

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Jay L. & Phyllis A. McElwain :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income
Tax under Article(s) 22 of the Tax Law :
for the Year 1980.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, 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 26th day of September, 1986, he/she served the within notice of Decision by certified mail upon Jay L. & Phyllis A. McElwain the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jay L. & Phyllis A. McElwain
46 Vernon Rd., RD 3
Clay, NY 13041

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
26th day of September, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

September 26, 1986

Jay L. & Phyllis A. McElwain
46 Vernon Rd., RD 3
Clay, NY 13041

Dear Mr. & Mrs. McElwain:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

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	:	
JAY L. MCELWAIN and PHYLLIS A. MCELWAIN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1980.	:	

Petitioners, Jay L. and Phyllis A. McElwain, 46 Vernon Road, RD #3, Clay, New York 13041, 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 1980 (File No. 53933).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on April 3, 1986 at 9:15 A.M. Petitioner Jay L. McElwain appeared pro se and for his spouse. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the Audit Division properly denied petitioners' claimed household credit and claimed disability income exclusion on petitioners' 1980 New York State personal income tax return.

FINDINGS OF FACT

1. On June 17, 1981 petitioners, Jay L. and Phyllis A. McElwain, filed separately on one return their 1980 New York State personal income tax returns. Petitioners claimed, in the aggregate, a household credit against tax of \$35.00 and petitioner Jay L. McElwain claimed \$5,200.00 as an adjustment to income

pursuant to the disability income exclusion provisions of section 105(d) of the Internal Revenue Code.

2. On January 5, 1983 the Audit Division issued to petitioners a Statement of Audit Changes with respect to petitioners' 1980 personal income tax return asserting a total of \$449.76 in additional tax due, plus interest. The adjustments were explained, in pertinent part, as follows:

"The starting point for computing the New York tax liability is federal adjusted gross income. Therefore, your tax liability has been recomputed as shown.

Adjustment is required because you subtracted only a portion of state and local taxes included in federal itemized deductions rather than the full amount.

Since the household gross income is \$25,000.00 or more, the household credit is not allowed.

* * *

Since the disability exclusion is not claimed on your federal return, it may not be claimed on your state return."

3. On February 9, 1983 petitioners filed separately on one return an amended 1980 New York State personal income tax return. On said amended return petitioners did not claim the household credit taken on their original return, nor did Mr. McElwain claim the disability income exclusion previously taken. Based upon the amended return petitioners calculated their additional 1980 personal income tax liability to be \$360.00. Petitioners remitted the \$360.00, together with \$79.00 in interest, with their amended return.

4. While petitioners claimed neither the household credit nor the disability income exclusion on their amended return, petitioners did take issue, both in their petition and at hearing, with the Audit Division's position that they were not entitled to the aforementioned tax benefits and therefore requested a

refund of the additional tax paid for the year 1980 based upon the exclusion of such tax benefits from the amended return.

5. On June 8, 1984 the Audit Division issued to petitioners two notices of deficiency with respect to said petitioners' 1980 personal income tax liability in amounts as follows:

<u>Taxpayer</u>	<u>Additional Tax Due</u>	<u>Interest</u>	<u>Total Amount Paid</u>	<u>Balance Due</u>
Jay L. McElwain	\$372.92	\$88.21	\$439.00	\$ 22.13
Phyllis A. McElwain	\$ 76.84	\$ 29.34	-0-	\$106.18

6. On May 31, 1985 petitioners paid the remaining additional tax asserted due in the notices of deficiency together with additional interest due thereon, remitting a total of \$143.74.

7. In its answer and at hearing, the Audit Division asserted that it accepted as correct petitioners' amended 1980 return except with respect to an alleged household credit taken by petitioners on said return. As discussed in Finding of Fact "3" supra, however, petitioners did not claim a household credit on their amended return.

8. Petitioners filed a joint federal income tax return for 1980 and did not claim a disability income exclusion on said return.

9. Petitioners contended that the Audit Division erroneously interpreted the instructions set forth in the Department of Taxation and Finance's "1980 Resident Income Tax Forms and Instruction Packet". Petitioners also contended, alternatively, that said instructions were inaccurate and misleading. Specifically, Mr. McElwain took issue with the instructions in the instruction packet regarding line 45 of Form IT-201 (the form used by petitioners in filing both their original and amended 1980 returns) which provided the following:

"Line 45

Adjustments to Income

Enter the total adjustments to income reported on your federal return. If you are married and filing separately on one Form IT-201, you each must enter your own adjustments in columns A and B as if you each had filed a separate federal return." (Emphasis supplied.)

10. Mr. McElwain took the position that the above-quoted instruction authorized him to take the disability income exclusion on his New York return notwithstanding the fact that he had not taken this exclusion on his federal return. Mr. McElwain's inclusion of the disability income exclusion on his New York return reduced his and Mrs. McElwain's combined income to \$21,616.00. Mr. McElwain contended that he and his wife were therefore entitled to a household credit of \$35.00.

11. Petitioners' "household gross income" for the year at issue was \$26,816.00.

CONCLUSIONS OF LAW

A. That inasmuch as an individual's New York taxable income is premised upon that individual's federal adjusted gross income (Tax Law §§ 611, 612), the Audit Division properly denied Mr. McElwain's claimed disability income exclusion. Petitioners did not claim the disability income exclusion on their 1980 federal income tax return; it was therefore not part of petitioners' 1980 federal adjusted gross income. Consequently, pursuant to sections 611 and 612 of the Tax Law, Mr. McElwain may not claim said exclusion on his 1980 New York return. In addition, with respect to Mr. McElwain's contention that the Audit Division erroneously interpreted the instructions regarding petitioners' adjustments to income, or that such instructions were inaccurate, it is noted that had Mr. McElwain entered his adjustments to income "as if" he had filed a separate federal return (Finding of Fact "9"), he would not have been entitled to the

claimed \$5,200.00 disability income exclusion because the relevant statute, section 105(d) of the Internal Revenue Code, requires married taxpayers claiming this exclusion to file joint returns. Consequently, had petitioners filed separate federal returns, Mr. McElwain would not have been entitled to the claimed exclusion. It is therefore clear that neither the instructions in question nor the Audit Division's interpretation of those instructions was erroneous; rather, Mr. McElwain was in error regarding his eligibility for the disability income exclusion.

B. That during the year at issue section 606(b)(2) of the Tax Law provided for a household credit against tax in the amount of \$35.00 if the household's gross income was less than \$25,000.00 but greater than \$7,000.00.

C. That inasmuch as petitioners' household gross income, properly computed for the year at issue, was greater than \$25,000.00, the Audit Division properly denied petitioners' claim for household tax credit.

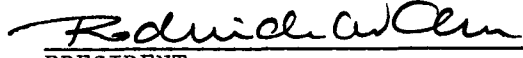
D. That in view of the Audit Division's acceptance of petitioners' amended return for the year at issue and the Audit Division's mistaken contention that petitioners claimed a household tax credit on said amended return, petitioners' personal income tax liability for the year at issue is limited to the amount of additional tax found due and owing on said return. The Audit Division is therefore directed to refund any amounts which may have been paid in excess of the amounts found lawfully due and owing herein.

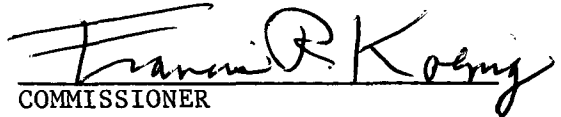
E. That the petition of Jay L. and Phyllis A. McElwain is granted to the extent indicated in Conclusion of Law "D" and is in all other respects denied.

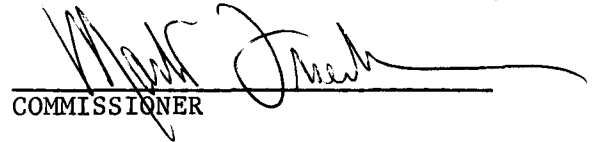
DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986


PRESIDENT


COMMISSIONER


COMMISSIONER