

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Claude C. & Lore K. Kelly :

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 1969 - 1970. :

AFFIDAVIT OF MAILING

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 9th day of November, 1979, he served the within notice of Decision by certified mail upon Claude C. & Lore K. Kelly, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Claude C. & Lore K. Kelly
46 Bis Ave.
Le Vesinet (Yvelines), France
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
9th day of November, 1979.

Joanne Krupp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Claude C. & Lore K. Kelly :

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AFFIDAVIT OF MAILING

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 9th day of November, 1979, he served the within notice of Decision by certified mail upon Elliott Manning the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Elliott Manning
One State Street Plaza
New York, NY 10004

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
9th day of November, 1979.

Joanne Krapp

J. Vredenburg

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

November 9, 1979

Claude C. & Lore K. Kelly
46 Bis Ave.
G. Clemenceau
Le Vesinet (Yvelines), France

Dear Mr. & Mrs. Kelly:

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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Elliott Manning
One State Street Plaza
New York, NY 10004
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|--|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| CLAUDE C., JR. and LORE K. KELLY | : | DECISION |
| for Redetermination of a Deficiency or | : | |
| for Refund of Personal Income Tax | : | |
| under Article 22 of the Tax Law for | : | |
| the Years 1969 and 1970. | : | |

Petitioners, Claude C., Jr. and Lore K. Kelly, 46 Bis Avenue, G. Clemenceau, Le Vesinet (Yvelines), France, 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 1969 and 1970 (File No. 01300).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 28, 1977 at 1:15 P.M. Petitioners appeared by Elliot Manning, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether an agreement entered into between nonresident petitioner Claude C. Kelly, Jr. and a New York partnership (of which he was a member), which provided that all of his income was to be considered foreign source income was binding on New York State for income tax purposes.

II. If said agreement was not binding on New York, whether the Income Tax Bureau made a proper allocation of petitioner Claude C. Kelly, Jr.'s distributive partnership income to New York, with particular reference to the section 911 exclusion of the Internal Revenue Code.

FINDINGS OF FACT

1. Petitioners, Claude C., Jr. and Lore K. Kelly, timely filed New York State personal income tax nonresident returns for 1969 and 1970, in which petitioner Claude C. Kelly, Jr. allocated a portion of his total distributive share of partnership income as New York source income.

2. The Income Tax Bureau contended that Claude C. Kelly, Jr. used an incorrect method of allocation to New York sources of distributive partnership income; therefore, it issued statements of audit changes in which it adjusted said allocation. Accordingly, it issued a Notice of Deficiency on April 13, 1973 for 1969 (which was amended on August 28, 1973) for \$348.98 in personal income tax, plus \$62.73 in interest, for a total of \$411.71. It also issued a Notice of Deficiency on March 25, 1974 for 1970 for \$608.82 in personal income tax, plus \$107.54 in interest, for a total of \$716.36.

3. Petitioners were nonresidents of New York State during 1969 and 1970. Claude C. Kelly, Jr. was a member of the New York partnership of Cleary, Gottlieb, Steen and Hamilton (hereinafter "the partnership"), which had other offices in Washington, D.C., Paris,

France, and Brussels, Belgium. He performed services as a resident partner in the Paris office during the years at issue.

4. In 1969 and 1970, the percent of total partnership income earned in New York State was 61.37% and 57.90%, respectively; 17.88% and 18.46% was earned in Washington, D.C., and 20.75% and 23.64% was from foreign sources.

5. After subtraction of additional first year depreciation, Claude C. Kelly, Jr.'s distributive share of partnership income was \$46,427.07 for 1969 and \$49,367.00 in 1970. He had an agreement with the partnership which provided that his entire distributive partnership share was payable out of income from sources outside the United States (and was so treated on the books of the partnership) and that it was considered foreign source income. Said agreement was recognized by the Internal Revenue Service for Federal income purposes. He also excluded \$25,000.00 in each year from his distributive share of partnership income in reporting Federal adjusted gross income, in accordance with section 911 of the Internal Revenue Code.

6. For 1969 the Income Tax Bureau recomputed Mr. Kelly's allocation by taking 61.37% of the total net distribution of \$46,427.07, to determine total New York source income. It then subtracted the section 911 exclusion of \$25,000.00 (which was greater than the remaining non-New York income) from the total net distribution to arrive at \$21,427.07. This was the amount allocable as New York source income and thus allowed petitioner the benefit of the section 911 exclusion.

7. For 1970 the Income Tax Bureau recomputed petitioner's allocation by taking 57.90% of the total distribution of \$49,547.00 to arrive at New York source income of \$24,547.00. This amount was reduced by additional first-year depreciation. Petitioner did not lose the benefit of the section 911 exclusion, since New York income was less than Federal income.

8. There was no disagreement with either factual matters or with the mathematical accuracy of the deficiencies.

CONCLUSIONS OF LAW

A. That the agreement entered into between petitioner Claude C. Kelly, Jr. and the partnership was not binding on New York State for purposes of New York State personal income tax, in accordance with the meaning and intent of section 637(b) of the Tax Law.

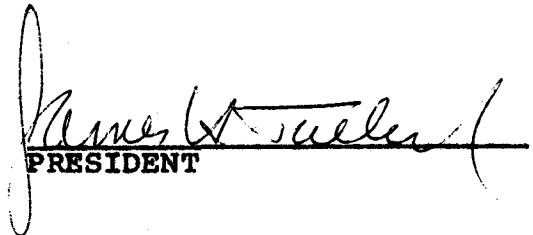
B. That the method used by the Income Tax Bureau in the allocation of petitioner's distributive share of partnership income to New York sources was proper, since it was based on the partnership's percentage of income derived from New York State. This allocation method also provided for the section 911 exclusion, in that petitioner did not lose the benefit of said section of the Internal Revenue Code and that New York source income was not greater than Federal income, in accordance with the meaning and intent of section 637 of the Tax Law.

C. That the petitions of Claude C., Jr. and Lore K. Kelly for 1969 and 1970 are denied and the notices of deficiency issued April 13, 1973, as revised August 28, 1973, for 1969 and March 25, 1974 for 1970 are sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

NOV 9 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER