

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
David Van Alstyne, Jr. :  
and Janet G. Van Alstyne : 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 1960 - 1969. :

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State of New York  
County of Albany

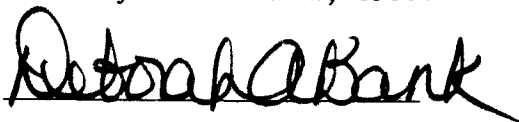
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of November, 1980, he served the within notice of Decision by certified mail upon David Van Alstyne, Jr., and Janet G. Van Alstyne, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

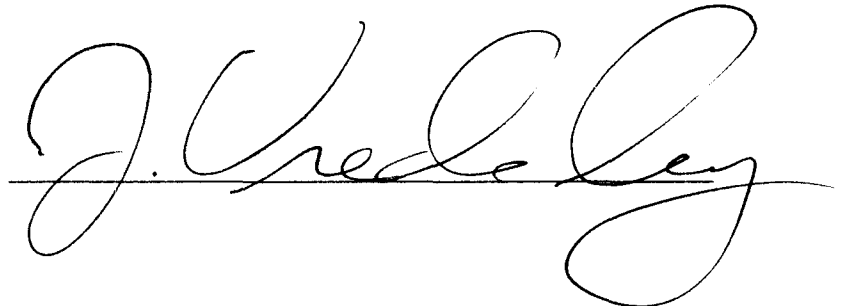
David Van Alstyne, Jr.  
and Janet G. Van Alstyne  
115 Chestnut St.  
Englewood, NJ 07631

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  
14th day of November, 1980.

  
Notary Public



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
David Van Alstyne, Jr. :  
and Janet G. Van Alstyne :  
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 1960 - 1969. :

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 14th day of November, 1980, he served the within notice of Decision by certified mail upon E. E. Finucan 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. E. E. Finucan  
Finucan & Greenwood  
10 E. 40th St.  
New York, NY 10016

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  
14th day of November, 1980.

*Deborah A. Bank*

*J. Vredenburg*

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

November 14, 1980

David Van Alstyne, Jr.  
and Janet G. Van Alstyne  
115 Chestnut St.  
Englewood, NJ 07631

Dear Mr. & Mrs. Van Alstyne:

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  
E. E. Finucan  
Finucan & Greenwood  
10 E. 40th St.  
New York, NY 10016  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
DAVID VAN ALSTYNE, JR.	:	
and	:	DECISION
JANET G. VAN ALSTYNE	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1960 through 1969.	:	

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Petitioners, David Van Alstyne, Jr. and Janet G. Van Alstyne, 115 Chestnut Street, Englewood, New Jersey 07631, 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 1960 through 1969 (File No. 01772).

A formal hearing was held before Nigel Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 17, 1975 at 1:20 P.M. and continued on August 5, 1976 at 9:15 A.M. The hearing was continued to conclusion before Edward L. Johnson, Hearing Officer, on June 24, 1977 at 12:40 P.M. Petitioners appeared by E. E. Finucan, CPA. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner David Van Alstyne, Jr., a member partner of Van Alstyne, Noel & Co., properly allocated his distributive share of partnership income.

II. Whether petitioner David Van Alstyne, Jr. was required to add to total income his share of the New York City unincorporated business tax deduction taken on the partnership return of Van Alstyne, Noel & Co. for 1966 through 1970.

III. Whether petitioner David Van Alstyne, Jr. was required to report his distributive share of partnership income/loss from Mawdsley, Sellas & Co., a Missouri partnership, for 1968 through 1971.

IV. Whether petitioner David Van Alstyne, Jr. was entitled to deduct losses incurred from a joint venture which was engaged in oil and gas explorations during 1969 and 1970.

V. Whether petitioners were entitled to allocate petitioner David Van Alstyne Jr.'s distributive share of partnership income received from Van Alstyne, Noel & Co. on the basis of days worked within and without New York State.

VI. Whether nonresident petitioner David Van Alstyne, Jr. was entitled to carryback a New York net operating loss even though he did not claim a carryback for Federal income tax purposes.

VII. Whether petitioners were entitled to carryover to 1967, a capital loss for 1965 which was derived from New York State sources.

#### FINDINGS OF FACT

1. Petitioners, David Van Alstyne, Jr. and Janet G. Van Alstyne, filed joint New York State income tax nonresident returns for 1960 through 1969, wherein petitioner David Van Alstyne, Jr. reported his distributive share of partnership income received from Van Alstyne, Noel & Co.

2. Petitioner David Van Alstyne, Jr. also was a member partner of Russell, McElnea & Co. and Mawdsley, Sellas & Co. during the years 1968 through 1971, and a member partner of three oil lease joint ventures in 1969 and 1970. His share of partnership income/loss from Russell, McElnea & Co. is not at issue.

3. Petitioner David Van Alstyne, Jr. signed consents fixing period of limitation upon assessment of personal income and unincorporated business

taxes, which consents extended the period for assessment of personal income tax for 1961 through 1969, until April 15, 1974.

4. On November 26, 1973, the Income Tax Bureau issued a Notice of Deficiency against petitioners for 1960 through 1971, asserting personal income tax of \$134,815.62, penalty, pursuant to section 685(c) of the Tax Law, of \$304.00, and interest of \$45,407.76, for a total sum of \$180,527.38. There was no tax deficiency asserted on said notice for the years 1970 and 1971. The Notice of Deficiency was issued, in part, as a result of a New York field audit of the partnership Van Alstyne, Noel & Co. for the fiscal years ending January 31, 1961 and 1962, for the short period February 1, 1962 through December 31, 1962 and for calendar years 1963, 1964, 1965 and 1968, wherein adjustments were made to the partnership allocation percentage which resulted in personal income taxes due from nonresident partners.

5. Mawdsley, Sellas & Co. was a partnership formed in the State of Missouri. It had two functions: the first was the financing of cattle and included such activities as investing money, borrowing money and making arrangements for various banking relationships in order to get enough money to buy the cattle; the second function was the actual cattle operation which included the purchasing of the animals, the selection of the feed yards in which they were kept, and the checking of the animals until they were ready for sale. Petitioners' representative stated that feed yards were located all over the Southwest and West, including California, Nevada, Louisiana, Texas and Oklahoma. Van Alstyne, Noel & Co. provided the collateral on loans made to Mawdsley, Sellas & Co. Van Alstyne, Noel & Co. was not a member partner in Mawdsley, Sellas & Co., nor did it carry said firm on its books as an investment.

Petitioner David Van Alstyne, Jr. and the other partners of Van Alstyne, Noel & Co. became joint venturers with Nyvatek, a joint venture involved in oil and gas exploration. The joint venture had no place of business in New York State during 1969 and 1970. The partners of Van Alstyne, Noel & Co. and their wives owned a large amount of stock in Nyvatek Oil Co., a public company listed in over-the-counter stocks. The explorations took place in the State of Montana and various other places, but not in New York State. In order to drill for oil, Nyvatek would seek out financing in the Wall Street financial community of New York City, excluding Van Alstyne, Noel & Co., and also from other companies. The partners of Van Alstyne, Noel & Co. became joint venturers as individuals and not as partners. Petitioners contended that Nyvatek also was engaged in a number of financial ventures in New York City, but submitted no evidence to support their contention.

6. Petitioners filed Forms IT-115, "Notice of Change in Taxable Income by United States Treasury Department Pursuant to Section 659 of the New York State Tax Law", for 1960 through 1963 and for 1965 through 1967. The schedules attached to Forms IT-115 for 1962 and 1963 showed that a net operating loss was incurred for said years. Subsequent adjustments made by the Income Tax Bureau's field examiner resulted in the disallowance of the 1963 net operating loss.

7. The 1966 and 1967 adjustments to New York taxable income were based on Federal audit adjustments and petitioner David Van Alstyne, Jr.'s share of the New York City unincorporated business tax deduction taken on the partnership return of Van Alstyne, Noel & Co.

The field audit adjustments for 1968 were based on the disallowance of petitioner David Van Alstyne, Jr.'s share of partnership income/loss from Mawdsley, Sellas & Co., the disallowance of a short-term capital loss from

said firm which was used to reduce long-term capital gains, the allowance of a 1971 net operating loss carryback, and his share of the New York City unincorporated business tax deduction taken on the partnership return of Van Alstyne, Noel & Co.

The field audit adjustments for 1969 and 1970 were based on partnership adjustments relating to Mawdsley, Sellas & Co., losses from oil lease joint ventures, and adjustments to sale of gas and oil properties and oil and gas royalties.

The field audit adjustments for 1971 were based on the disallowance of David Van Alstyne, Jr.'s allocation of salary payments received from Van Alstyne, Noel & Co., which salary was allocated on the basis of days worked within and without New York State, a partnership loss from Mawdsley, Sellas & Co., and omission of the New York City unincorporated business tax modification. The adjustments for 1971 were offset against the loss as shown on petitioners' New York tax return, resulting in a smaller net operating loss for 1971. The Income Tax Bureau limited said loss to the New York State amount since it was smaller than the Federal amount.

8. Petitioners claimed on their 1965 New York income tax return a capital loss of \$1,000.00 (short-term loss of \$738.12 and long-term loss of \$32,272.60) from Van Alstyne, Noel & Co. The remainder of the loss was not allowed as an offset against the net long-term gains in 1967 since said loss was not deducted on petitioners' Federal income tax return.

#### CONCLUSIONS OF LAW

A. That the Audit Division is hereby directed to recompute petitioner David Van Alstyne, Jr.'s proportionate share of partnership income from Van Alstyne, Noel & Co. in a manner consistent with the State Tax Commission decision in the Matter of the Petition of Van Alstyne, Noel & Co., signed on this date.



B. That the New York City unincorporated business tax is an income tax for which deduction shall be allowed under section 706(4) of Article 23 of the Tax Law, which refers to the computation of New York State unincorporated business income tax. For purposes of personal income tax, Article 22 is applicable, which article requires a modification increasing total income by adding back income taxes imposed by this or any other state or taxing jurisdiction; therefore, New York City unincorporated business tax was not deductible in computing New York State adjusted gross income under section 632(a)(2) of the Tax Law.

C. That although financial arrangements were made on behalf of Mawdsley, Sellas & Co., at the offices of Van Alstyne, Noel & Co. in New York City, such location did not constitute a place of business of the Missouri partnership; that even though the interests of the partners in Mawdsley, Sellas & Co. were in the same percentages as their proportionate interests in Van Alstyne, Noel & Co., the Missouri partnership did not maintain in this State a place of business where its business affairs were systemically and regularly carried on. Therefore, petitioner David Van Alstyne, Jr.'s share of partnership loss from Mawdsley, Sellas & Co. is not includable in determining his New York adjusted gross income under section 637(a)(1) of the Tax Law and 20 NYCRR 134.1.

D. That petitioners are not entitled to deduct losses from oil lease joint ventures, since said losses were incurred as a result of oil drilling operations, which were carried on outside New York State, and which were individually financed by petitioner David Van Alstyne, Jr.

E. That petitioner David Van Alstyne, Jr. is not entitled to allocate partnership income based upon the number of days worked within and without New York State since such a method is available only to nonresident employees (Matter of the Petition of John J. McGlew, State Tax Commission March 29, 1972).

F. That the Income Tax Bureau erred in limiting the amount of New York net operating loss carryback for 1971. A nonresident taxpayer who reports his New York income on a separate accounting basis is allowed a net operating loss carryover or carryback deduction even though he does not claim a net operating loss for Federal income tax purposes. (See: John Graham et al. v. State Tax Commission, 48 A.D.2d 444, 369 N.Y.S.2d 863.)

G. That the Income Tax Bureau erred in limiting the amount of the 1965 New York capital loss carryover to 1967 to the amount of Federal carryover for 1967. A nonresident individual is allowed a New York carryover even though he does not have a capital loss carryover for Federal income tax purposes, providing said loss is derived from or connected with New York State sources.

H. That the Audit Division is directed to modify the Notice of Deficiency issued on November 26, 1973 to the extent shown in Conclusions of Law "A", "F", and "G", supra; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
NOV 14 1980

STATE TAX COMMISSION

James D. Tully  
PRESIDENT

James H. [Signature]  
COMMISSIONER

Frank R. Koenig  
COMMISSIONER