

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
John F. Rickard (Deceased) & Frances Rickard :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Unincorporated :  
Business Tax under Article 23 of the Tax Law for :  
the Year 1977. :  
\_\_\_\_\_:

AFFIDAVIT OF MAILING

State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 23rd day of November, 1984, he served the within notice of Decision by certified mail upon John F. Rickard (Deceased) & Frances Rickard, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John F. Rickard (Deceased) & Frances Rickard  
321 W. 78th St.  
New York, NY 10024

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  
23rd day of November, 1984.

David Parchuck

James A. Haggard  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

November 23, 1984

John F. (Deceased) & Frances Rickard  
321 W. 78th St.  
New York, NY 10024

Dear Mrs. Rickard:

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 & 722 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

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In the Matter of the Petition	:	
	:	
of	:	
JOHN F. RICKARD (DECEASED) AND FRANCES RICKARD	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1977.	:	

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Petitioners, John F. Rickard (deceased) and Frances Rickard, 321 West 78th Street, New York, New York 10024, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1977 (File No. 38845).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 10, 1984 at 1:15 P.M. Petitioner Frances Rickard appeared pro se and for her deceased husband, John F. Rickard. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioners are properly entitled to a refund of unincorporated business tax paid for the year 1977.

FINDINGS OF FACT

1. Petitioners, John F. Rickard and Frances Rickard, timely filed a 1977 New York State Income Tax Resident Return under filing status "married filing separately on one return". In conjunction therewith, petitioner John F. Rickard filed a New York State Unincorporated Business Tax Return for said year whereon he reported the income he derived from his activities engaged in as an illustrator. Unincorporated business tax of \$596.31 was paid. Subsequently,

on July 23, 1979, Mr. and Mrs. Rickard filed an amended 1977 New York State return. The amendment incorporated therein did not affect petitioner John F. Rickard's unincorporated business tax return.

2. On June 12, 1981, petitioners filed a claim for credit or refund of unincorporated business tax for the year 1977. Their basis for filing said claim was that:

"Taxpayer (husband) is an illustrator from which more than 80% of his unincorporated business gross income is derived from personal services he actually rendered and in which capital is not a material income producing factor.

Taxpayer erroneously filed and paid 1977 unincorporated business tax of \$596.00. He is not required to pay and refund is hereby requested."

Claims for credit or refund of unincorporated business tax were also filed for the years 1978 and 1979.

3. On March 18, 1982, the Audit Division issued a notice advising petitioners that their claims for refund for the years 1977, 1978 and 1979 had been disallowed in full. The reason given for such disallowance was "[f]ailure to reply to our letters dated November 10, 1981 and December 11, 1981..."

4. The aforementioned letters of the Audit Division stated, in pertinent part, that:

"Your 1977 claim cannot be accepted as the Statute of Limitations on timely filed 1977 returns expired on April 15, 1981 and your claim was not filed until June 12, 1981 (postmark).

Please explain the type of illustrating you do. Are you a commercial illustrator preparing advertisements? Or is your income derived from illustrations not used in advertising? Please explain in detail."

5. On March 26, 1982, petitioner John F. Rickard submitted a letter to the Audit Division wherein he stated that:

"I am an illustrator for comics and magazines. Most of my income are (sic) for my labor and services. I do not employ capital to earn my income. My income is derived from illustrations not used in advertising."

6. Based on petitioner John F. Rickard's letter of March 26, 1982, the Audit Division held that his income derived from illustrating was not subject to unincorporated business tax. Accordingly, petitioners' refunds, as claimed for the years 1978 and 1979, were granted. However, petitioners' refund claim for 1977 continued to be denied based on the untimely filing of said claim.

7. On May 24, 1982, the Audit Division issued a Formal Notice of Disallowance to petitioners advising them that their 1977 claim for refund was disallowed in full "based on timeliness only".

8. Petitioners contend that section 697(d) of the Tax Law (special refund authority) is applicable and although late filed, their 1977 claim for refund should be granted based on said section.

#### CONCLUSIONS OF LAW

A. That section 687(a) of the Tax Law provides, in pertinent part, that:

"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..."

B. That section 687(e) of the Tax Law provides, in pertinent part, that:

"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."

C. That section 697 of the Tax Law provides:

"(d) 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 section 722(a) of Article 23 of the Tax Law incorporates into said article sections 687(a), 687(e) and 697(d) of Article 22 of the Tax Law for unincorporated business tax purposes.

E. That at the time petitioners late filed their 1977 claim for credit or refund of unincorporated business tax, and until petitioner John F. Rickard's response on March 26, 1982 to the Audit Division's inquiry letters of November 10, 1981 and December 11, 1981, a critical question of fact existed; namely, what type of illustration work did petitioner John F. Rickard do? The taxability of his income derived from illustration work hinged on the answer to this question. Accordingly, since a question of fact existed after the running of the statute of limitations, section 697(d) of the Tax Law is inapplicable (Matter of National Benefit Fund for Hospital and Health Care Employees, State Tax Comm., October 7, 1983; see also Kreiss et al. v. State Tax Comm., 61 N.Y.2d 916, rev'g. 92 A.D.2d 1048).


F. That petitioners' claim for credit or refund of unincorporated business tax filed for the year 1977 was late filed. Accordingly, said claim is disallowed pursuant to sections 687(a) and 687(e) of the Tax Law.


G. That the petition of John F. Rickard (deceased) and Frances Rickard is denied and the Formal Notice of Disallowance issued May 24, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 23 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER