STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICHARD F. AND DIANE L. HOROWITZ	:	DECISION DTA No. 813726
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and City of New York Nonresident Earnings Tax under Chapter 46, Title U of the Administrative Code of the City of New York for the Year 1976.	:	

Petitioners Richard F. and Diane L. Horowitz, 15 Emerson Terrace, Bloomfield, New Jersey 07003-2921, filed an exception to the determination of the Administrative Law Judge issued on October 10, 1996. Petitioners appeared pro se by Richard F. Horowitz. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners submitted their briefs filed below with the Administrative Law Judge in support of their exception. The Division of Taxation submitted its brief filed below in opposition to petitioners' exception. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether certain income received by petitioner Richard F. Horowitz during the year at issue was properly determined by the Division of Taxation to be New York source income and, accordingly, subject to the imposition of New York State personal income tax and City of New York nonresident earnings tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "3" which has been modified. The Administrative Law Judge's findings of fact and the

modified finding of fact are set forth below.

On August 29, 1994, the Division of Taxation ("Division") issued a Notice of Additional Tax Due to Richard F. and Diane L. Horowitz[1] which asserted additional New York State personal income tax in the amount of $4,898.00 and additional City of New York nonresident earnings tax of $2,990.00, plus interest imposed on both taxes, for a total amount due of $31,093.66 for the year 1976. Attached to the Notice of Additional Tax Due was an explanation and computation which stated as follows:

> "Since you have not furnished the information requested in our letters of April 15 and June 1, 1994, we have recomputed your New York tax liability to include the Federal Audit Changes made to the Weiss, Rosenthal, Heller, Schwartzman Partnership.

	Federal	New York
Total New York income, previously adjusted	$ 70,477.00	$ 69,930.00
Federal audit adjustment	33,796.00	33,796.00
New York income, adjusted	$104,273.00	$103,726.00
Limitation Percentage: $103,726.00 = 99.48% $104,273.00		
Itemized deductions ($11,842.00 X 99.48%)	11,780.00	
Balance		$ 91,946.00
Exemptions ($2,600.00 X 99.48%)		2,586.00
New York taxable income		$ 89,360.00
New York State tax		$ 11,714.00
New York City tax		3,442.00
Total tax		$ 15,156.00
Tax previously adjusted		7,268.00
ADDITIONAL PERSONAL INCOME TAX DUE	$ 7,888.00"	

Previously, by letter dated May 19, 1992, the Division had requested that petitioner provide additional information relating to a Federal audit change. This letter, from the Central

[1]For the year 1976, Richard F. and Diane L. Horowitz filed a New York State Income Tax Nonresident Return and a City of New York Nonresident Earnings Tax Return under the filing status "married filing joint return." Since the income at issue was earned by Richard F. Horowitz and since Diane L. Horowitz is a party to this proceeding only by virtue of the aforementioned filing status, all references to "petitioner" shall refer solely to Richard F. Horowitz.

Income Tax Section of the Audit Division, stated, in part, as follows:

> "Information available indicates the Internal Revenue Service has adjusted your Federal income tax return(s) for the year(s) shown above. This information also indicates that the net income/loss from the partnership, Weiss, Rosenthal, Heller, Schwartzman of which you are a member partner, was adjusted.
>
> "A search of our files fails to show that you reported these changes to New York State. Section 659 of the New York State Tax Law states that Federal audit changes must be reported to New York State within 90 days of the date of the final Federal determination."

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

> For the year 1993, petitioner filed an individual New York State tax return. The Division determined that petitioner had made an overpayment of tax in the amount of $22,834.00 for 1993. On November 10, 1994, the Division issued a Statement of Income Tax Adjustment (see, Exhibit "D") which advised petitioner that the overpayment was being applied to the outstanding tax liability for the year 1976. As a result thereof, a Consolidated Statement of Tax Liabilities, dated January 3, 1995, advised that a balance of $8,695.17 (consisting solely of interest on the State income tax portion) was due and owing as of that date (see, Exhibit "D"). Petitioner filed a petition with the Division of Tax Appeals on April 13, 1995 protesting the assessment of additional tax by the Division's Notice of Additional Tax Due dated August 29, 1994 and seeking a refund of the 1993 overpayment which had been applied to petitioner's 1976 tax liability.[2]

During the year at issue and for several years prior thereto, petitioners were nonresidents of the State of New York, having resided in Bloomfield, New Jersey since April 1971. For the tax year 1976, petitioner, an attorney at law, was a partner in the law firm of Weiss, Rosenthal, Heller, Schwartzman & Lazar (the "law firm"). The law firm's offices were located at 295 Madison Avenue, New York, New York; it had no offices outside of the City and State of New York.

For the tax year ended December 31, 1976, petitioner and 16 other partners in the law firm invested in certain tax shelter partnerships, to wit, Brighton & Fairview, a California movie deal, Spruce & River, a Kentucky coal mine, Spanish Village, an out-of-state partnership and Future Tense, a New York based record deal. The Internal Revenue Service determined that the

---

[2] We modified this finding by adding the last sentence to more accurately reflect the record.

law firm had ordinary income which it had not reported as distributions to the partners. As a result of these Federal audit changes, the Division of Taxation issued the Notice of Additional Tax Due (see, above) to petitioners.[3]

Form 4605-A, Examination Changes - Partnerships, Fiduciaries, Small Business Corporations, and Domestic International Sales Corporations and Form 886-S, Partners' Shares of Income, Deductions, and Credits (see, Division's Exhibit "G"), the Internal Revenue Service documents which formed the basis for the issuance of the Notice of Additional Tax Due by the Division, were issued by the Internal Revenue Service to the law firm rather than to each of the 17 partners who had taken part in the investments.

OPINION

Tax Law former § 632(a)(1)(A), in effect during the year at issue, provided that the New York adjusted gross income of a nonresident individual included his "distributive share of partnership income, gain, loss and deduction, determined under section six hundred thirty-seven." Tax Law former § 637(a)(1) provided that the New York adjusted gross income of a nonresident partner of any partnership includes only that portion of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his Federal adjusted gross income which is derived from or connected with New York sources. Pursuant to Tax Law former § 632(b)(1), items of gain, loss and deduction "derived from or connected with New York sources" consisted of items attributable to the ownership of an interest in real or tangible personal property in the State or "a business, trade, profession or occupation carried on in this state."

20 NYCRR former 131.4(a)(2) provided that:

> "[a] business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within New York State

[3]The explanation and computation attached to the Notice of Additional Tax Due indicates that, as a result of the Federal audit adjustment, petitioner had additional New York income in the amount of $33,796.00. Petitioner's Exhibit "1," prepared by the law firm's accountants subsequent to the Federal audit changes, sets forth the amounts derived by each of the partners from the partnerships. This accounting document indicates that petitioner received $34,518.00 from the partnerships rather than $33,796.00. However, since the amount of the adjustment was not raised as an issue by either party to this proceeding, it shall be assumed that, in the event that the Division correctly determined that this income was New York source income, the amount at issue is correct.

> by a nonresident when such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such nonresident's affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within New York State and yet not be engaged in a trade or business within New York State. If a taxpayer pursues an undertaking continuously as one relying on the profit therefrom for such taxpayer's income or part thereof, such taxpayer is carrying on a business or occupation. However, see section 131.10 of this Part with regard to the effect of the purchase and sale of property by a nonresident of such nonresident's own account."

In his determination, the Administrative Law Judge concluded that since petitioner's law firm had no offices outside the State of New York, this nonresident petitioner carried on his profession within the State. Further, despite petitioner's statements that the investments were made in the law firm's name for convenience purposes only and were, in reality, investments made by a group of individuals, there was no documentary evidence in the record to corroborate such statements. Petitioner's testimony did not refute the documentary evidence submitted by the Division which indicates that the investments in the tax shelter partnerships were made in the name of the law firm. Thus, petitioner failed to sustain his burden of proof to show that the income at issue was anything other than a distributive share of partnership income from the law firm in which he was a partner in 1976. As to whether or not such income was New York source income, the Administrative Law Judge concluded that while investments in tax shelter partnerships were, in all probability, not the primary business of the law firm,

> "the law firm did make such investments and did derive income therefrom. All of the income of the law firm was New York source income since it had no offices outside of New York. Accordingly, despite the fact that three of the four tax shelter partnerships were located in other states, the income from the investments in these partnerships by the law firm is New York source income and petitioner's share of this partnership income was properly subjected to State and City tax by the Division" (Determination, conclusion of law "F").

On exception, petitioner argues that based on his testimony, it is uncontroverted that the investments at issue were, in reality, made by a group of individuals, including petitioner.

Petitioner argues that his law firm was used for investment purposes only as a matter of convenience. Further, even if the investments were made by the law partnership rather than the individuals involved, the income therefrom was not New York source income because, with one exception, the tax shelters were not New York businesses. On exception, petitioner makes the same arguments that were presented to the Administrative Law Judge.

The Division, in opposition, urges that the Administrative Law Judge's determination is correct.

Initially, we note that at the hearing held in this matter, an issue was raised as to the subject matter jurisdiction of the Division of Tax Appeals to entertain a petition challenging a Notice of Additional Tax Due. Based on the decision of this Tribunal in Matter of Jaffe (Tax Appeals Tribunal, September 21, 1995 [where we held that a petitioner was entitled to a hearing in cases where Federal charges were not reported, consistent with the Appellate Division decision in Matter of Meyers v. Tax Appeals Tribunal, 201 AD2d 185, 615 NYS2d 90, lv denied 84 NY2d 810, 621 NYS2d 519]), we conclude that the Division of Tax Appeals had jurisdiction to hear the petition in this matter. With this exception, we find that the Administrative Law Judge has adequately and completely addressed all the issues raised by the parties. After reviewing the entire record in this matter, we conclude that petitioner has provided no evidence nor directed us to any authority which provides a basis for modifying the Administrative Law Judge's determination in any respect. As a result, we affirm that determination based upon the reasoning stated therein.

Accordingly, is it ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard F. and Diane L. Horowitz is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Richard F. and Diane L. Horowitz is denied; and

4. The Notice of Additional Tax Due issued on August 29, 1994, as modified by the Consolidated Statement of Tax Liabilities dated January 3, 1995, is sustained.

DATED: Troy, New York
July 17, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner