

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John & Thelma Root :
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 :
1975. :
:

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 John & Thelma Root, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John & Thelma Root
198 Dodge Ave.
Corning, NY 14830

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 A. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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AFFIDAVIT OF MAILING

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 served the within notice of Decision by certified mail upon Walter R. Conlin, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Walter R. Conlin
P.O. Box 1386
Corning, NY 14830

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
28th day of January, 1986.

David Parchuck

Connie A. 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

John & Thelma Root
198 Dodge Ave.
Corning, NY 14830

Dear Mr. & Mrs. Root:

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
Walter R. Conlin
P.O. Box 1386
Corning, NY 14830
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JOHN AND THELMA ROOT
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1975.

DECISION

Petitioners, John and Thelma Root, 198 Dodge Avenue, Corning, New York 14830, 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 1975 (File No. 24614).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 164 Hawley Street, Binghamton, New York, on May 23, 1985 at 1:15 P.M. Petitioners appeared by Walter R. Conlin, P.A. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioners filed a New York State income tax return for the year 1975.

II. Whether the Audit Division properly computed petitioners' income tax liability for the year 1975.

III. Whether petitioners are entitled to a refund for the year 1975.

FINDINGS OF FACT

1. Petitioners, John and Thelma Root, did not timely file a New York State resident income tax return for the year 1975.

2. On April 18, 1978, the Audit Division issued to petitioners a Statement of Audit Changes asserting tax due of \$1,363.05, plus penalty pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law premised upon \$22,715.00 of "Total NY Income" which, after application of the standard deduction and exemptions, resulted in \$19,415.00 in "NY Taxable Income."

3. On July 10, 1978, the Audit Division issued to petitioners a Notice of Deficiency asserting a tax deficiency of \$1,363.05 for the year 1975 plus penalty and interest to the date of the notice.

4. Petitioners timely protested the Notice of Deficiency issued to them for the year 1975.

5. Petitioners claim that their personal income tax return for the year 1975 was filed with their personal income tax return for the year 1976 on or about July 26, 1978. The Audit Division denies having received said returns.

6. Petitioners filed their 1975 federal income tax return on the basis of "married filing joint return." Exclusive of a claimed loss carryover (see Finding of Fact "8", infra), petitioners had itemized deductions of \$3,489.92, which included \$1,144.59 of withheld New York State income tax.

7. A copy of a New York State income tax return of petitioners for the year 1975 submitted at the hearing (which petitioners allege is a copy of the return filed in July of 1978) reflects a filing on the basis of "married filing joint return" and requests a refund of \$1,144.59.

8. Petitioners' federal return was involved in litigation in United States Tax Court. Said litigation, inter alia, concerned a loss carryover of \$33,010.04 claimed on petitioners' 1975 federal return. At the hearing, petitioners submitted Form IT-115, "Notice of Change in Taxable Income, Items

of Tax Preference and Claim for Credit or Refund by U.S. Treasury Department
Pursuant to Section 659 of the New York State Tax Law."

9. Said Form IT-115 and related documents and attachments reflect for the
year 1975:

- a) federal taxable income for petitioners of \$17,820.95;
- b) a form W-2 for petitioner John Root showing wages of \$14,711.76 and
New York State income tax withholding of \$711.22;
- c) a form W-2 for petitioner Thelma Root showing wages of \$10,627.93
and New York State income tax withholding of \$433.37;
- d) a refund request of \$383.13 based upon a computation on the basis
of married filing separate returns; and
- e) New York taxable income of \$18,020.95 allocated \$9,010.48 and
\$9,010.47 to "Col. A" and "Col. B", respectively [see sub. (d) above].

10. The record at hearing was left open for submission of documents by the
Audit Division and petitioners regarding computation of New York State taxable
income as reflected on the IT-115 submitted by petitioners at the hearing
(petitioners' Exhibit "4"). The Audit Division concluded that petitioners
erroneously computed New York taxable income pursuant to said IT-115 (petitioners'
Exhibit "4") and provided the following computations:

"The proper recomputation of taxable income would be as follows:

Federal taxable income per tax court	17,820.95
Add back federal exemptions 1500	
Subtract NYS exemptions [1300]	
Net adjustment for exemption amount	200.00
 Add back State & Local income taxes used in computing federal taxable income	 <u>1,144.59</u>
Corrected NY taxable on a joint return	19,165.54"

Petitioners replied by providing a Form IT-115, dated July 22, 1985, calculating their combined taxable income to be \$19,070.00, computing their tax due on a "married filing separately" basis and requesting a refund of \$309.69.

11. The Form IT-115, dated July 22, 1985, also explained that the \$4,104.53 loss as claimed on petitioners' income statement on their federal return (line 12, income other than wages, dividends and interest, Department's Exhibit "G") and the copy of their state return was allocable solely to the husband.

12. Counsel for the Audit Division at hearing conceded that the two Form W-2's submitted by petitioners at hearing (petitioners' Exhibit "4", Finding of Fact "9") to substantiate petitioners' claimed New York State withholding for the year 1975 were duplicate copies of the originals.

13. Petitioners' computation of their requests for refund (Form IT-115, Findings of Fact "9" and "10") failed, inter alia, to include the tax surcharge imposed for the year 1975.

CONCLUSIONS OF LAW

A. That petitioners' correct joint New York State taxable income for the year 1975 is \$19,165.54 (determined as noted in Finding of Fact "10"). Included in the computation in arriving at said taxable income was \$2,345.33 (\$3,489.92 in federal itemized deductions less New York State income tax withheld of \$1,144.59) in New York itemized deductions.

B. That section 651(b) of the Tax Law provides, in part, that a husband and wife who filed a joint federal return may elect to file a separate New York State income tax return on a single form.

C. That section 660 of the Tax Law provides that any election authorized by Article 22 of the Tax Law may be changed on such terms or conditions as the tax commission may prescribe by regulation.

D. That section 154 of the income tax regulations (20 NYCRR 154) establishes conditions with respect to elections under the Internal Revenue Code and conditions with respect to elections under Article 22 of the New York State Tax Law. This section permits a husband and wife who have filed an original joint return to elect to change their return by filing amended separate returns on a single form.

E. That 20 NYCRR 154.4(c) provides, in part, "Where the change of election results in an overpayment of tax, the return or amended return...will be deemed a claim for refund for purposes of section 687 of the Tax Law, but refund will be allowable only if such return or amended return is filed within the time prescribed by that section...."

F. That section 687(f) provides, in part, that if a Notice of Deficiency for a taxable year is mailed to the taxpayer under section 681 and if the taxpayer files a timely petition with the Tax Commission, it may determine that the taxpayer has made an overpayment for such year (whether or not it also determines a deficiency for such year). Further, Tax Law section 687(g) in establishing limitations on the amount of credit or refund under section 687(f) of the Tax Law states, in pertinent part, that the overpayment determined shall not exceed the amount of tax which was paid within the period which would be applicable under subsections (a), (b) and (c), if on the date of the mailing of the notice of deficiency a claim had been filed.

G. That the Notice of Deficiency in the instant case was mailed on July 10, 1978, and a claim filed on such date (whether or not filed) is within the statute of limitations provided for in section 687(a) of the Tax Law. Petitioners may therefore elect to determine their New York State personal income tax on the basis of "married filing separately."

H. That section 615(b) of the Tax Law permits a husband and wife who determined their federal taxable income on a joint return but their New York taxable incomes separately to divide their itemized deductions between them as they may elect.

I. That considering petitioner John Root's gross wage income of \$14,711.76 and petitioner Thelma Root's gross wage income of \$10,627.93 (Finding of Fact "9"), the loss of \$4,104.53 allocable against the husband's income (Finding of Fact "11") and the ability of petitioners to elect to allocate their \$2,345.33 of itemized deductions between them (Conclusions of Law "G" and "H"), petitioners' New York taxable joint income of \$19,165.54 is "redetermined" to be \$9,582.77 in taxable income each.

J. That the Audit Division is directed to redetermine petitioners' taxes for the year 1975 based upon the status of "married filing separately" on a single return, the husband and wife each having \$9,582.77 in taxable income.

K. That petitioners are to be credited with \$1,144.59 of withholding taxes for the year 1975 (Findings of Fact "9" and "12").

L. That the Audit Division is directed to refund to petitioners the excess of their withholding over the deficiency as recomputed pursuant to Conclusion of Law "J", together with interest as allowed by law.

M. That a refund of taxes withheld from petitioners' wages being due, penalty and interest as claimed on the Notice of Deficiency are cancelled.

N. That the Notice of Deficiency is sustained to the extent noted in Conclusions of Law "J" as limited by Conclusion of Law "M", and the petition is

granted to the extent of Conclusions of Law "J", "K", "L" and "M" and is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986

Roderich A. Allen
PRESIDENT

Francis Q. Koenig
COMMISSIONER

[Signature]
COMMISSIONER