

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Richard P. & Mary Jane VanGinhoven :
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 Years :
1977 & 1978. :

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, 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 18th day of February, 1986, he/she served the within notice of Decision by certified mail upon Richard P. & Mary Jane VanGinhoven, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard P. & Mary Jane VanGinhoven
724 Grandview Ave.
Olean, NY 14760

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
18th day of February, 1986.

Doris E. Steinhardt

John C. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 18, 1986

Richard P. & Mary Jane VanGinhoven
724 Grandview Ave.
Olean, NY 14760

Dear Mr & Mrs. VanGinhoven:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
RICHARD P. VAN GINHOVEN AND MARY JANE VAN GINHOVEN
for Redetermination of a Deficiency or for Refund
of Personal Income Tax under Article 22 of the
Tax Law for the Years 1977 and 1978.

DECISION

Petitioners, Richard P. Van Ginhoven and Mary Jane Van Ginhoven, 724 Grandview Avenue, Olean, New York 14760, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1977 and 1978 (File Nos. 34762 and 34763).

A 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 October 21, 1985 at 9:00 A.M., with additional evidence to be submitted by November 4, 1985. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether petitioners timely filed their 1976 New York State personal income tax return.

II. Whether petitioners timely filed a claim to have an overpayment of New York State personal income tax for the year 1976 credited to their 1977 estimated tax.

III. Whether petitioners are entitled to a refund of New York State personal income tax for the year 1978.

FINDINGS OF FACT

1. On April 23, 1981, the Audit Division issued to Richard P. Van Ginhoven and Mary Jane Van Ginhoven (hereinafter "petitioners") a Notice and Demand for Payment of Income Tax Due for the year 1977 in the amount of \$237.45, plus interest and penalty, for a total amount due of \$368.43 and a Notice and Demand for Payment of Income Tax Due for the year 1978 in the amount of \$140.84, plus interest and penalty, for a total amount due of \$200.20. The reasons for issuance of these notices were set forth on an attachment which provided as follows:

"A search of our files was unable to locate any record of a 1976 New York State personal income tax return under your name and social security number or that of your spouse.

The 'Copy' of your 1976 return submitted in reply to our letter of January 6, 1981 has been processed by this office as an original 1976 return.

The law does not permit us to allow the refund or credit of \$541.34 you claimed in your income tax return for the 1976 tax year.

There is a deadline for filing for a refund or credit and that date, April 15, 1980 for the 1976 tax year, had expired before you filed your 1976 return on January 28, 1981.

Penalties imposed under Section 685(a)(1) of the Tax Law for failure to file your 1977 and 1978 tax return on or before the due date at the rate of 5% a month, with a maximum limitation of 25%.

Penalties imposed under Section 685(c) of the Tax Law for underestimation of 1977 tax.

Interest for late payment or underpayment of your 1977 and 1978 tax has been charged at the rate of 8½% per annum.

	<u>1977</u>	<u>1978</u>
Personal income tax due	\$237.45	\$212.35
State tax withheld	-0-	\$71.51
State estimated tax paid	<u>-0-</u>	<u>-0-</u>
Total prepayments	<u>-0-</u>	<u>71.51</u>
ADDITIONAL PERSONAL INCOME TAX DUE	\$237.45	\$140.84
Section 685(c) Penalty	\$ 10.77	\$ -0-
Section 685(a)(1) Penalty	59.36	<u>35.21"</u>

2. Petitioners contend that they timely filed their 1976 New York State personal income tax return on which they claimed an overpayment of \$541.34 to be credited on their estimated tax for 1977. The Audit Division has no record of receiving petitioners' 1976 return until petitioners filed a copy of said return, at the request of the Audit Division, on January 28, 1981.

3. For the tax year 1977, petitioners filed Federal Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, which extended the time to file their 1977 return until June 15, 1978. Petitioners did not, however, timely file their 1977 return, but, instead, filed said return on June 29, 1979. Petitioners' 1977 return was filed on the same date as their 1978 return which, therefore, was also not timely filed. On petitioners' 1977 return, they claimed estimated tax paid of \$541.34, the amount of their overpayment from 1976, which resulted in an overpayment for 1977 in the amount of \$303.89. Petitioners credited their 1977 overpayment of \$303.89 to their 1978 estimated tax. On their 1978 return, petitioners claimed estimated tax paid of \$303.89, the amount of their overpayment from 1977 which, together with State tax withheld of \$71.51, resulted in an overpayment of \$163.05. On the 1978 return, petitioners did not seek to have their overpayment credited to 1979 estimated tax, but, instead, sought a refund of this amount.

4. In late 1979, when petitioners did not receive their 1978 refund, they contacted the Income Tax Bureau of the Department of Taxation and Finance and were subsequently informed that they had been selected for an audit examination. On January 18, 1980, the Audit Division sent a letter to petitioners advising them that a search of their files was unable to locate any record of a 1976 New York State personal income tax return on file for petitioners. This letter requested that, if petitioners had filed a 1976 return, they should submit a

copy of the return along with additional information requested. Petitioners contend that they responded to this Audit Division letter, but the Audit Division has no record of receipt of said reply. Therefore, on January 6, 1981, the Audit Division sent petitioners another request for the same information which was previously requested in their letter of January 18, 1980. On January 28, 1981, petitioners submitted the information requested and filed a copy of their 1976 return.

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 section 687(e) of the Tax Law provides, in pertinent part, as follows:

"No credit or refund shall be allowed or made, ..., after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous."

C. That section 687(i) of the Tax Law provides as follows:

"For purposes of this section, any tax paid by the taxpayer before the last day prescribed for its payment, any income tax withheld from the taxpayer during any calendar year, and any amount paid by the taxpayer as estimated income tax for a taxable year shall

be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year with respect to which such amount constitutes a credit or payment."

Petitioners are, therefore, deemed to have paid their 1976 New York State personal income tax on April 15, 1977.

D. That in view of petitioners' record of failing to timely file their New York State personal income tax returns for the two years subsequent to 1976 and of failing to promptly comply with the request by the Audit Division for additional information, petitioners have failed to sustain their burden of proof, imposed by section 689(e) of the Tax Law, to show that they filed a New York State personal income tax return for the year 1976 prior to submission to the Audit Division of a copy thereof on January 28, 1981. Petitioners did not, therefore, file a claim for a crediting of their overpayment of tax for the year 1976 to their estimated tax for the year 1977 within the time period provided for in section 687(a) of the Tax Law as the same is set forth in Conclusion of Law "A", supra. As a result of petitioners' failure to make said timely claim, the amount of \$541.34, overpaid by petitioners for the year 1976, may not be credited to estimated tax for the succeeding year and additional New York State personal income tax for the years 1977 and 1978 is, therefore, due and owing, together with applicable interest and penalties.

E. That the petition of Richard P. Van Ginhoven and Mary Jane Van Ginhoven is denied and the notices and demands for payment of income tax due issued on April 23, 1981 are sustained.

DATED: Albany, New York

FEB 18 1980

STATE TAX COMMISSION

R. David Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER