

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

ROBERT NEUNER AND
CLAIRE A. NEUNER

:
:
:

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Years 1980, 1981
and 1982.

Petitioners, Robert Neuner and Claire A. Neuner, 320 Longbow Drive,
Franklin Lakes, New Jersey 07417, filed petitions for redetermination of a
deficiency or for refund of personal income tax under Article 22 of the Tax
Law for the years 1980, 1981 and 1982 (File Nos. 54139 and 60851).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on July 17, 1986 at 1:15 P.M. Petitioner Robert Neuner appeared pro se.
The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq.,
of counsel).

ISSUES

I. Whether a nonresident partner of a New York law firm may allocate a
percentage of his partnership income where the partnership does not so
allocate.

11. Whether the Audit Division is barred from making its determination of
deficiency for the years 1980 and 1981 by the doctrines of laches, estoppel or
collateral estoppel.

FINDINGS OF FACT

1. On March 21, 1984, the Audit Division issued a Notice of Deficiency to petitioners, Robert Neuner and Claire A. Neuner, together with a Statement of Audit Changes, asserting liability for additional personal income tax for the years 1980 and 1981 in the following sums:

<u>Year</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
1980	\$2,094.01	737.86	\$2,831.87
1981	2,998.86	673.56	3,672.42

2. On February 26, 1985, the Audit Division issued a Notice of Deficiency to petitioners with an attached Statement of Audit Changes, asserting liability for additional personal income taxes for the year 1982 in the following sum:

<u>Year</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
1982	\$1,349.85	263.58	\$1,613.43

3. During the years in issue, petitioner Robert Neuner was a partner at the New York City law firm of Brumbaugh, Graves, Donohue & Raymond while residing in the State of New Jersey.

4. The law firm of Brumbaugh, Graves, Donohue & Raymond did not allocate any of its income to sources without the State of New York.

5. Petitioners filed a joint New York State Income Tax Nonresident Return for the year 1980. On said return petitioners allocated Robert Neuner's partnership income derived from Brumbaugh, Graves, Donohue & Raymond to sources within and without New York State. Said allocation, computed on schedule A-1, was based on days worked within and without the State. Pursuant to said schedule, \$60,151.

of Mr. Neuner's partnership distributive share of \$83,961.00 was reported as allocable to New York State sources.

6. Petitioners' 1981 jointly filed nonresident income tax return contained a similar allocation computed on schedule A-1 of the return, showing \$100,562.25 of Mr. Neuner's partnership share of \$133,903.75 as allocable to New York State sources.

7. The 1982 Nonresident Income Tax Return, jointly filed by the petitioners, revealed an allocation, again computed on Schedule A-1 of the return, which attributed \$98,265.00 of Mr. Neuner's partnership share of \$118,698.00 to New York sources.

8. The Statement of Audit Changes issued with the Notice of Deficiency, dated March 21, 1984, explained the Audit Division's position on the allocation of petitioner's distributive share as follows:

"You may not use Schedule A-1 to allocate partnership income. You are not an employee receiving salary or wages.

You may not allocate your partnership income from Brumbaugh, Graves, Donohue & Raymond since the partnership does not allocate its income."

9. A similar explanation was given to petitioners in the Statement of Audit Changes issued with the Notice of Deficiency, dated February 26, 1985:

"Since the partnership ~~of~~ Brumbaugh, Graves, Donohue & Raymond does not allocate its income within and without New York State, you **may** not allocate your income from this partnership."

10. Petitioners contend that they should be permitted to allocate Mr. Neuner's partnership income for the years in issue because they were notified by letter from the Audit Division on March 17, 1980 regarding allocation of days worked outside of New York State and no mention was made of the partnership income allocation issue.

11. Based upon said notification, petitioners believe that the Audit Division is barred by the theories of laches, estoppel and/or collateral estoppel from claiming tax due based upon petitioners' allocation of Mr. Neuner's partnership income.

12. By letter dated December 6, 1984, the Audit Division notified petitioner that they had erroneously completed schedule A-1 on each of their returns for 1981 and 1982, indicating that Mr. Neuner was allocating salary or wages, not business income, implying employee status, not partner status (emphasis added).

13. Petitioners allege that the Audit Division was constructively on notice since it had the partnership's returns for all the years in issue, and each indicated Mr. Neuner's partner status.

14. Petitioners filed returns for the years in issue with the State of New Jersey, declaring their income allocated without the State of New York.

CONCLUSIONS OF LAW

A. That pursuant to section 637(b)(2) of the Tax Law, and the regulations promulgated thereunder, a nonresident partner may not allocate "as income or gain from sources outside New York, a greater proportion of his distributive share of partnership income or gain than the ratio of partnership income or gain from sources outside New York to partnership income or gain from all sources". Such income is allocated to New York sources on the same basis as the firm uses to allocate the distributive share of each partner (see Debevoise v. State Tax Commission, 52 AD2d 1023). Accordingly, since the partnership did not allocate its income, petitioners are not properly entitled to allocate any portion of Mr. Neuner's distributive share of income from Brumbaugh, Graves, Donohue & Raymond to sources without New York State.


B. That the Audit Division was not barred from assessing additional taxes due by the doctrines of laches, estoppel and/or collateral estoppel. Laches or estoppel may not be imputed to the State in absence of statutory authority. This rule is generally applied in connection with tax matters (Matter of Jamestown Lodge 1681 Loyal Order of Moose, 31 AD2d 981; Matter of Turner Construction Co. v. State Tax Commission, 57 AD2d 201. The record herein clearly shows that the State acted reasonably in light of the circumstances and without prejudice to petitioners.

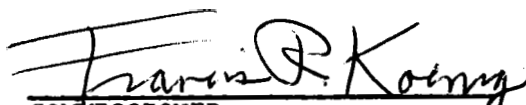
C. That the petitions of Robert Neuner and Claire A. Neuner are denied and the Notices of Deficiency dated March 21, 1984 and February 26, 1985, respectively, are hereby sustained together with such additional interest as may be lawfully owing.

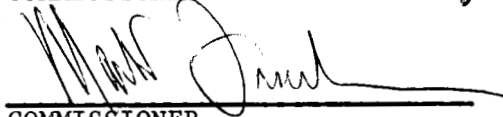
DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER