

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Bennett Poor :

AFFIDAVIT OF MAILING

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 Personal Income :  
Tax under Chapter 46, Title T of the Administrative :  
Code of the City of New York for the Year 1979. :

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State of New York :

ss.:

County of Albany :

David Parchuck/Connie Hagelund, 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 28th day of January, 1986, he/she served the within notice of Decision by certified mail upon Bennett Poor, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bennett Poor  
26 Alton Court  
Brookline, MA 02146

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  
28th day of January, 1986.

David Parchuck

Connie Hagelund  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 28, 1986

Bennett Poor  
26 Alton Court  
Brookline, MA 02146

Dear Mr. Poor:

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 and Chapter 46, Title T of the Administrative Code of the City of New York, 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

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In the Matter of the Petition	:	
of	:	
BENNETT POOR	:	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 Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Year 1979.	:	

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Petitioner, Bennett Poor, 26 Alton Court, Brookline, Massachusetts 02146, 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 personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1979 (File No. 49105).

A formal hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on April 25, 1985 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether petitioner filed his amended New York State income tax return for the year 1979, containing a claim for refund, more than three years after said return was due, thus precluding his claim for refund.

FINDINGS OF FACT

1. On November 1, 1982, as a result of information obtained from the Federal/State Tape Match Program, the Audit Division issued a Statement of

Audit Changes (Assessment Number A821101574C) to petitioner and his wife, Alwyn C. Poor, which contained the following explanation and computation:

"Since you failed to reply to our previous letter(s), your 1979 personal income tax liability has been computed from information obtained from the Internal Revenue Service under authorization of Federal law (section 6103(d) of the Internal Revenue Code).

Interest for late payment or underpayment at the applicable rate.

Penalty for late filing at 5% per month, maximum 25%. Penalty for late payment at  $\frac{1}{2}$ % per month, maximum 25%.

	1979 NYS Joint	1979 NYS Joint	
Total income	35602.00	35602.00	
Itemized/standard deduction	-2400.00	-2400.00	
Balance	33202.00	33202.00	
Exemptions	-1400.00	-1400.00	
Taxable income	31802.00	31802.00	
Tax on above	3012.28	967.49	
Personal income tax due	3012.28	967.49	
Section 685(a)(1) penalty	677.76	217.69	
Section 685(a)(2) penalty	466.90	149.96	
Total penalty	1144.66	367.65	
Total interest	844.67	271.30	
Total due	5001.61	1606.44	6608.05"

Accordingly, on September 16, 1983, a Notice of Deficiency was issued to Alwyn C. Poor, asserting additional tax due of \$3,979.77, plus penalty of \$1,711.29 and interest of \$1,482.63, for a total due in the amount of \$7,173.69.<sup>1</sup>

2. Prior to the year 1979, petitioner and his wife, Alwyn C. Poor, were residents of the State of Massachusetts. Early in 1979, petitioner and his wife separated and petitioner moved to New York City where he resided in the

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1 Since the Notice of Deficiency was erroneously issued to Alwyn C. Poor only and not to said Alwyn C. Poor and petitioner jointly, and since an amended return substantiated that a deficiency did not exist, the Notice of Deficiency was cancelled at a pre-hearing conference.

Seville Hotel and took employment with J. A. Ewing and McDonald, Inc., 51 Madison Avenue, New York, New York. Alwyn C. Poor continued to live and work in Boston, Massachusetts. During 1979, she neither resided in, worked in, nor spent any time in the State of New York.

3. Petitioner testified that, as of the April 15, 1980 filing deadline for the 1979 tax year, he was unable to properly compute approximately \$10,000.00 worth of business expenses, since such expenses had been incurred in South America in many different currencies. On April 14, 1980, he therefore filed Form IT-372, Application for Extension of Time, and was granted such extension by the New York State Processing Division until June 15, 1980. During the period of said extension, petitioner was still unable to compute his business expenses, but he testified that he knew that he could file amended returns at a later date which would properly set forth his business expenses for purposes of his Federal and State returns. Prior to June 15, 1980, petitioner filed a joint Federal return with his wife and petitioner filed a separate New York State and City of New York return. Alwyn C. Poor filed a separate Massachusetts income tax return for the year 1979. Petitioner testified that he mailed the joint Federal return and his separate New York State and City of New York return by dropping them in the slot on the fourteenth floor of the building wherein he resided. These returns were never received by the Internal Revenue Service or the Department of Taxation and Finance.

4. Petitioner and his wife reconciled in February, 1981 and, on February 20, 1981, Alwyn C. Poor moved into petitioner's residence at 209 East 56th Street, New York, New York. During the fall of 1980 and the spring of 1981, petitioner was able to compute his business expenses for 1979 and, on July 31, 1981, petitioner and his wife filed an amended joint Federal return for 1979. The

amended Federal return was received by the Internal Revenue Service on September 25, 1981. On December 26, 1983, petitioner and his wife received from the Internal Revenue Service, a "Statement of Adjustment to Your Account" wherein they were issued a refund in the amount of \$752.94 for the year 1979. Petitioner testified that within a day of his mailing of the amended Federal return on July 31, 1981, he also prepared and mailed an amended New York State and City of New York return for the year 1979. The amended New York State and City of New York return was a separate, resident return which included his business expenses and indicated an overpayment of \$804.00 for the year 1979. The Audit Division has no record of receipt of such amended return for the year 1979.

5. In July, 1982, petitioner and his wife again separated and were subsequently divorced. Alwyn C. Poor returned to Boston, Massachusetts and, in September, 1982, petitioner moved to Syracuse, New York where he resided until September, 1983.

6. Petitioner testified that he had no knowledge that neither his original nor his amended New York State and City of New York personal income tax returns had been received by the New York State Department of Taxation and Finance until he received a Statement of Audit Changes in November, 1982. He further testified that he had been in contact with various Department of Taxation and Finance personnel concerning the whereabouts of his refund since about December, 1981, a few months after he filed his amended return for 1979. On August 10, 1983, petitioner and his wife received a letter from the Audit Division, Central Income Tax Section, which upheld the Statement of Audit Changes and which contained a statement that "the fact that the wife lived and worked in Boston in 1979 does not necessarily preclude her from filing a New York State return, since the domicile of the wife normally follows that of the husband." Petitioner testified

that, upon receipt of said letter of August 10, 1983, he met with Brian A. Thayer, Tax Auditor III in the Syracuse District Office, who confirmed the statement contained in said letter. In order to comply with this determination, petitioner went to H & R Block in Syracuse and had prepared a second amended New York State and City of New York income tax return on October 10, 1983. This second amended return was filed under the status "married filing separately on one return" and included the income of petitioner's wife, Alwyn C. Poor, along with the identical information as to petitioner's income which was contained on the amended return filed by petitioner on or about July 31, 1981. The second amended return was signed only by petitioner. H & R Block also prepared a corrected Massachusetts tax return for the year 1979 for Alwyn C. Poor which changed her status to that of a nonresident. As set forth in the footnote to Finding of Fact "1" herein, the fact that the Notice of Deficiency of September 16, 1983 was erroneously issued only to Alwyn C. Poor, together with the fact that the information contained in the second amended return of October 10, 1983 substantiated that no deficiency existed, resulted in its being cancelled at a pre-hearing conference.

#### CONCLUSIONS OF LAW

A. That section 687(a) of the Tax Law, in effect for the year at issue, provided as follows:

"Claim for credit or refund of an overpayment 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."

B. That in view of the demeanor of petitioner while testifying, his ability to produce a copy of his amended Federal income tax return for the year at issue along with a copy of Form IT-372, Application for Extension of Time to file his 1979 New York State personal income tax return, his diligence and perseverance in pursuing his refund claim with various personnel of the New York State Department of Taxation and Finance and his compliance with the directives of said personnel, it is hereby found that petitioner's testimony was credible and that he has sustained the burden of proof imposed by section 689(e) of the Tax Law and section T46-189.0(e) of Chapter 46, Title T of the Administrative Code of the City of New York in demonstrating that an original New York State and City of New York income tax return for the year 1979 had been timely filed and that an amended New York State and City of New York income tax return claiming an overpayment had been timely filed.

