

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Reuben & Georgiana Porton :
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 1972. :

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 18th day of July, 1980, he served the within notice of Decision by certified mail upon Reuben & Georgiana Porton, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

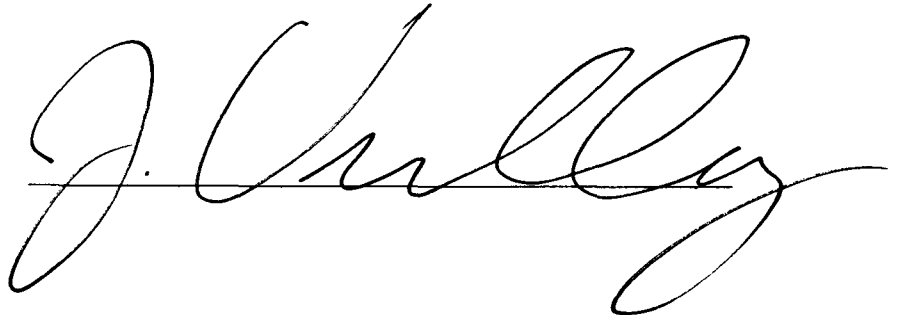
Reuben & Georgiana Porton
345 Eighth Ave.
New York, NY 10001

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
18th day of July, 1980.

Deborah A. Bank

A large, stylized handwritten signature, likely of Jay Vredenburg, written in dark ink over a horizontal line.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Reuben & Georgiana Porton :

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 1972. :

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 18th day of July, 1980, he served the within notice of Decision by certified mail upon Evelyn J. Lehman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ms. Evelyn J. Lehman
Gifford, Woody, Carter & Hays
14 Wall St.
New York, NY 10005

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
18th day of July, 1980.

Deborah A. Bank

J. Vredenburg

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

July 18, 1980

Reuben & Georgiana Porton
345 Eighth Ave.
New York, NY 10001

Dear Mr. & Mrs. Porton:

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
Evelyn J. Lehman
Gifford, Woody, Carter & Hays
14 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
REUBEN PORTON and GEORGIANA PORTON	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1972.	:	

Petitioners, Reuben Porton and Georgiana Porton, 345 Eighth Avenue, New York, New York 10001, 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 1972 (File No. 19953).

A formal hearing was scheduled before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 16, 1979 at 10:30 A.M. On said date, petitioners' representative, Gifford, Woody, Palmer & Serles, Esqs., (Evelyn J. Lehman, Esq., of counsel) advised the State Tax Commission, in writing, that the petitioners waived a formal hearing and submitted the case to the State Tax Commission on the entire record in the file. The State Tax Commission renders the following decision.

ISSUES

I. Whether petitioners' amended tax return, wherein they sought a refund by reporting a lump-sum payment of an employee profit-sharing and pension plan as a long-term gain, was correct.

II. Whether the Tax Commission is bound by changes in petitioners' Federal income tax return.

FINDINGS OF FACT

1. The petitioners timely filed Federal, State and New York City returns for 1972 as married persons filing jointly. On the returns petitioners reported as ordinary income the entire amount of a lump-sum distribution paid in 1972 to Reuben Porton from a qualified employee pension and profit-sharing plan in the amount of \$60,608.48.

2. Subsequently, petitioners filed amended Federal, State and City returns for 1972. The amended returns reported as a capital gain the amount of the lump-sum distribution representing employer contributions to the plan during pension plan years beginning before 1969. As a result of this, petitioners' taxable income amounted to \$26,437.45 less than was reported originally by petitioners. Petitioners received the refund for Federal income taxes paid for 1972 as shown on the amended return. In addition, petitioners were paid a refund for 1972 from the New York City tax authorities.

3. On January 10, 1974, the State Income Tax Bureau advised petitioners that their claim for refund in the amount of \$3,251.81 was denied on the grounds that for an employee to receive capital gain treatment on a lump-sum distribution it must be distributed on account of death or other separation from service. As the distribution was made due to the liquidation of the plan, while petitioner continued to work for the firm, the \$60,608.48 was not eligible for capital gain treatment, therefore, the claim for refund was disallowed.

4. On December 13, 1976, petitioners filed a Petition for Redetermination of Deficiency or for Refund of Tax. The petition was received on December 20, 1976.

5. The Internal Revenue Service conducted an audit of petitioners' amended 1972 U.S. Individual Income Tax Return. The issues raised on the audit of said return were adjusted in an agreement made with the Appellate Division of the Internal Revenue Service. Said adjustments did not relate to the payment from the profit-sharing and pension plan.

6. In answer to an inquiry from the State Income Tax Bureau, petitioner Reuben Porton stated that the pension was no longer warranted or needed; therefore, he agreed to the request to terminate the plans. He continued to work for this firm.

CONCLUSIONS OF LAW

A. That during the year at issue, section 403(a)(2) A(iii) of the Internal Revenue Code permitted capital gains treatment of a lump-sum distribution of an exempt trust if, "the total amounts payable by reason of an employee's death or separation from the service, or by reason of the death of an employee after the employee's separation from the service, are paid to the payee within one taxable year of the payee". The payment at issue here, however, does not fall within the scope of this section.

B. That section 697(b) of the Tax Law provides:

"The Tax Commission for the purpose of ascertaining the correctness of any return, or for the purpose of making an estimate of taxable income of any person, shall have power to examine or to cause to have examined, by any agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon matters required to be included in the return, and may require the attendance of the person rendering the return or any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take testimony and require proof material for its information, with power to administer oaths to such person or persons."

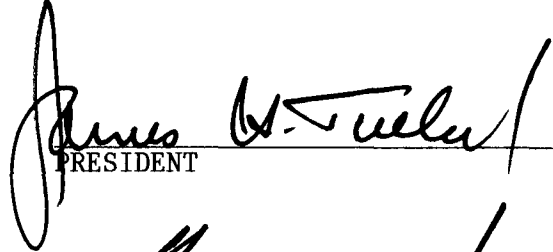
C. That the Tax Commission is not required to accept as correct any (Federal) change in taxable income but may conduct an independent audit or investigation. (20 NYCRR 153.4).


D. That the petition of Reuben Porton and Georgiana Porton, filed December 20, 1976, is denied.

DATED: Albany, New York

JUL 18 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER