

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 of
Herbert F. Tompkins :

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 May, 1987, he/she served the within notice of Decision by certified mail upon Herbert F. Tompkins the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert F. Tompkins
6032 Indrio Rd. P-5
Ft. Pierce, FL 33451

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 May, 1987.

Janet M. Snay

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 26, 1987

Herbert F. Tompkins
6032 Indrio Rd. P-5
Ft. Pierce, FL 33451

Dear Mr. Tompkins:

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

HERBERT F. TOMPKINS

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1980.

DECISION

Petitioner, Herbert F. Tompkins, 6032 Indrio Road, P-5, Ft. Pierce,
Florida 33451, 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. 68085).

On February 9, 1987, petitioner advised the State Tax Commission that he
desired to waive a hearing and to submit the case to the State Tax Commission
based upon the entire record contained in the file, with the submission of
briefs by February 13, 1987. After due consideration of said record, the State
Tax Commission hereby renders the following decision.

ISSUE

Whether the Audit Division properly denied petitioner's claim for a refund
of an overpayment of New York State personal income tax for the year 1980.

FINDINGS OF FACT

1. Herbert F. Tompkins (hereinafter "petitioner") timely filed New York
State resident income tax returns for the years 1980, 1981, 1982 and 1983 and
paid the amount of tax stated to be due on the returns filed. On each of these
returns, petitioner included, in his New York adjusted gross income, amounts
which represented the proceeds of a pension from New York State.

2. Petitioner subsequently became aware that he had erroneously included, in his New York adjusted gross income, the proceeds of his State pension and, on February 9, 1985, filed amended returns for each of said years claiming an overpayment as a result of including the pension proceeds as New York taxable income.

3. For the years 1981, 1982 and 1983, the Department of Taxation and Finance, upon receipt of petitioner's amended returns, issued refunds for the overpayment of personal income tax.

4. On March 31, 1986, the Audit Division - Central Income Tax Section issued to petitioner a Notice of Disallowance of petitioner's claim for a refund of an overpayment of personal income tax in the amount of \$44.41 for the year 1980, on the basis that the claim for refund was not timely filed.

5. Petitioner contends that his original return filed for 1980 clearly indicated that pension income was included and that the Department of Taxation and Finance should have ascertained the source of the pension income from petitioner, and should have immediately refunded the overpayment after it had ascertained that it represented the proceeds of a New York State employee's pension.

CONCLUSIONS OF LAW

A. That section 612(c)(3) of the Tax law provides that there shall be subtracted from Federal adjusted gross income "[p]ensions of officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes".

B. That section 687(a) of the Tax Law provides that a claim for credit or refund of an overpayment of income tax shall be filed within three years from

the time the return was filed or two years from the time the tax was paid, whichever period expires later.

C. That section 697(d) of the Tax Law provides as follows:

"Special refund authority.---Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

D. That, petitioner erroneously included the proceeds of his State pension in his New York adjusted gross income for the year 1980. Since such proceeds were included in petitioner's New York adjusted gross income under a mistake of fact and there is no question of fact or law, petitioner's claim for refund of the resulting overpayment will be granted, notwithstanding the period of limitation for claim for refund set forth in section 697(a) of the Tax Law (see Matter of the Petition of Issac and Lilyan Zimmet, State Tax Commission, October 14, 1968).

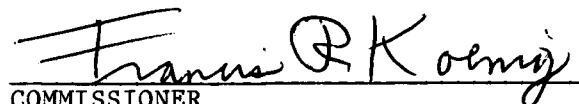
E. That the petition of Herbert F. Tompkins is granted and the sum of \$44.41 is to be refunded, together with such interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 26 1987


PRESIDENT


COMMISSIONER


COMMISSIONER