

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

David L. & Dorothy Graham :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1973. :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 25th day of April, 1980, he served the within notice of Decision by certified mail upon David L. & Dorothy Graham, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David L. & Dorothy Graham
RD # 1 Longview Rd.
South Salem, NY 10590

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
25th day of April, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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for the Year 1973. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 25th day of April, 1980, he served the within notice of Decision by certified mail upon Anthony C. Barranco the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Anthony C. Barranco
Arthur R. San Filippo & Co.
233 Broadway
New York, NY 10007

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
25th day of April, 1980.

Joanne Knapp

J. Vredenburg

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

April 25, 1980

David L. & Dorothy Graham
RD # 1 Longview Rd.
South Salem, NY 10590

Dear Mr. & Mrs. Graham:

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Anthony C. Barranco
Arthur R. San Filippo & Co.
233 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DAVID L. GRAHAM and DOROTHY GRAHAM	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1973.	:	

Petitioners, David L. Graham and Dorothy Graham, RD #1, Longview Road, South Salem, New York 10590, 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 1973 (File No. 18967).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 25, 1979 at 3:15 P.M. Petitioners appeared by Arculeo & D'Ambrosio, Esqs. (Angelo J. Arculeo, Esq., of counsel) and by Anthony C. Barranco, Esq. The Audit Division appeared by Peter Crotty, Esq. (Aliza Schwardron, Esq., of counsel).

ISSUE

Whether petitioners are entitled to subtract a \$16,973.50 capital gain from reported Federal adjusted gross income in determining total New York income for 1973.

FINDINGS OF FACT

1. On February 28, 1977, the Audit Division issued a Notice of Deficiency against petitioners, David L. and Dorothy Graham, asserting a deficiency of \$3,161.13, plus interest, for 1973.

2. On their 1973 resident tax return, petitioners subtracted \$16,973.50

from their Federal adjusted gross income to determine their New York income. In Schedule C of their New York return, petitioners sought to justify the subtraction by stating that "50% of capital gain from estate - Elinor Graham (mother) from State of Mass. and tax paid to State of Mass."

3. The background to this matter is as follows:

In 1920, Thomas F. Welch died a resident of the Commonwealth of Massachusetts. He left a last will and testament in which he created a testamentary trust. The trust was to continue during the lifetime of his wife, children and sisters. Among the beneficiaries was Elinor L. Graham. Petitioner David L. Graham is the son of Elinor L. Graham.

The Welch trust was terminated in 1972. Prior to its termination, the trust sold the bulk of the trust corpus, which was land. The 1972 U.S. Fiduciary Income Tax Return for the Welch trust was filed on the basis of an installment sale of real estate, with the income on the sale being reportable on a deferred basis as being received in succeeding years. This resulted in a long-term capital gain taxable to the beneficiaries of the trust. Elinor L. Graham had a one-third interest as a beneficiary. As a result of her death prior to the termination of the trust, this one-third share went into her estate.

A 1972 Fiduciary Income Tax Return was also filed by the Welch trust with the Commonwealth of Massachusetts. Unlike Federal tax laws, Massachusetts has no provision permitting installment sales of real estate. When the trust property was sold, the entire gain occurred and was reportable in that year. A tax was paid by the Welch trust in 1972 to the Commonwealth of Massachusetts on Elinor L. Graham's entire interest in said trust.

The Estate of Elinor L. Graham was subsequently probated and distribution

was made of his share to petitioner David L. Graham in 1973. Included in this distribution was a long-term capital gain of \$33,947.00 realized by the Estate of Elinor L. Graham from the Welch trust on the deferred sale of the land. Petitioners included one-half of this long-term capital gain in 1973 Federal adjusted gross income.

On their New York State income tax return for 1973, petitioners treated the capital gain income as not taxable since said gain had already been taxed by the Commonwealth of Massachusetts in 1972.

CONCLUSIONS OF LAW

A. That section 612(a) of the Tax Law provides that the New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in section 612. Section 612(c) of the Tax Law enumerates the modifications reducing federal adjusted gross income. No modification is listed which would permit petitioners to subtract the capital gain from their federal adjusted gross income.

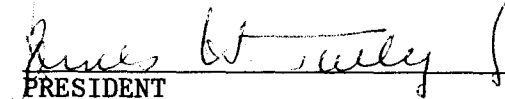
B. That section 620(a) of the Tax Law provides that a resident shall be allowed a credit against tax otherwise due "for any income tax imposed for the taxable year by another state of the United States...". Petitioners are not entitled to a tax credit, since the taxes were imposed by another state in a year prior to the year at issue and also, since the taxes were imposed on and paid by a taxpayer other than the petitioners.

C. That the petition of David L. Graham and Dorothy Graham is denied and the Notice of Deficiency dated February 28, 1977 is sustained.

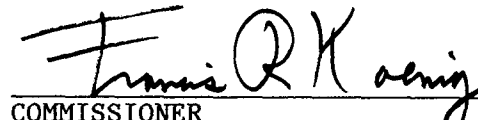
DATED: Albany, New York

STATE TAX COMMISSION

APR 25 1980


PRESIDENT


COMMISSIONER


COMMISSIONER