STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JOSEPH T. C. HART

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1980.

DECISION

In the Matter of the Petition

of

GEORGE ROWE, JR.

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1980.

Petitioner Joseph T. C. Hart, 2241 Palmer Avenue, New Rochelle, New York 10801, 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 1980 (File No. 52152).

Petitioner George Rowe, Jr., 11 South Cottenet Street, Irvington, New York 10533, 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 1980 (File No. 52353).

A consolidated hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 19, 1985 at 2:45 P.M., with all briefs to be submitted by January 7, 1986. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether New York City unincorporated business taxes paid by petitioners' law firm should be included in their personal service income for purposes of computing New York State maximum tax on personal service income.

FINDINGS OF FACT

1. Petitioners, Joseph T. C. Hart and George Rowe, Jr., were partners in the law firm of Fulton, Duncombe & Rowe which derived income from New York State and New York City sources. The partnership timely filed a New York State and New York City partnership return for 1980.

2. Each petitioner timely filed a New York State Income Tax Resident Return on Form IT-201 for calendar year 1980. On Schedule A, each reported his New York income including a sum which represented each petitioner's distributive share of the ordinary income of the law firm as reported by the firm for Federal income tax purposes for the year 1980.

3. As required by section 612(b)(3) of the Tax Law, each petitioner added back to his Federal adjusted gross income a sum which represented his share of the New York City unincorporated business tax paid by the law firm on its income from New York City sources. This tax had been deducted by the firm in computing the ordinary income of the law firm.

4. All of the income of the law firm was derived from the practice of law and was personal service income as defined in section 1348 of the Internal Revenue Code in effect during the year in issue.

5. Petitioners computed the maximum tax on personal service income on Form IT-250 which each attached to his New York State Resident Return. On line 2 of that form Mr. Hart reported a total personal service income of $94,767.82, arriving at this amount by adding his share of the New York City

unincorporated business tax paid by his law firm ($3,655.00) to his share of the ordinary income of the law firm as reported by him on his New York State Income Tax Resident Return ($91,112.82). Mr. Rowe reported a total personal service income of $242,842.00 computing this amount in the same manner as Mr. Hart.

6. On October 24, 1983, the Audit Division issued to Mr. Hart a Statement of Audit Changes which explained that the maximum tax benefit on his 1980 New York State income tax return had been recomputed on the basis of an examination of the law firm's partnership return which reported Mr. Hart's distributive share of the firm's ordinary income as $91,113.00. This resulted in personal income tax due of $89.22 plus interest. A similar statement was issued to Mr. Rowe.

8. In response to the Statement of Audit Changes, Mr. Hart sent a letter to the Audit Division stating, in pertinent part:

> "My distributive share of partnership income cited by you, although correct for federal income tax purposes, fails to take into account $3,655 which the firm paid in New York City Unincorporated Business Taxes, which although deductible for federal income tax purposes, is not deductible for New York State income tax purposes.
>
> Thus, my New York State personal service income would equal the federal amount referred to by you plus the additional $3,655, paid by the firm in New York City Unincorporated Business Taxes, which New York State requires be added back in."

Mr. Rowe sent a substantially similar letter to the Audit Division.

9. A Notice of Deficiency was issued to Mr. Hart on April 5, 1984 asserting additional tax due for the year 1980 of $89.22 plus interest. On the same date, a Notice of Deficiency was issued to Mr. Rowe asserting a tax due for the year 1980 of $262.33 plus interest.

CONCLUSIONS OF LAW

A. That section 603-A(b)(1) of the Tax Law, as it applied to the year in issue, defines New York personal service income, in pertinent part, as items of income includible as personal service income for purposes of section 1348 of the Internal Revenue Code, to the extent such items are includible in New York State adjusted gross income.

B. That once the taxpayer has determined what items of New York source income constitute personal service income, the taxpayer must then calculate his personal service taxable income. Section 603-A(c) of the Tax Law defines "New York personal service net income" as personal service income reduced first by any deductions allowable under section 62 of the Internal Revenue Code which are properly allocable or chargeable against New York personal service income. New York City unincorporated business taxes are allowable deductions under section 62 of the Internal Revenue Code. Therefore, petitioners' personal service income was properly reduced by an amount representing each petitioner's distributive share of those taxes.

C. That Tax Law section 612(b)(3) requires that any state, local and foreign income taxes deducted as expenses in arriving at Federal adjusted gross income be added back for purposes *of* determining New York adjusted gross income. This modification is not included in section 603-A(b)(1) of the Tax Law which defines "New York personal service income." The intent of the legislature with regard to this matter **is** shown in the Laws of 1980, Chapter 417, section 34, where New York personal service income was redefined to include "the amount of the modifications which must be added to federal adjusted gross income pursuant to paragraphs seven, eight and nine of subsection (b) of section six hundred twelve." Where one or more exceptions are expressly made

in a statute, it may be fairly inferred that the legislature intended that no other exceptions be made, by implication or otherwise (Matter of Marx v. State Tax Comm., 103 A.D.2d 905). Accordingly, the modification contained in section 612(b)(3) cannot be read into section 603-A(b)(1) of the Tax Law.

D. That the petitions of Joseph T. C. Hart and George Rowe, Jr. are denied and the notices of deficiency dated April 5, *1984* are sustained.

DATED: Albany, New York

JUN 17 1986

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER