



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

October 27, 1978

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

Mr. & Mrs. Ernest L. Molloy  
Box 223  
Incline Village, Nevada 89450

Dear Mr. & Mrs. Molloy:

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 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,

*Michael Alexander*  
**Michael Alexander**  
**Supervising Tax**  
**Hearing Officer**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition  
of  
ERNEST L. MOLLOY and JULIA A. MOLLOY  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under  
Article 22 of the Tax Law for the Year  
1971.

DECISION

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Petitioners, Ernest L. Molloy and Julia A. Molloy,  
Box 223, Incline Village, Nevada 89450, 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 1971 (File No.  
13324).

A formal hearing was scheduled for February 17, 1977. In  
lieu thereof, however, petitioners stipulated and agreed that  
the matter be submitted to the State Tax Commission for decision  
based on all material contained in the file. After due consider-  
ation of the record, the State Tax Commission renders the fol-  
lowing decision.

ISSUES

I. Whether director's fees of \$4,925.00 received by  
petitioner Ernest L. Molloy while a nonresident, were derived  
from or connected with New York State sources and, as such,  
constituted New York State taxable income.

II. Whether deferred compensation payments of \$24,300.00 received by petitioner Ernest L. Molloy while a nonresident, were variable and did not qualify as an annuity, and thus were taxable in whole or in part as New York State source income.

FINDINGS OF FACT

1. Petitioners, Ernest L. Molloy and Julia A. Molloy, jointly filed both New York State resident and nonresident income tax returns for 1971, conceding New York residency for the period January 1, 1971 to July 31, 1971, but claiming nonresidency from August 1, 1971 to December 31, 1971 (hereinafter referred to as the "nonresident period") and indicating their address at this time as Box 223, Incline Village, Nevada 89450.

2. On July 30, 1973, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, asserting additional income tax for 1971 of \$2,367.01, plus interest of \$183.35, for a total of \$2,550.36, on the following grounds:

- a) Directors fees of \$4,925.00 received during the nonresident period were deemed to be fully derived from New York State sources.
- b) Deferred compensation of \$24,300.00 received during the nonresident period was allocated to New York State at a ratio of 32.14 percent.
- c) Income of \$15,833.33 originally reported as consulting fees was deemed fully taxable to New York State.

3. A Notice of Deficiency dated July 30, 1973 was issued against petitioners in the amount of \$2,550.36, together with the aforesaid Statement of Audit Changes.

4. Petitioners conceded the correctness of the Income Tax Bureau's position concerning the consulting fees as set forth in subparagraph c of paragraph 2, supra, and do not here contest that issue.

5. There is no dispute that subsequent to July 31, 1971, petitioners were nonresidents of the State of New York, residing in, and being domiciliaries of, the State of Nevada.

6. During the nonresident period, petitioner Ernest L. Molloy served on the Board of Directors of W.R. Grace & Company and R.H. Macy & Co., Inc. In such capacity, he attended board meetings of both corporations at their respective offices in New York State, for which he received fees totalling \$4,925.00. Said fees were not reported as New York State taxable income by petitioners in filing their nonresident returns for the period in question.

7. Petitioners did not offer substantial or sufficient documentary or other evidence regarding apportionment of the aforesaid director's fees, based either on the maintenance of a business, trade, profession or occupation carried on both within and without this State or (alternatively), on the number of days worked within and without this State.

8. During the nonresident period, petitioner Ernest L. Molloy received the sum of \$24,300.00 pursuant to a written

agreement dated August 1, 1966 (the "Deferred Compensation Agreement") which he entered into with R.H. Macy & Co., Inc., his then-employer. Said sum was not reported as New York State taxable income by petitioners in filing their nonresident return for the period in question.

9. The Deferred Compensation Agreement provided (inter alia) that petitioner Ernest L. Molloy was to be employed by R.H. Macy & Co., Inc. in an executive position at a stated basic annual salary, payable monthly; that, effective August 1, 1966, a deferred compensation account was to be established for the benefit of said petitioner, to which account the sum of \$131,250.00 was immediately credited and to which was thereafter credited on a monthly basis, an amount equal to one-twelfth (1/12) of \$17,500.00, altogether with interest to be determined in accordance with the prevailing prime interest rate charged by major New York City banks; that, conditioned on said petitioner's faithful service during his active period of employment, said petitioner would receive annual payments for a period of fifteen (15) years, commencing on August 1 next succeeding the date of termination of active employment and on August 1 of each subsequent year; that the annual payments, payable in money only, were to be in an amount equal to the total of one-fifteenth (1/15) of the total amounts credited to the deferred compensation account, together with interest on each annual payment made subsequent to the first such payment, which interest was to be determined in accordance with the prevailing

prime interest rate charged by major New York City banks; that if, after termination of active employment, said petitioner performed services for any retail enterprise engaged in selling department store-type merchandise, the annual payments would, in substance, be reduced by deducting from the credit balance in the deferred compensation account, all interest credited to such account from the date of its establishment to the date of said petitioner's termination of active employment; that, in the event said petitioner voluntarily terminated his active employment prior to age 55, the annual payment was to exclude any interest credited to the deferred compensation account from the date of its establishment to the date of said petitioner's voluntary termination; and that, in the event of said petitioner's death, annual payments (if any remained unpaid) were to be made to named beneficiaries in such shares as said petitioner may designate or, if no such designation was made, to said petitioner's estate.

10. Petitioner Ernest L. Molloy became 65 years of age on August 1, 1971.

#### CONCLUSIONS OF LAW

A. That director's fees of \$4,925.00 received by petitioner Ernest L. Molloy while a nonresident during the period August 1, 1971 through December 31, 1971 were wholly derived from or connected with New York State sources and, as such, constituted New York State taxable income, pursuant to sections 631 and 632 (b)(1) of the Tax Law. See 20 NYCRR 131.4(a) and (c); Ruling

of State Tax Commission 1CCH, New York State Tax Reports, ¶17-413.15(b) (5/25/20); Cf Linsley v. Gallman, 38 A.D.2d 367, 329 N.Y.S.2d 486 (3rd Dept. 1972), aff'd., 33 N.Y.2d 863, 352 N.Y.S.2d 199 (1973); Oxnard v. Murphy, 19 A.D.2d 138, 241 N.Y.S.2d 333 (3rd Dept. 1963), aff'd., 15 N.Y.2d 593, 255 N.Y.S.2d 260 (1964).

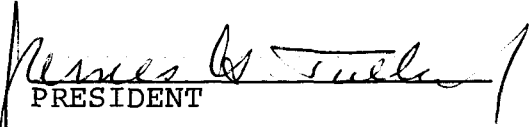
B. That the deferred compensation payments in the amount of \$24,300.00 received by petitioner Ernest L. Molloy while a nonresident during the period August 1, 1971 through December 31, 1971, qualified as an annuity and thus were exempt from taxation within the meaning and intent of sections 631 and 632 (b) (2) of the Tax Law and 20 NYCRR 131.4(d) (1) and (2). Linsley v. Gallman, supra. See, Edward H. Best, Counsel, State Tax Commission, 1CCH, New York State Tax Reporter, ¶17-413.70 (3/26/69); Rev. Rul. 61-157, 1961-2, Cum Bull. 67; Rev. Rul. 185, 1953-2, Cum. Bull. 202.

C. That the petition of Ernest L. Molloy and Julia A. Molloy is granted to the extent that the assessment (including penalty and interest, if any) with respect to deferred compensation in the amount of \$24,300.00 for the period August 1, 1971 through December 31, 1971, be and hereby is cancelled; that the Income Tax Bureau is directed to accordingly modify the Notice of Deficiency issued July 30, 1973, and that, except as so

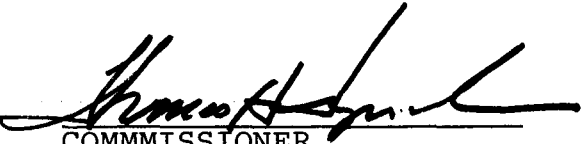
modified, the Notice of Deficiency issued on July 30, 1973 is  
in all other respects sustained.

DATED: Albany, New York  
October 27, 1978

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

ERNEST L. MOLLOY and JULIA A. MOLLOY

AFFIDAVIT OF MAILING

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

State of New York  
County of Albany

John Huhn, 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 27 day of October, 1978, he served the within  
Notice of Decision by (certified) mail upon Ernest L. Molloy  
and Julia A. Molloy  
(representative of) the petitioner in the within proceeding,

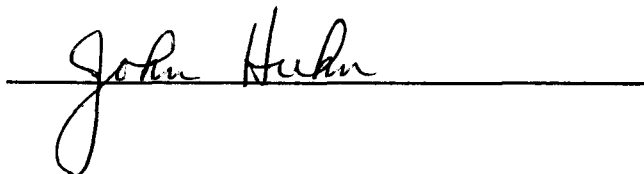
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Mr. & Mrs. Ernest L. Molloy  
Box 223  
Incline Village, Nevada 89450

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)~~  
~~XXXX~~ petitioner herein and that the address set forth on said wrapper is the  
last known address of the ~~(representative of)~~ petitioner.

Sworn to before me this

27 day of October, 1978.



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

ERNEST L. MOLLOY and JULIA A. MOLLOY

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
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of Personal Income :  
Taxes under Article(s) 22 of the :  
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1971

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 27 day of October, 1978, she served the within  
Notice of Decision by (certified) mail upon Kenneth N. Hersch

(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Kenneth N. Hersch  
151 W. 34th St., Room 1311  
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 (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

27 day of October, 1978



