

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Burton H. Finkelstein :

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 1973 - 1974. :

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 13th day of March, 1981, he served the within notice of Decision by certified mail upon Burton H. Finkelstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Burton H. Finkelstein
4516 Garfield St., N.W.
Washington, D.C. 20007

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
13th day of March, 1981.

Conrad A. Hegeland

J. Vredenburg

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

March 13, 1981

Burton H. Finkelstein
4516 Garfield St., N.W.
Washington, D.C. 20007

Dear Mr. Finkelstein:

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

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|---|---|----------|
| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| BURTON H. FINKELSTEIN | : | DECISION |
| | : | |
| for Redetermination of a Deficiency or | : | |
| for Refund of Personal Income Tax under | : | |
| Article 22 of the Tax Law for the Years | : | |
| 1973 and 1974. | : | |

Petitioner, Burton H. Finkelstein, 4516 Garfield Street N.W., Washington, D.C. 20007, 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 1973 and 1974 (File No. 18242).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 15, 1979 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether petitioner, a nonresident partner in a New York law firm with a branch office in Washington, D.C., is entitled to allocate his distributive share of partnership income.

FINDINGS OF FACT

1. Petitioner, Burton H. Finkelstein, filed a joint New York State income tax nonresident return for 1973. On May 14, 1975, he filed an amended income tax return for 1973. On the original 1973 return, petitioner checked filing status box number 2, i.e. "Married filing joint return" and on the 1974 return and the 1973 Amended Return the petitioner checked filing status box number 3, i.e. "Married filing separate return". Petitioner's spouse did not sign any of the returns.

2. On January 24, 1977, the Audit Division issued a Notice of Deficiency against petitioner on which it listed the following amounts:

| | <u>Deficiency</u> | <u>Penalty</u> | <u>Interest</u> | <u>Total</u> |
|--------|----------------------------|-------------------|-----------------|-----------------|
| 1973 | \$ 5,742.89 | \$166.11 | \$ 692.20 | \$ 6,601.20 |
| 1974 | <u>7,593.31</u> | <u> </u> | <u>1,148.72</u> | <u>8,742.03</u> |
| Totals | \$13,336.20 | \$166.11 | \$1,840.92 | \$15,343.23 |
| | Overpayment on 1973 return | | \$ 2,420.61 | |
| | Amount Due | | \$12,922.62 | |

3. After his graduation from the University of Pennsylvania Law School in 1962 and during 1963 and part of 1964, petitioner resided in either the State of Maryland or the State of Virginia. From 1964 through the tax years in issue, petitioner was a resident of Washington, D.C. From 1963 until 1969, petitioner was employed in Washington, D.C., first as General Attorney for the Federal Power Commission and then as Trial Attorney, Special Counsel and Assistant Director, Trading and Markets Division, U.S. Securities and Exchange Commission.

4. Petitioner, in December, 1969, left the employment of the U.S. Securities and Exchange Commission, and was employed as an associate attorney in the Washington, D.C. law offices of Phillips, Nizer, Benjamin, Krim & Ballon, ("Phillips, Nizer"), a law firm having its principal offices in the City of New York.

5. On July 1, 1972, petitioner, pursuant to an agreement, became a partner of Phillips, Nizer working out of its Washington, D.C. office.

6. During 1973 and 1974, petitioner spent most of his time in Washington, D.C. on matters relating to Phillips, Nizer. His practice was engaged in what was called "national", as distinguished from "local" law, i.e., he represented clients located in all parts of the country in connection with their legal problems arising in departments and agencies of the federal government, and in related litigation in federal courts, in Washington, D.C.

7. During 1973 and 1974 petitioner's practice consisted almost exclusively of clients whom he brought into the firm and personally serviced. His time was devoted primarily to his own clients, introduced to him by sources other than Phillips, Nizer's New York office, with a small percentage of his time devoted to servicing the firm's New York clients amounting to 4.84 percent in 1973 and 8.35 percent in 1974. The following is a breakdown of the hours and percentage of time petitioner devoted to clients of the firm's New York office:

| | <u>1973</u> | <u>1974</u> |
|--|-------------|-------------|
| Total hours worked..... | 1,880 | 2,012 |
| Hours devoted to firm's clients generated out of New York office..... | 91 | 168 |
| Percentage of time devoted to firm's clients generated out of New York office..... | 4.84% | 8.35% |

In connection with his own clients, petitioner personally handled his clients' matters, determined what fees they were to be charged, billed them directly, and received their checks in payment, all without consulting the New York office.

8. Petitioner's admission to partnership in Phillips, Nizer is recorded in Amendment No. 12, dated September 1, 1972, to the firm's partnership agreement, dated July 1, 1954. This Amendment provided:

"The Parties of the Second Part [i.e. Mr. Finkelstein and the others admitted to partnership at the same time] were duly admitted to partnership in the Firm as of July 1, 1972. Their respective participation in the net income, profits and losses of the Firm shall be such respective percentages as shall be determined by the Executive Committee of the Firm based upon their respective salaries, bonuses and other income from the Firm prior to their admission to partnership."

9. When petitioner became a partner of Phillips, Nizer, it was agreed that he and the firm's executive committee would negotiate his income based on his productivity in generating and servicing clients which he introduced to

the firm. It was further agreed that if the firm suffered financial reverses in any given year, his income would not be subject to the fluctuations of the firm's financial position, but instead would remain as agreed.

10. For the year 1973, it was agreed that petitioner would be paid \$62,000.00. In 1973, petitioner's clients paid gross fees to the firm of \$104,750.00. His proportionate share of the overhead of the firm's Washington, D.C. office was \$12,000.00, making his net fees \$92,750.00, of which his income was \$62,000.00 or approximately 65 percent. Similar negotiations occurred with respect to 1974 in which it was agreed petitioner would be paid \$76,299.33. In 1974, petitioner's clients paid gross fees to the firm of \$186,350.00. His proportionate share of the overhead of the firm's Washington, D.C. office was \$34,750.00, making his net fees \$151,600.00, of which his income was \$76,299.33 or approximately 50 percent.

11. Under the procedures which Phillips, Nizer followed in 1973 and 1974, substantially all of petitioner's income, i.e., 95.16 percent in 1973 and 91.65 percent in 1974 was derived from the practice he generated and serviced in Washington, D.C. and only 4.84 percent in 1973 and 8.35 percent in 1974 was derived from the firm's New York office. The partnership did not allocate income outside of New York on its New York State partnership return.

12. Petitioner did not submit any evidence as to the allocation that would have been allowed if the partnership had allocated its net income between the New York and Washington, D.C. offices.

13. Petitioner has been a member of the Washington, D.C. Bar since 1963, but he has never been a member of the New York Bar. From 1963, until and during the tax years in issue, he had never practiced law in any jurisdiction other than Washington, D.C. The letterhead of Phillips, Nizer indicated that he was assigned to the Washington, D.C. office and that he was not admitted to the New York Bar.

CONCLUSIONS OF LAW

A. That petitioner Burton H. Finkelstein erroneously allocated his distributive share of partnership income on the basis of the ratio that hours devoted to New York clients bore to total hours worked (in Finding of Fact "7" supra). Income received by a nonresident from a New York law firm in which he is a partner is allocated to New York sources for personal income tax purposes on the same basis as the firm uses to allocate the distributive share of each partner, even though the partner mostly works in Washington, D.C. (see Thomas M. DeBevoise et al. v. State Tax Commission, 52 A.D.2d 1023, 383 N.Y.S.2d 698; Alfred R. McCauley v. State Tax Commission, 67 A.D.2d 51, 415 N.Y.S.2d 118).

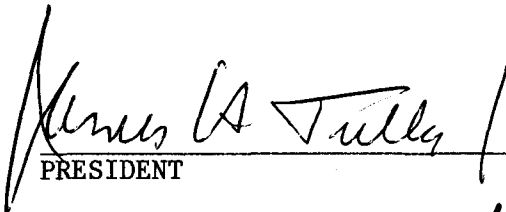
B. That petitioner failed to sustain the burden of proof imposed by section 689(e) of the Tax Law in establishing what the allocation percentage would have been had the partnership allocated its net income. Therefore, the entire distributive share of partnership income received from Phillips, Nizer, Benjamin, Krim & Ballon is subject to personal income tax.

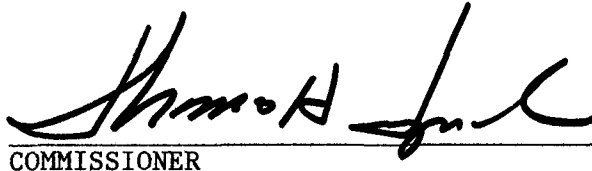
C. That the petition of Burton H. Finkelstein is denied and the Notice of Deficiency issued on January 24, 1977 is sustained.


DATED: Albany, New York

MAR 13 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER