

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Robert & Elizabeth Giebel :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Persoanl Income Tax :
under Article 22 of the Tax Law
for the Year 1972. :

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 2nd day of January, 1980, he served the within notice of Decision by certified mail upon Robert & Elizabeth Giebel, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert & Elizabeth Giebel
10 Pembroke Rd.
Darien, CT 06820

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
2nd day of January, 1980.

Joanne Knapp

J. Vredenburg

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

January 2, 1980

Robert & Elizabeth Giebel
10 Pembroke Rd.
Darien, CT 06820

Dear Mr. & Mrs. Giebel:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT GIEBEL and ELIZABETH GIEBEL	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1972.	:	

Petitioners, Robert Giebel and Elizabeth Giebel, 10 Pembroke Road, Darien, Connecticut 06820, 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 1972 (File No. 12617).

A formal hearing was held before George F. Murphy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 10, 1977 at 1:15 P.M. Petitioner Robert Giebel appeared pro se and for his wife, petitioner Elizabeth Giebel. The Income Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUES

- I. Whether a distribution from a profit-sharing plan constituted a capital gain or ordinary income.
- II. Whether petitioner properly allocated his salary income to sources within and without New York State.

FINDINGS OF FACT

1. Petitioners, Robert Giebel and Elizabeth Giebel, timely filed a joint New York State Income Tax Nonresident Return for 1972, on which they allocated salary income of \$65,160.00 and a net capital gain of \$34,030.00 on the basis of the number of days worked within and without New York State. The net

capital gain of \$3,030.00 included a profit-sharing lump sum distribution of \$74,046.00, which had been reported as a long-term capital gain on their Federal Income Tax Return.

2. On November 25, 1974, the Income Tax Bureau issued a Notice of Deficiency for 1972 asserting personal income tax of \$9,166.28, plus interest of \$1,109.39, for a total of \$10,275.67. Said notice disallowed 36 days worked at petitioner Robert Giebel's home in Connecticut as days worked without New York State. In addition, the profit-sharing lump sum distribution was taxed as ordinary income and allocated on the same basis as the salary income.

3. Petitioner Robert Giebel was president of Thomas Wilson & Co., Inc. and owned seventy-five percent of the stock in said corporation. The corporation had its headquarters in New York City and had plants in Port Jefferson, New York and in Alabama.

4. Petitioner Robert Giebel contended that during 1972 the profit-sharing plan of the corporation was terminated and was liquidated on the request of the Internal Revenue Service. No evidence was submitted as to the terms and conditions of the profit-sharing plan, or as to the reasons behind the request made by the Internal Revenue Service.

5. During 1972, petitioner Robert Giebel received a profit-sharing lump sum distribution of \$74,046.00 but continued his relationship as president and principal shareholder of Thomas Wilson & Co., Inc.

6. Petitioner Robert Giebel contended that he worked 36 days at his home in Connecticut because his doctor preferred that he work at home rather than at the office of the corporation.

CONCLUSIONS OF LAW

A. That the days worked by petitioner Robert Giebel at his home in Connecticut during 1972 were days worked there by reason of his own convenience and necessity and not for the necessity of his employer; therefore, such days are considered to have been days worked within New York State for income allocation purposes, in accordance with the meaning and intent of Section 632(c) of the Tax Law and 20 NYCRR 131.16.

B. That the lump sum distribution of \$74,046.00, received during 1972 from the profit-sharing plan, does not qualify for capital gain treatment; that said distribution constituted ordinary income in accordance with the meaning and intent of Section 402 of the Internal Revenue Code and Article 22 of the Tax Law.

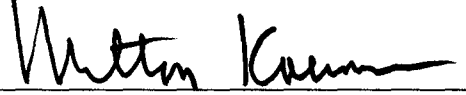
C. That the petition of Robert Giebel and Elizabeth Giebel is denied and the Notice of Deficiency issued November 25, 1974 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JAN 2 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER