

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Herbert L. & Gertrude Smith :

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 Year 1967. :

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 Herbert L. & Gertrude Smith, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert L. & Gertrude Smith
Equinox Pond Rd.
Manchester, VT 05254

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

In the Matter of the Petition :
of

Herbert L. & Gertrude Smith :

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 Year 1967. :

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 John O'Shea 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. John O'Shea
10 E. 40th St.
New York, NY

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
2nd day of January, 1980.

Joanne Knapp

J. Vredenburg

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

January 2, 1980

Herbert L. & Gertrude Smith
Equinox Pond Rd.
Manchester, VT 05254

Dear Mr. & Mrs. Smith:

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
John O'Shea
10 E. 40th St.
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HERBERT L. SMITH and GERTRUDE SMITH	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1967.	:	

Petitioners, Herbert L. Smith and Gertrude Smith, Equinox Pond Road, Manchester, Vermont 05254, 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 1967 (File No. 01946).

A formal hearing was held before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on December 7, 1972 at 9:15 A.M. Petitioners appeared by John O'Shea, Esq. The Income Tax Bureau appeared by Saul Heckelman, Esq. (Francis X. Boylan, Esq., of counsel).

ISSUES

I. Whether the gain derived from the sale of a New York Stock Exchange seat was subject to personal income tax.

II. Whether petitioner Herbert Smith properly allocated his distributive share of partnership income to New York State.

III. Whether a modification was required in order to add back petitioner Herbert L. Smith's share of the partnership New York City unincorporated business tax deduction.

FINDINGS OF FACT

1. Petitioners, Herbert L. and Gertrude Smith, timely filed a part-year, New York State personal income tax resident return and a part-year, New York State income tax nonresident return for 1967.

2. Petitioners were residents of New York State from January 1, 1967 to June 30, 1967; thereafter they became residents of Vermont. On their resident tax return, they reported total New York income of \$92,926.41 which represented all income, including accruals, up to the date of their change of residence. On their nonresident tax return, they reported total New York income of \$78,777.54, which represented income from sources within New York. The "Schedule of Income Apportionment" which was attached to petitioners' tax returns showed dividends, interest income, and partnership income allocated to the resident and nonresident periods on a 50-50 basis. Sale or exchange of property of \$120,701.20 was apportioned to the nonresident period and a capital loss of \$1,000.00 was apportioned to the resident period.

3. Petitioner Herbert L. Smith was a partner of Murphey, Marseilles & Smith, a stockbrokerage firm doing business solely within New York State.

4. On March 29, 1971, the Income Tax Bureau issued a Notice of Deficiency against petitioners, on the ground that the total partnership distributive share should have been reported on their nonresident return and should not have been apportioned between the resident and nonresident periods. The Notice also contained adjustments attributable to petitioner Herbert L. Smith's failure to report the gain on the sale of his stock exchange seat and from his failure to include his share of the partnership New York City unincorporated business tax deduction.

5. Petitioner Herbert L. Smith contributed the use of his New York Stock Exchange seat (the "seat") to Murphey, Marseilles & Smith, which seat represented his capital contribution to said firm. The firm paid petitioner 6% interest on the value of the seat. The partnership agreement which was dated January 1, 1962, and which was later amended, provided the following:

Said membership shall be the absolute property of the partner and neither the partnership nor the other partners shall have any interest therein, and any increase or decrease in the value thereof shall be for his account and not for the account of the partnership.

The agreement also provided the following:

That the membership shall be an asset of the partnership so far as may be necessary for the protection of the creditors of the partnership or for the purpose of making good any impairment of the capital of the partnership to the extent to which said partner may be liable to other parties.

6. Petitioner Herbert L. Smith retired from the firm on June 27, 1967, and became a limited partner. He moved to Vermont on July 1, 1967 and on November 30, 1967, while still a limited partner, sold said seat and realized a capital gain of \$211,000.00.

CONCLUSIONS OF LAW

A. That the seat was intangible personal property which had a business situs in New York State, and the gain on the sale thereof was subject to personal income tax (People ex rel. Whitney v. Graves, 299 U.S. 366 (1937)).

B. That the partnership income reported by petitioners, Herbert L. and Gertrude Smith, was improperly allocated between their periods of residence and nonresidence; therefore, the distributive share of partnership income was required to be reported on their nonresident return, within the meaning and intent of section 654 of the Tax Law and 20 NYCRR 148.6.

C. That petitioners were required to add to Federal adjusted gross income, petitioner Herbert L. Smith's share of the partnership New York City unincorporated business tax deduction, within the meaning and intent of section 612(b) (3) of the Tax Law and 20 NYCRR 116.2(c).

D. That the petition of Herbert L. and Gertrude Smith is denied, and the Notice of Deficiency issued on March 29, 1971 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