

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of

Harold and Bette Tara :

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 1979.  
\_\_\_\_\_ :

State of New York :

ss.:

County of Albany :

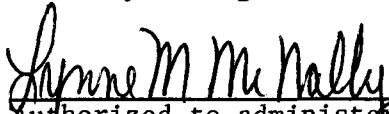
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 28th day of August, 1987, he/she served the within notice of Decision by certified mail upon Harold and Bette Tara the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold and Bette Tara  
48 Brookwood Dr.  
Wayne, New Jersey 07470

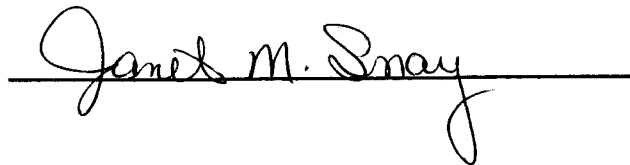
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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 August, 1987.



Authorized to administer oaths  
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

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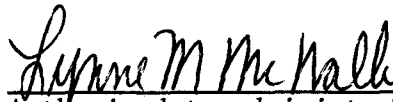
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 28th day of August, 1987, he served the within notice of Decision by certified mail upon Brian C. Faranda, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

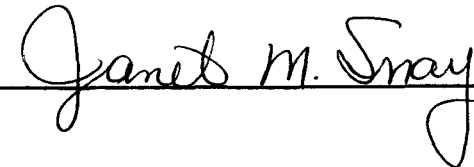
Brian C. Faranda  
44-10 30th Ave.  
Astoria, NY 11103

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 August, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

August 28, 1987

Harold and Bette Tara  
48 Brookwood Dr.  
Wayne, New Jersey 07470

Dear Mr. & Mrs. Tara:

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) 453-4301

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Brian C. Faranda  
44-10 30th Ave.  
Astoria, NY 11103

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

HAROLD TARA AND BETTE TARA

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1979.

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DECISION

Petitioners, Harold Tara and Bette Tara, 48 Brookwood Drive, Wayne, New Jersey 07470, 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 1979 (File No. 46251).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 5, 1986 at 9:15 A.M. Petitioners appeared by Brian C. Faranda, Esq. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division may, pursuant to the provisions of 20 NYCRR 601.6(c), amend its answer to conform to the proof by raising, for the first time at the hearing held herein, the issue of whether or not petitioners timely filed a petition for redetermination of a personal income tax deficiency.

II. If so, whether a petition for redetermination of said personal income tax deficiency was timely filed.

#### FINDINGS OF FACT

1. On July 16, 1982, the Audit Division issued to Harold Tara and Bette Tara (hereinafter "petitioners") a Statement of Audit Changes for the year 1979

in the amount of \$4,411.83, plus interest, for a total amount due of \$5,472.70. On April 8, 1983, the Audit Division issued to petitioners a Notice of Deficiency asserting additional tax due in the amount of \$4,411.83, plus interest of \$1,466.50, for a total amount due of \$5,878.33.

2. On July 20, 1983, the Tax Appeals Bureau of the State Tax Commission received from petitioners a petition dated July 2, 1983 which was signed by both petitioners. Attached thereto were several attachments including, among other things, an affidavit of petitioners which was dated and notarized on July 1, 1983. The Notary Public was petitioners' representative, Brian C. Faranda, Esq. Mr. Faranda contends that the petition was signed in his presence by petitioners on July 2, 1983 and was mailed, by ordinary mail, on the same day by depositing it into a mailbox near his office. He had no specific recollection of mailing the petition, but contends that it would have been the normal procedure to take the signatures and mail the petition on the same day.

3. At the hearing held herein, the Audit Division raised, for the first time, the issue of whether or not petitioners timely filed a petition for redetermination of a deficiency of personal income tax for the year 1979. At the hearing, the representative of the Audit Division requested leave to amend its answer to conform to the proof. Petitioners objected to the motion and contend that the issue of timeliness could not be raised, for the first time, at the hearing since the Audit Division's pleadings never raised such issue.

4. After the Audit Division raised the issue of the timeliness of filing of the petition at the hearing, petitioners, at no time, requested an adjournment or stated that they were not prepared to offer proof relating to said issue. The hearing officer offered petitioners the option of proceeding with their proof with respect to the timeliness issue and the substantive matters relating

to the personal income tax deficiency or, in the alternative, of addressing the the issue of timeliness alone. Petitioners requested that the hearing address only the issue of timeliness. Petitioner Harold Tara was present at the hearing and, along with petitioners' representative, Brian C. Faranda, testified concerning the timeliness issue. At the conclusion of testimony, petitioners' representative, when queried if he wished to reserve time to submit additional evidence, answered that he did not wish to do so.

CONCLUSIONS OF LAW

A. That 20 NYCRR 601.6(c) provides, in pertinent part, as follows:

"The one exception to the requirement that a pleading be amended prior to a hearing is where a party, at the hearing, requests leave to amend a pleading to conform to the proof. In such an instance, the hearing officer shall determine whether such amendment would work to the prejudice of the adverse party, affect a person not present at the hearing or unduly delay the proceeding."

B. That the Audit Division's request to amend its answer, at the hearing, to address the issue of the timeliness of filing of the petition did not prejudice petitioners. Leave to amend the Audit Division's answer was properly granted and the issue of timeliness was, therefore, properly addressed at the hearing.

C. That section 681(b) of the Tax Law provides, in pertinent part, as follows:

"After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, ...except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the tax commission a petition under section six hundred eighty nine."

D. That in Matter of Garofalo (State Tax Commn., September 28, 1983) and Matter of Mancuso (State Tax Commn., September 28, 1983) the State Tax Commission held the following:

"That to be timely, a petition must be actually delivered to the Tax Commission within ninety days after a deficiency notice is mailed, or it must be delivered in an envelope which bears a United States postmark of a date within the ninety day period. The petitioners have not shouldered their burden of proof under Tax Law § 689(e) to show that the petition was delivered to the Tax Commission. Proof of mailing by registered or certified mail was not shown. Proof of mailing by ordinary mail does not satisfy the requirement of proving delivery of the petition to the Tax Commission. See Deutsch v. Commissioner, 599 F.2d 44 (2d Cir.), cert. denied, 444 U.S. 1015."


E. That the ninety day statutory period expired, in the present matter, on July 7, 1983. The petition was not received by the Tax Appeals Bureau until July 20, 1983, beyond the ninety day period prescribed by section 681(b) of the Tax Law. Petitioners have not carried their burden of proof under section 689(e) of the Tax Law to show that their petition was timely delivered. Upon the expiration of the ninety day period, the Notice of Deficiency became an assessment of the amount of tax and interest specified therein.

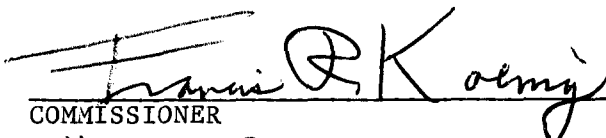
F. That the petition of Harold Tara and Bette Tara is denied and the Notice of Deficiency issued April 8, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 28 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

Harold and Bette Tara

I have reluctantly signed the above decision, accepting the majority view, but I have sought leave from the majority to take the unusual step of attaching this concurring opinion, because of the significant issues raised herein. The instant petition was rejected for untimeliness, in that the Notice of Deficiency was issued on April 8, 1983, and the appeal, consequently, was due no later than July 7, 1983. The Tax Commission received the petition on July 20, 1983, and found it to be dated July 2nd. The petition included an affidavit by the taxpayer, notarized by his attorney on July 1, 1983. The Tax Commission accepted the petition as timely, discarded the envelope in which the petition arrived, and did not raise the issue of timeliness until the Department's Law Bureau moved for dismissal at the hearing. As a result, no evidence can be gleaned from the postmark which may have appeared on the envelope containing the petition. At the hearing, the attorney for taxpayer indicated that he "probably" mailed the petition on July 2nd, since it would have been his usual practice to mail it on the date noted on the face of the petition. The instant petition relates to a deficiency in personal income tax.

The majority's opinion dwells on the fact that there was no substantial prejudice to petitioner arising from the late assertion of untimeliness, since petitioner could have sought an adjournment (on the basis of surprise) but did not do so. Yet, a more fundamental issue is at stake. By accepting the petition initially, and discarding the envelope, the Tax Commission is responsible for the loss of critical evidence. Whether or not taxpayer requested an adjournment, such evidence could no longer be found. Consequently, the initial assertion of untimeliness just prior to the hearing, represented a tactic which was fundamentally unfair to the petitioner.

Nevertheless, on balance, I am willing to accept a finding against petitioner for the following reasons: The petition arrived a full 13 days following the final date for appeal, thus strongly suggesting late mailing. Second, no clear evidence was presented in support of timely mailing, and a finding of timeliness cannot be made based upon an attorney's opinion as to his usual practice. Third, and perhaps most significantly, since this matter relates to personal income tax, the statute provides a scheme whereby the tax can be paid and a claim for refund submitted at a later date. Since taxpayer's rights are not arbitrarily cut off by the majority's decision, the prejudice resulting from the absence of his mailing envelope does not appear to be so substantial or critical as to warrant reversal of this result. Consequently, under these specific circumstances, I concur.

AUG 28 1987.

  
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MARK FRIEDLANDER  
Commissioner