STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
William D. & Lorraine Downes :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Years 1971 & 1972. :

State of New York
County of Albany

Jay Vredenburg, 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 22nd day of June, 1979, he served the within Notice of Decision by certified mail upon William D. & Lorraine Downes, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William D. & Lorraine Downes
2759 Woodland Ave.
Morristown, PA 19401

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
22nd day of June, 1979.

Marilyn J. LaPlante

Jay Vredenburg

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

STATE TAX COMMISSION
JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

June 22, 1979

William D. & Lorraine Downes
2759 Woodland Ave.
Morristown, PA 19401

Dear Mr. & Mrs. Downes:

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,

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of WILLIAM DOWNES and LORRAINE DOWNES for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1971 and 1972.	:	DECISION

Petitioners, William Downes and Lorraine Downes, 2759 Woodland Avenue, Morristown, Pennsylvania 19401, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1971 and 1972 (File No. 13940).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on December 20, 1977 at 9:00 A.M. Petitioners appeared by Joseph H. Murphy, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (James J. Morris, Esq., of counsel).

ISSUE

Whether petitioners may allocate income received as a distributive share of partnership profits on the basis of the three-factor allocation formula, or whether such income should be

allocated based on the ratio that New York gross receipts bore to gross receipts from within and without New York State.

FINDINGS OF FACT

1. Petitioners, William Downes and Lorraine Downes, timely filed New York State personal income tax nonresident returns for 1971 and 1972.

2. Petitioner William Downes was a partner in the certified public accounting firm of Tait, Weller and Baker, which was located in the State of Pennsylvania ("Pennsylvania Partnership"). The Pennsylvania partnership allocated a portion of its income to New York by use of the three-factor allocation schedule on its New York State partnership return for 1971 and 1972. It entered dollar amounts for each of the three factors in the column headed "Totals-Inside and Outside the State." In the next column "New York State Amounts," it entered "none" for the property and wages factors and a dollar amount for the gross receipts factor. It then determined the ratio that New York gross receipts bore to gross receipts inside and outside the State and divided the resulting percentage by 3 to arrive at the percent of net income allocable to New York. Petitioner William Downes applied this to his distributive share of partnership income and reported on petitioners' New York State personal income tax nonresident returns for the years at issue.

The percentage of net income allocable to New York State, determined in this manner, was 9.72% for 1971 and 7.98% for 1972.

3. The Income Tax Bureau contended that the three-factor method as used by the Pennsylvania partnership was not fair and/or equitable since it neither owned nor rented property in New York, nor did it pay wages to employees in New York. The Income Tax Bureau issued a Statement of Audit Changes against petitioners based on the ratio that New York gross receipts bore to total gross receipts from inside and outside New York. It applied this percentage (29.17% for 1971 and 23.95% for 1972) to petitioners total Federal distributive share of partnership income, to arrive at the amount allocable to New York State. Accordingly, the Income Tax Bureau issued a Notice of Deficiency against petitioners on February 24, 1975 for 1971 and 1972 in the amount of $2,028.96 in personal income tax, plus $316.32 in interest, for a sum of $2,345.28.

4. Petitioners contended that the Income Tax Bureau should have conducted a field audit of the Pennsylvania partnership, rather than "arbitrarily" base its determination of New York income on the application of the gross receipts factor. They contended further that it cost 10 to 15% more to produce New York income and that the Pennsylvania partnership did professional and clerical work for a related New York accounting partnership, for which it received no compensation. They also contended that the expenses so incurred

were not considered by the Income Tax Bureau in arriving at New York income. They claimed that the books and records of the Pennsylvania partnership were not kept in such a manner so as to produce the data required to determine New York net income on a direct accounting method.

5. The New York accounting partnership referred to in Finding of Fact "4" was also named Tait, Weller and Baker. It was completely controlled and financed by the Pennsylvania partnership although it filed separate tax returns, had a separate set of books and had one additional partner who was not a partner of the Pennsylvania partnership. The Pennsylvania partnership included the New York partnership on its letterhead. It set up a bank account in New York and paid all the expenses of the New York partnership. It hired the personnel for the New York partnership and completed all the work done by the New York partnership, billed all clients and collected all fees. It did all the bookkeeping and clerical work for the New York partnership at its office in Pennsylvania.

6. The New York partnership was, in fact, a branch office of the Pennsylvania partnership.

7. Petitioners contended that the payroll and property factors of the New York partnership could be included in the Pennsylvania partnership's three-factor allocation formula.

CONCLUSIONS OF LAW

A. That the allocation method used by both the Income Tax Bureau and the Pennsylvania partnership did not produce a fair and equitable portion of income allocable to New York State, in accordance with section 632(c) of the Tax Law and 20 NYCRR 131.13.

B. That the direct accounting method is the preferred method of allocation, in accordance with section 632(c) of the Tax Law and 20 NYCRR 131.13(a), and is to be utilized unless, as in this case, the partnership's books do not adequately separate out New York income and expenses (Piper, Jaffray and Hopwood v. State Tax Commission, 42 AD 2d 381, 348 NYS 2d 242 (1973)). The next recourse is to the three-factor allocation formula in accordance with section 632(c) of the Tax Law and 20 NYCRR 131.13(b). Since the Pennsylvania partnership had an office in New York State, where its affairs were regularly and systematically carried on in accordance with section 632 of the Tax Law and 20 NYCRR 131.4(a), and since sufficient information is available for use of the three-factor method, said method is to be used, resulting in percentages allocable to New York of 13.65% for 1971 and 16.32% for 1972.

C. That the petition of William Downes and Lorraine Downes is granted to the extent that the New York allocation percentage is reduced from 29.17% to 13.65% for 1971 and from 23.95% to 16.32% for

1972; that the Income Tax Bureau is hereby directed to so modify the Notice of Deficiency issued February 24, 1975, together with such interest as may be lawfully owing and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
June 22, 1979

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER