

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Robert & Florence Marchi :

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 1967 - 1969. :

State of New York
County of Albany

Jean Schultz, 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 29th day of February, 1980, she served the within notice of Decision by certified mail upon Robert & Florence Marchi, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert & Florence Marchi

34 Priscilla Ln.

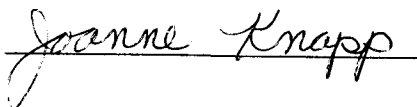
Englewood Cliffs, NJ 07632

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
29th day of February, 1980.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Robert & Florence Marchi :
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 1967 - 1969. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jean Schultz, 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 29th day of February, 1980, she served the within notice of Decision by certified mail upon Vincent M. Tepedino 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. Vincent M. Tepedino
Norman J. Elliott & Co.
522 Fifth Ave.
New York, NY 10036

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
29th day of February, 1980.

Joanne Knapp

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

February 29, 1980

Robert & Florence Marchi
34 Priscilla Ln.
Englewood Cliffs, NJ 07632

Dear Mr. & Mrs. Marchi:

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
Vincent M. Tepedino
Norman J. Elliott & Co.
522 Fifth Ave.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

ROBERT M. MARCHI and FLORENCE MARCHI :

DECISION

for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article :
22 of the Tax Law for the Years 1967, 1968 :
and 1969.

Petitioners, Robert M. Marchi and Florence Marchi, 34 Priscilla Lane, Englewood Cliffs, New Jersey 07632, 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 1967, 1968 and 1969 (File No. 01177).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on Thursday, May 19, 1977 at 1:15 P.M. Petitioners appeared by Vincent M. Tepedino, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUES

I. Whether income received by petitioner Robert M. Marchi, a nonresident, from the partnership of Herold, Wilson & Gerald, a New York securities firm, is taxable as New York source income.

II. Whether the Income Tax Bureau properly increased the amount of petitioner Robert M. Marchi's New York source income by including therein his distributive share of the New York State and New York City unincorporated business taxes taken as deductions on the partnership return of Herold, Wilson & Gerald.

FINDINGS OF FACT

1. As the result of an audit, the Income Tax Bureau asserted deficiencies for personal income tax against petitioners, Robert M. Marchi and Florence Marchi, as follows: by a Notice of Deficiency dated March 29, 1971, a deficiency of \$1,646.29 for 1967; by a Notice of Deficiency dated February 28, 1972, a deficiency of \$5,100.96 for 1968; by a Notice of Deficiency dated March 26, 1973, a deficiency of \$824.81 for 1969. Petitioners timely filed a Petition for Redetermination of Deficiency or for Refund of Personal Income Tax for each of the aforementioned years. Petitioners have paid, under protest, a total of \$6,346.10 toward the asserted deficiencies and the interest due thereon for taxable year 1968.

2. During the years herein at issue, petitioner Robert M. Marchi was a general partner in the New York State partnership of Herold, Wilson & Gerald, a stock brokerage firm. Petitioners were residents of New Jersey and petitioner Robert M. Marchi was engaged in managing offices of Herold, Wilson & Gerald which were located in New Jersey. Petitioner Robert M. Marchi received one percent (1%) of the partnership profits together with an amount, designated as a commission, determined by reference to petitioner Robert M. Marchi's total sales. Although he was a general partner, petitioner Robert M. Marchi did not participate in the management of the partnership. Mr. Marchi was made a general partner for the purpose of creating a favorable impression on clients who came to his office and to insure petitioner's careful pursuit of his duties by making him subject to the liabilities of the partnership.

3. The Income Tax Bureau determined the percentage of petitioner Robert M. Marchi's income which was to be treated as New York source income by referring to the percentage of the partnership income which Herold, Wilson & Gerald reported on its New York State tax returns as being derived from New York sources.

Additionally, the Income Tax Bureau increased petitioner Robert Marchi's New York source income by the amounts which represented his distributive share of the New York State and New York City unincorporated business taxes taken as deductions on the partnership returns of Herold, Wilson & Gerald.

4. In determining the amount of petitioners' deficiency for 1969, the Income Tax Bureau failed to include in its computation, petitioner Robert Marchi's wage income derived from Marchi's Restaurant, Inc., a New York corporation. Said income, in the amount of \$10,000.00, was reported on petitioners' return as New York source income. During the formal hearing, counsel for the State sought permission to determine a greater deficiency than asserted in the Notice of Deficiency.

CONCLUSIONS OF LAW

A. That petitioner Robert Marchi's income derived from the New York State partnership of Herold, Wilson & Gerald is allocable to New York State in the same proportion that the partnership's income is allocated to sources within and without New York, regardless of the location where petitioner rendered his services pursuant to section 637(b) (1) of the Tax Law which provides:

"In determining the sources of a nonresident partner's income, no effect shall be given to a provision in the partnership agreement which characterizes payments to the partner as being for services or for the use of capital."

B. That the Income Tax Bureau properly increased the amount of petitioner Robert M. Marchi's New York source income in accordance with the meaning and intent of sections 637(c) and 612(b) (3) of the Tax Law, by including therein his distributive share of the New York State and New York City unincorporated business taxes taken as deductions on the partnership return of Herold, Wilson & Gerald.

C. That the Income Tax Bureau is directed to increase the deficiency for taxable year 1969 so as to include taxable wages which were previously omitted as set forth in Finding of Fact "4" above, in accordance with the meaning and intent of section 689(d) (1) of the Tax Law, which provides in part that:

"The tax commission shall have the power to determine a greater deficiency than asserted in the notice of deficiency... if claim therefore is asserted at or before the hearing under rules of the tax commission."

D. That the petition of Robert M. Marchi and Florence Marchi is denied and, except as modified by paragraph "C" above, the notices of deficiency issued March 29, 1971, February 28, 1972 and March 26, 1973 are sustained, together with such interest as may be lawfully due.

DATED: Albany, New York

FEB 29 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER