

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benito & Frances Gaguine :
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 :
1974 & 1975. :

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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Benito & Frances Gaguine, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Benito & Frances Gaguine
3628 Appleton Station NW
Washington, DC 20008

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
25th day of September, 1981.

Annie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benito & Frances Gaguine :
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 :
1974 & 1975.

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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Leonard S. Schwartz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard S. Schwartz
850 Third Ave.
New York, NY 10022

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
25th day of September, 1981.

Annie A. Haglund

J. Vredenburg

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

September 25, 1981

Benito & Frances Gaguine
3628 Appleton Station NW
Washington, DC 20008

Dear Mr. & Mrs. Gaguine:

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
Leonard S. Schwartz
850 Third Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BENITO GAGUINE and FRANCES GAGUINE	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1974 and 1975.	:	

Petitioners, Benito Gaguine and Frances Gaguine, 3628 Appleton Station N.W., Washington, DC 20008, 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 1974 and 1975 (File No. 23389).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 15, 1980 at 1:15 P.M. Petitioners appeared by Leonard S. Schwartz, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the "alternate allocation formula" used on the partnership returns of Fly, Shuebruk, Blume & Gaguine accurately reflects its income derived from New York sources.

FINDINGS OF FACT

1. Petitioners, Benito Gaguine and Francis Gaguine, filed joint New York State income tax nonresident returns for the years 1974 and 1975 wherein they reported petitioner Benito Gaguine's distributive share of income allocable to New York from the partnership of Fly, Shuebruk, Blume & Gaguine (hereinafter the partnership) for each of said years.

2. On February 1, 1978, the Audit Division issued a Statement of Audit Changes wherein petitioner Benito Gaguine's distributive shares from the partnership for 1974 and 1975 were increased to conform with the Audit Division's adjustments to the business allocation percentage of the partnership. Accordingly, a Notice of Deficiency was issued to the petitioners on April 4, 1978 asserting additional personal income tax of \$2,071.04, plus interest of \$442.32, for a total due of \$2,513.36.

3. Fly, Shuebruk, Blume & Gaguine, a law partnership specializing in Federal Communication Commission matters, maintained offices in Washington, D.C. and New York. On filing its returns for the fiscal years ended April 30, 1974 and April 30, 1975, the partnership allocated its income between the offices using an alternative method comprised of two factors, specifically, the gross income percentage and the payroll percentage. As a result of audit, the Audit Division adjusted the partnership's allocation percentage by computing same under the method prescribed within 20 NYCRR 131.13(b). Such method uses three factors which, in addition to the factors used by the partnership, incorporates a property percentage factor.

4. Petitioner argued that the property percentage factor was deleted from the partnership's alternative method since use of said factor would yield an inequitable allocation percentage which does not accurately reflect the location where the partnership income was earned. The major portion of the partnership's business was conducted through the Washington, D.C. office, where five partners were assigned, rather than the New York office, where only two partners were assigned. The rent paid for office space in New York was far greater than that paid in Washington, D.C., even though the New York office was the smaller of the two. Accordingly, it is the petitioner's position that the property percentage is unsuitable for use as an allocation factor in

the instant case.

5. The partnership's allocation percentages, as computed on its returns under its alternative two factor method, yielded percentages of 35.375 percent for fiscal year ended April 30, 1974 and 32.785 percent for fiscal year ended April 30, 1975, whereas the Audit Division's adjusted allocation percentages under the three factor method prescribed under 20 NYCRR 131.13(b) yielded percentages of 45.83 percent and 43.12 percent respectively.

6. During the hearing, petitioner's representative submitted worksheets, prepared on behalf of the firm, showing the income and expenses attributable to the New York office and to the Washington, D.C. office. The amounts listed as expenses included an expenditure for payment to a KEOGH Plan. Furthermore, several expenses which normally would be allocated between offices were charged entirely to the New York office. Petitioner did not submit any documentary evidence showing how the amounts were determined. The schedules attached to the worksheets for the fiscal years ending April 30, 1974 and 1975 showed the New York office as receiving approximately 26 percent of the net income of the firm for each year while expenses represented approximately 50 percent of the total amount paid. Petitioner's representative also submitted schedules wherein he computed allocation percentages under various other methods which he contended were reasonable. These other methods yielded percentages allocable to New York which were closer to those claimed by the partnership, than those computed by the Audit Division.

7. The Audit Division's position during the course of the hearing was that the partnership's alternative allocation method was unacceptable because approval was not sought and granted for use of such method prior to the partnership's filing of the returns for the years at issue.

CONCLUSIONS OF LAW

A. That the worksheets submitted by petitioner show a deduction for KEOGH Plan, which deduction is not allowed for unincorporated business tax purposes, and deductions which normally would be allocated among offices were charged against New York income in full. Therefore, the aforementioned worksheets do not properly reflect the New York expenses of the partnership. The "Direct Accounting" method is the preferred method of allocation (Piper, Jaffray & Hopwood v. State Tax Commission, 42 A.D.2d 381, 348 N.Y.S.2d 242) and is to be utilized unless, as in this case, the partnership books do not adequately separate out New York income and/or expenses.

B. That petitioners have failed to sustain their burden of proof imposed by section 689(e) of the Tax Law to show that the three factor formula is inequitable. Therefore, said method is to be used in determining the distributive share of petitioner Benito Gaguine within the meaning and intent of section 632(c) of the Tax Law and 20 NYCRR 131.13.

C. That the petition of Benito Gaguine and Frances Gaguine is denied and the Notice of Deficiency issued on April 4, 1978 is sustained.

DATED: Albany, New York

SEP 25 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER