

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

E. C. STERLING ^{of} MC KITTRICK
and

SALLY A. MC KITTRICK

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Personal Income :
Taxes under Article ~~(s)~~ 22 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1971 and 1972.

AFFIDAVIT OF MAILING

State of New York
County of Albany

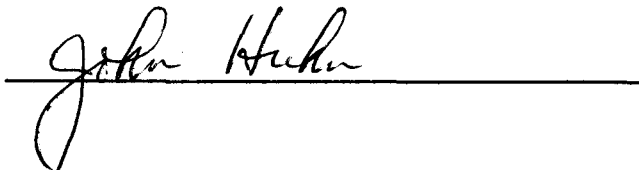
John Huhn , being duly sworn, deposes and says that
~~she~~ is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 13th day of December , 1978, ~~she~~ served the within
Notice of Decision by (certified) mail upon E. C. Sterling
McKittrick and Sally A. McKittrick ~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Mr. & Mrs. E. C. Sterling McKittrick
30 Oak Lane
Morristown, New Jersey 07960
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

13th day of December , 1978.





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For a Redetermination of a Deficiency or :
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John Huhn, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 13th day of December, 1978, she served the within
Notice of Decision by (certified) mail upon John B. Riordan

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: John B. Riordan, Esq.
Ferris, Bangs, Davis, Trafford & Syz
74 Trinity Place
New York, New York 10006

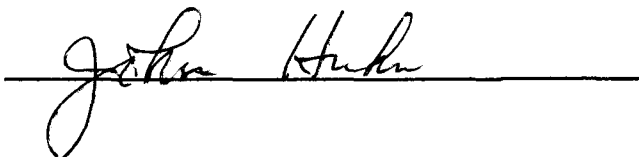
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

13th day of December, 1978.







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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

December 13, 1978

**Mr. & Mrs. E. C. Sterling McKittrick
30 Oak Lane
Morristown, New Jersey 07960**

Dear Mr. & Mrs. McKittrick:

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(x) **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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

**Joseph Chyrywat
Hearing Examiner**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 20, 1976 at 10:45 A.M. Petitioners appeared by John B. Riordan, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioner E. C. Sterling McKittrick was entitled to allocate the income he received from the partnership of Ingalls & Snyder during 1971, on the basis of the days on which he performed services within and without New York State for said partnership.

II. Whether interest payments received by petitioner E. C. Sterling McKittrick during 1971 and 1972 from the partnership of Ingalls & Snyder constituted taxable income to petitioners, for 1971 and 1972 New York State income tax purposes.

FINDINGS OF FACT

1. During 1971 petitioner E. C. Sterling McKittrick was a limited partner in the partnership of Ingalls & Snyder, performing services on behalf of the partnership both within and without New York State. In connection with his activities as a partner of the firm in 1971, he was paid a guaranteed salary of \$25,000.00, plus a fixed percentage of commissions on sales generated by him. Neither the guaranteed salary nor the commissions were based on partnership income. He was entitled to the salary and commissions, regardless of the profitability of the partnership. Petitioner contended that he should be permitted to allocate the salary and commissions received from the partnership in 1971 on the ratio that the days worked within New York State bore to the total working days.

2. As a limited partner of Ingalls & Snyder, petitioner was required to contribute a certain amount of money to the capital of the firm, for which he received a specific amount of interest in 1971, which constituted the income earned on his capital account.

3. On January 1, 1972, petitioner became a general partner of Ingalls & Snyder and received a partnership distribution on a percentage basis. In addition, he received interest payments from the partnership which were earned on his capital contribution.

4. Petitioners, E. C. Sterling McKittrick and Sally A. McKittrick, filed a 1971 New York State nonresident income tax return, on which the income received by petitioner E. C. Sterling McKittrick from the partnership of Ingalls & Snyder was allocated on the basis of the days on which he performed services on behalf

of the partnership, both within and without New York State. In addition, the interest income paid to petitioner E. C. Sterling McKittrick by the partnership (in connection with interest earned on his capital contributions) was not included as income on the 1971 New York return.

5. Petitioners filed a 1972 New York State nonresident income tax return, on which less than petitioner E. C. Sterling McKittrick's distributive share of partnership income allocable to New York State was reported as business income. In addition, the interest income paid to petitioner E. C. Sterling McKittrick by the partnership (in connection with the interest earned on his capital contribution) was not reported as income on petitioners' 1972 New York return.

6. On April 11, 1975, the Income Tax Bureau issued a Notice of Deficiency against petitioners. The deficiency was based on the Bureau's findings that all of the amounts paid to petitioner E. C. Sterling McKittrick by the partnership during 1971 and 1972 constituted partnership distributions which were reportable as income on petitioners' 1971 and 1972 New York State nonresident income tax returns, to the extent of the partnership's allocation percentage of 99.8% for 1971 and 99.89% for 1972. The Bureau also held that petitioner E. C. Sterling McKittrick understated his 1972 partnership income and incorrectly reported such income as business income.

CONCLUSIONS OF LAW

A. That although petitioner E. C. Sterling McKittrick may have performed services on behalf of the partnership of Ingalls & Snyder both within and without New York State in 1971, these services were rendered as a partner and not as an employee. The guaranteed salary and commission paid to said petitioner by the partnership during 1971 and 1972 constituted partnership distributions which were

reportable as income on petitioner's 1971 and 1972 New York returns to the extent of the partnership's allocation percentages of 99.8% for 1971 and 99.89% for 1972, within the meaning and intent of sections 632 and 637 of the Tax Law. Petitioner E. C. Sterling McKittrick is not permitted to allocate the amounts received from the partnership in 1971 under 20 NYCRR 131.16, since the method of allocation provided thereunder is available only to a nonresident employee.

B. That the interest income paid to petitioner E. C. Sterling McKittrick by the partnership in 1971 and 1972 constituted income from New York sources to the petitioners for the years in question (to the extent of the partnership's allocation percentages for said years), in accordance with the meaning and intent of sections 632(b)(2) and 637(b)(1) of the Tax Law.


C. That the petition of E. C. Sterling McKittrick and Sally A. McKittrick is denied and the Notice of Deficiency issued April 11, 1975 in the amount of \$3,933.40 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York
December 13, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER