

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Ronald K. & Diana J. Leirvik : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of NYS Personal Income Tax under Article 22 of the
Tax Law and New York City Nonresident Earnings Tax :
under Chapter 46, Title U of the Administrative
Code of the City of New York for the Years 1980 & :
1981.

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 17th day of January, 1986, he served the within notice of Decision by certified mail upon Ronald K. & Diana J. Leirvik, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ronald K. & Diana J. Leirvik
12700 Lake Avenue, Suite #2902
Lakewood, OH 44107

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
17th day of January, 1986.

David Parchuck

James A. Haggard

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Ronald K. & Diana J. Leirvik : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of NYS Personal Income Tax under Article 22 of the
Tax Law and New York City Nonresident Earnings :
Tax under Chapter 46, Title U of the Administrative
Code of the City of New York for the Years 1980 & :
1981.

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 17th day of January, 1986, he served the within notice of Decision by certified mail upon Martin Drazen, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Martin Drazen
McCarthy, Fingar, Donovan, Drazen & Smith
175 Main Street
White Plains, NY 10601

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
17th day of January, 1986.

David Parchuck

James R. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 17, 1986

Ronald K. & Diana J. Leirvik
12700 Lake Avenue, Suite #2902
Lakewood, OH 44107

Dear Mr. & Mrs. Leirvik:

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 & 1312 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
Martin Drazen
McCarthy, Fingar, Donovan, Drazen & Smith
175 Main Street
White Plains, NY 10601
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
RONALD K. LEIRVIK AND DIANA J. LEIRVIK	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Years 1980 and 1981.	:	

Petitioners, Ronald K. Leirvik and Diana J. Leirvik, 12700 Lake Avenue, Suite #2902, Lakewood, Ohio 44107, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1980 and 1981 (File No. 54946).

On May 30, 1985, petitioners advised the State Tax Commission, in writing, that they desired to waive a formal hearing and submit the case to the State Tax Commission. After due consideration of the entire file, the State Tax Commission renders the following decision.

ISSUES

- I. Whether the petition for redetermination was timely filed.
- II. Whether petitioners properly allocated Ronald K. Leirvik's wage income to sources within and without the State and City of New York.

FINDINGS OF FACT

1. Petitioners, Ronald K. Leirvik and Diana J. Leirvik¹, timely filed joint New York State nonresident income tax returns for 1980 and 1981. Ronald K. Leirvik also timely filed New York City nonresident earnings tax returns for 1980 and 1981. On both the State and City returns for each of the years at issue, petitioner allocated wage income to New York State and City sources based on a percentage determined by placing the number of days worked within the State and City over the total number of days worked. For 1980, wage income was allocated to New York State and City sources based on 114 days worked within the State and City placed over 250 total days worked. For 1981, wage income was allocated to New York State and City sources based on 121 days worked within the State and City placed over 235 total days worked.

2. On March 10, 1983, the Audit Division sent a questionnaire letter to petitioner regarding the claimed allocation of wage income to New York State and City sources for 1980 and 1981. Mr. Leirvik did not respond to this letter² and therefore the Audit Division, on August 25, 1983, issued a Statement of Personal Income Tax Audit Changes to petitioner. On said Statement, the Audit Division disallowed in full petitioner's allocation of wage income to

1 Diana J. Leirvik is involved in this proceeding solely as the result of having filed joint New York State income tax returns with Ronald K. Leirvik. Furthermore, the wage income, the allocation of which being the only audit issue in dispute, was earned entirely by Mr. Leirvik. Accordingly, the term petitioner shall hereinafter refer solely to Ronald K. Leirvik.

2 Petitioner claimed that Audit Division requests for additional information were made during a period when he and Diana J. Leirvik were in the process of being divorced and living in separate residences. Mr. Leirvik asserted that Audit Division letters were addressed to the residence occupied by Mrs. Leirvik and that she did not forward said letters for his consideration and reply.

sources outside the State and City of New York since there had been no reply to the questionnaire letter dated March 10, 1983.

3. Based on the aforementioned Statement, the Audit Division, on November 18, 1983, issued a Notice of Deficiency to petitioner for 1980 and 1981 asserting additional New York State and City tax due of \$7,678.17, plus interest of \$2,130.32, for a total allegedly due of \$9,808.49.

4. On April 2, 1984, petitioner's representative sent a letter to the State Tax Commission, Tax Appeals Bureau, which was received on April 5, 1984 and which stated, in pertinent part:

"On or about February 10, 1984, we sent to you a letter-petition on behalf of Ronald K. and Diana J. Leirvik for redetermination of deficiencies for 1980 and 1981. We requested a copy of your computation and a pre-hearing conference. Enclosed is a copy of that letter."

5. The copy of the undated letter-petition contained, inter alia, the following:

"This writing constitutes a petition on behalf of Ronald K. and Diana J. Leirvik, for redetermination of deficiencies for the calendar years 1980 and 1981. Your assessment of additional taxes due of \$7,678.17 plus interest of \$2,130.32, making a total of \$9,808.49, is in error since the petitioners were non-residents of New York in 1980 and 1981, and your apportionment/allocation of income for those years failed to take into account the days when the taxpayers were not earning income in New York."

6. On April 17, 1984, the Conference Unit of the Tax Appeals Bureau advised petitioner's representative that:

"The Tax Law requires that a petition must be filed within ninety days from the date of the Notice of Deficiency. In this case, the Notice was dated November 18, 1983, but the petition was not received until April 5, 1984 or in excess of ninety days. It therefore appears that your petition was not timely filed, and this matter has been referred to the Tax Compliance Bureau for collection."

The letter also indicated that the Tax Appeals Bureau had no record of receiving the letter-petition allegedly mailed on February 10, 1984, and that unless such

correspondence had been sent by certified mail, the copy of the undated letter-petition could not be accepted as a timely filed petition.

7. Petitioner's attorney, Martin Drazen, asserted that on February 8, 1984, he had his secretary prepare a corrected letter-petition which was undated and which he signed. On February 10, 1984, he directed his secretary to mail the letter-petition. He had assumed his secretary would date the letter-petition but this was not done. Mr. Drazen's secretary later informed him that she sent the undated letter-petition out on February 10, 1984. Mr. Drazen maintains that he can substantiate timely mailing by sworn affidavits.

8. Petitioner was employed by Crane Co. from January, 1980 through 1981 as Vice President of the Valves and Fitting Division. His duties included management and supervision of the Division's operations, marketing and distributors in a number of states. Petitioner had an office at Crane's New York City location, but claimed the responsibilities of his position mandated continuous travel outside New York State. Petitioner asserts that during a large part of both years, his presence in New York was for the use of New York airports and other transportation facilities.

9. Documentation was submitted by petitioner which he believes will substantiate the number of days worked within and without the State and City of New York. This documentation includes copies of expense account vouchers and statements explaining that expenses with references to New York were for tolls, parking and gasoline charges incurred while petitioner was passing through New York airports or on the way to non-New York work assignments when he did not stop at his New York office.

10. On his 1983 New York State income tax return, petitioner claimed a refund of \$2,895.00. Instead of issuing the refund to petitioner as requested,

the Audit Division applied the \$2,895.00 to the amounts asserted due in the Notice of Deficiency dated November 18, 1983. Petitioner asserts that since no additional taxes are due for 1980 and 1981, he is entitled to his 1983 claimed refund of \$2,895.00.

CONCLUSIONS OF LAW

A. That "(w)ithin ninety days...after the mailing of the notice of deficiency...the taxpayer may file a petition with the tax commission for a redetermination of the deficiency." Tax Law §689(b). Thus, petitioner's letter-petition would be timely only if filed within ninety days of November 18, 1983, the date the Notice of Deficiency was issued.

B. That "(a)ll proceedings before the Commission must be commenced by the filing of a petition..." 20 NYCRR 601.3(a). The following time limitations regarding the filing of a petition are provided in 20 NYCRR 601.3(c):

"Time limitations. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of that time limitation. If the petition is filed by mail, it must be addressed to the particular operating bureau in Albany, New York. When mailed, the petition will be deemed filed on the date of the United States postmark stamped on the envelope."

C. That Tax Law §691(a) provides, in pertinent part:

"Timely mailing. -- If any return, ... 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..., the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. ... If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section."

D. That Tax Law §691(a) is patterned after Internal Revenue Code §7502, "Timely Mailing Treated as Timely Filing and Paying." Matter of Garofalo, State Tax Comm., September 28, 1983; Matter of Mancuso, State Tax Comm., September 28, 1983. Treasury Regulation §301.7502-1(d)(1) provides:

"Section 7502 is not applicable unless the document is delivered by United States mail to the agency, officer, or office with which it is required to be filed. However, if the document is sent by registered mail or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued therefor, and that the envelope or wrapper was properly addressed to such agency, officer, or office shall constitute prima facie evidence that the document was delivered to such agency, officer, or office."

In Deutsch v. C.I.R., 599 F.2d 44 (2d Cir.), cert. denied, 44 U.S. 1015, a petition addressed to the Tax Court was never found and the taxpayer offered an affidavit of his accountant who claimed he mailed it within the statutory period. The Court noted that "(w)here as here, the exception of §7502 is not literally applicable, courts have consistently rejected testimony or other evidence as proof of the actual date of mailing." Id. at 46 (citations omitted).

E. That in Garofalo, supra and Mancuso, supra, petitions alleged to be timely mailed were never received by the State Tax Commission. The petitioners' representative, an attorney, testified to assembling the Garofalo and Mancuso petitions, signing the petitions and placing each petition in an envelope. Likewise, his secretary testified to mailing these petitions within the ninety day statutory period. The Tax Commission held the following in both cases:

"That to be timely, a petition must be actually delivered to the Tax Commission within ninety days after a deficiency notice is mailed, or it must be delivered in an envelope which bears a United States postmark of a date within the ninety day period. The petitioners have not shouldered their burden of proof under Tax Law §689(e) to show that the petition was delivered to the Tax Commission. Proof of mailing by registered or certified mail was not shown. Proof of mailing by ordinary mail does not satisfy the requirement of

proving delivery of the petition to the Tax Commission. See Deutsch v. C.I.R., 599 F.2d 44 (2d Cir.), cert. denied, 444 U.S. 1015." Garofalo, supra; Mancuso, supra.

F. That petitioners have not shouldered their burden of proof under §689(e) of the Tax Law to show that their original letter-petition was timely delivered. Although petitioner's attorney, Martin Drazen, and his secretary were willing to sign sworn affidavits to the mailing of this petition within the prescribed statutory period, proof of ordinary mailing does not satisfy the requirement of proving delivery of the petition to the Tax Commission. Garofalo, supra; Manucso, supra.

G. That petitioners had until February 16, 1984 to timely file a petition. The copy of the undated letter-petition, received by the Tax Appeals Bureau on April 5, 1984, was not timely filed.

H. That in view of the fact that the petition was untimely, Issue II is rendered moot.


I. That the petition of Ronald K. Leirvik and Diana J. Leirvik is in all respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER