigned from this Agency from 4/1/77 to 1/1/80. Agent Henry was then assigned to the Wilson District on 1/2/80."

10. Petitioner submitted two (2) Equitable production statements dated August 29, 1980 and October 31, 1980 whereon Thomas G. Grant was listed as Agency Manager and Donald E. Wilson was listed as District Manager. In addition to showing "current year" production said statements also showed "previous year" production. In contrast to the letters referred to in Finding of Fact "9", said statements appear to indicate that petitioner had substantial production from the White Plains New York office during the "previous year" 1979.

11. Petitioner testified that in or about April, 1977, he changed all of his New York insurance licenses to resident Connecticut insurance licenses

and that in 1979 he acquired a stockbroker's variable life insurance license. In support thereof he submitted a "State of Connecticut - Insurance Department, Agents License". Said license, which bore an issuance date of August 12, 1977, indicated a status of "residency". The insurance company listed on said license was Equitable at an address listed as 2 Church Street South, New Haven, Connecticut 06510. Petitioner also submitted a "State of Connecticut - Department of Business Regulation, Division of Insurance, Agent's License" indicating a nonresident status. Said license, which was issued on April 16, 1979, listed the insurance company as Equitable, at an address listed as 1285 Avenue of the Americas, New York, New York 10019. Both of the aforesated licenses appear to have been initially issued, rather than renewed, on the dates specified. Accordingly, they appear to contradict petitioner's allegation that since 1964, approximately 90 percent of his insurance sales income was derived from Connecticut. Although petitioner claimed that said licenses represented a change from New York to Connecticut, no evidence was submitted to show that his New York licenses had been terminated.

CONCLUSIONS OF LAW

A. That section 632(a) of the Tax Law provides, in part, that:

" - The New York adjusted gross income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources..."

B. That section 632(b) of the Tax Law provides that:

"-(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this state; or

(B) a business, trade, profession or occupation carried on in this state."

C. That section 689(e) of the Tax Law provides that in any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for three instances, none of which are at issue herein.

D. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that his income derived from Equitable during his nonresident periods was not derived from or connected to New York sources. Accordingly, such income is taxable to petitioner during his nonresident periods.

E. That section 654(a) of the Tax Law provides that:

" - If an individual changes his status during his taxable year from resident to nonresident, or from nonresident to resident, he shall file one return as a resident for the portion of the year during which he is a resident and one return as a nonresident for the portion of the year during which he is a nonresident..."

F. That section 654(c)(1) of the Tax Law provides, in pertinent part, that:

"If an individual changes his status from resident to nonresident, he shall, regardless of his method of accounting, accrue for the portion of the taxable year prior to such change of status any items of income, gain, loss or deduction accruing prior to the change of status..."

G. That section 683(c)(1)(A) of the Tax Law provides that the tax may be assessed at any time if no return is filed.

H. That the capital gain derived from petitioners' sale of their New York residence subsequent to their change of residence to Connecticut in April 1977 did not constitute an item of gain accruing prior to the change of status. Accordingly, such gain was taxable during their nonresident period in 1977. Since no return was filed for such period, the tax may be assessed at any time. Therefore, the Notice of Deficiency issued for taxable year 1977, incorporating

adjustments made for the nonresident period of said year, is not barred by the period of limitations on assessment within the meaning and intent of sections 654(a) and 683(c)(1)(A) of the Tax Law.

I. That the petition of Richard Henry and Josephine Henry is denied and the three (3) notices of deficiency issued May 25, 1983 are sustained together with such additional penalty and interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1984

Rodwin A. Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Jank
COMMISSIONER