C. That, generally, the domicile of a husband and wife are the same. However, if they are separated, in fact they may each, under some circumstances, acquire their own separate domiciles, even though there be no judgment or decree of separation [20 NYCRR 102.2(d)(5)]. In 1979, petitioner's wife, Alwyn C. Poor, was domiciled in the State of Massachusetts.

D. That according to the definitions furnished by section 605 of the Tax Law (as in effect during the year in question) and section T46-105.0 of the Administrative Code of the City of New York, a resident individual is one who is domiciled in New York State and/or the City of New York unless he or she maintains no permanent place of abode in New York State and/or the City of New York, maintains a permanent place of abode elsewhere and spends not more than 30 days of the taxable year in the state and/or city. [Tax Law section 605(a)(1); Administrative Code section T46-105.0(a)(1)]. If not domiciled in New York

State and/or the City of New York, an individual may nonetheless be deemed a resident for tax purposes if he or she maintains a permanent place of abode in such state and/or city and spends more than 183 days of the taxable year in such state and/or city (unless in active service in the armed forces) [Tax Law section 605(a)(2); Administrative Code section T46-105.0(a)(2)]. Since Alwyn C. Poor neither maintained a permanent place of abode in New York State nor spent in the aggregate more than 183 days of the taxable year in New York State, she is deemed a nonresident of New York State for the taxable year 1979 within the meaning and intent of section 605(b) of the Tax Law.

E. That the New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within this State [20 NYCRR 131.4(b)]. Alwyn C. Poor's sole income in 1979 was derived from her employment in Boston, Massachusetts and, therefore, was not derived from or connected with New York sources. Accordingly, such income is not taxable for New York State or City of New York personal income tax purposes. Since Alwyn C. Poor was, for the taxable year 1979, a nonresident of New York and had no New York source income, she was not a person required to file a New York income tax return for said year.

F. That a return not captioned a joint return and signed only by the husband generally has been held to be a separate return, despite inclusion of the wife's income, especially where the return is prepared by accountants (McCord v. Granger, 201 F.2d 103).

That petitioner's credible testimony that he filed a separate, amended New York return on or about July 31, 1981 claiming an overpayment, that the second amended New York return, signed only by petitioner, bearing a date of

October 10, 1983 contained identical information as to petitioner's income and was filed under the status "married filing separately on one return" in reliance on the directives of certain New York State Department of Taxation and Finance personnel, taken together with the determination contained in Conclusion of Law "E", supra, lead to the conclusion that the October 10, 1983 amended New York return was a separate return of petitioner, Bennett Poor, only.

G. That it is the separate, amended New York return containing a claim of overpayment, timely filed by petitioner on or about July 31, 1981, which sustains petitioner's claim for refund. Since this return was not received by the Audit Division, the information contained on the second amended New York return bearing the date October 10, 1983 shall be utilized by the Audit Division in computing said refund. Petitioner is entitled to claim the entire standard deduction which, on the October 10, 1983 amended return, had been apportioned between petitioner and Alwyn C. Poor, his wife. Therefore, petitioner's 1979 New York State income tax liability is \$547.00 rather than the \$597.00 listed on the October 10, 1983 return, and his City of New York income tax liability is \$218.00 rather than the \$235.00 set forth on said return. Petitioner is entitled to a refund in the amount of \$876.00 for the year 1979.

H. That the petition of Bennett Poor is granted and the Audit Division is directed to refund the sum of \$876.00, together with such interest as may be lawfully owing.

DATED: Albany, New York

JAN 28 1986

STATE TAX COMMISSION

Roderick A. Carr  
PRESIDENT

Francis R. Kaemy  
COMMISSIONER

Mark J. Judd  
COMMISSIONER