

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
John D. & Nancy A. Koenig :  
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 :  
1973. :

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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 13th day of November, 1981, he served the within notice of Decision by certified mail upon John D. & Nancy A. Koenig, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

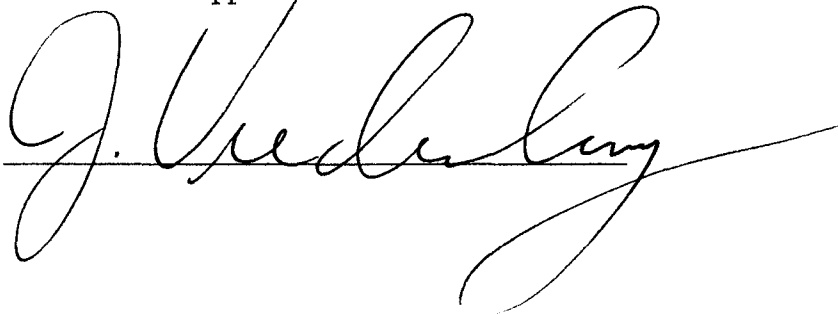
John D. & Nancy A. Koenig  
112 Ridge Rd.  
Rumson, NJ 07760

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 November, 1981.





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

November 13, 1981

John D. & Nancy A. Koenig  
112 Ridge Rd.  
Rumson, NJ 07760

Dear Mr. & Mrs. Koenig:

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  
JOHN D. and NANCY A. KOENIG  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1973.

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DECISION

Petitioners, John D. and Nancy A. Koenig, 112 Ridge Road, Rumson, New Jersey 07760, 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 1973 (File No. 19448).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 18, 1979 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by Peter Crotty, Esq., (J. Ellen Purcell, Esq., of counsel).

ISSUE

Whether New York City unincorporated business tax is an "income tax" which must be added to Federal adjusted gross income in determining New York adjusted gross income.

FINDINGS OF FACT

1. Petitioners, John D. and Nancy A. Koenig, husband and wife, were throughout the period herein involved non-residents of the State of New York. They timely filed a New York State Non-Resident Income Tax Return (Form IT-203) for 1973 on which they allocated wage and salary income to New York by the factor 184/223. They did not increase federal income on the return by Mr.

Koenig's share of the New York City unincorporated business tax deduction taken on the return of a partnership in which he was a member.

2. On April 11, 1977, petitioners were issued a Notice of Deficiency and a Statement of Audit Changes which asserted additional income taxes of \$2,386.40 plus interest of \$534.95 as due for the year 1973.

3. The additional personal income tax deficiency for 1973 was due to the disallowance of the allocation of income and an addition to Federal income of \$2,476.00, Mr. Koenig's share of the New York City unincorporated business tax deduction taken by the partnership.

4. Petitioner John D. Koenig was a partner in the New York City law firm of Gasser & Hayes.

5. Petitioner John D. Koenig has conceded that since the partnership did not allocate any of its 1973 income to sources outside of New York State, he could not individually, as a matter of law, do so. Petitioners have therefore withdrawn all objections to the determination of an increased income tax based on the disallowance of such allocation.

6. Petitioners' case was submitted for determination of the single legal question of whether the New York City Unincorporated Business Tax is analogous to a franchise tax in that both constitute a tax on the right or privilege of carrying on a business.

7. Petitioners contend that although the New York City Unincorporated Business Tax is computed on the basis of personal income derived from the business, it is not a personal income tax but is equivalent to the corporate franchise tax computed on the basis of corporate earnings. Petitioners further contend that the New York City Unincorporated Business Tax, like a franchise tax, should be treated as an ordinary and necessary expense of doing business

and thus a partner's distributive share of such tax should be allowed as a deduction against his taxable income.

8. It was conceded at the hearing that the Audit Division made an error in calculating the amount of personal income tax due as shown on the Statement of Audit Changes, and thus even if such statement were correct on all other points, the amount of tax due should be reduced by \$189.00 as well as any interest calculated thereon.

#### CONCLUSIONS OF LAW

A. That the New York City unincorporated business tax is an "income" tax within the meaning and intent of Chapter 46, title S of the Administrative Code of the City of New York. Matter of Richard J. Taylor, State Tax Commission Decision, June 20, 1980.

B. That income taxes imposed by the State or any other taxing jurisdiction, to the extent deductible in determining Federal adjusted gross income, shall be added to such income in determining New York adjusted gross income of a resident individual, under sections 617 and 612(b)(3) of the Tax Law. Furthermore, sections 632 and 637 make sections 612(b)(3) and 617 of the Tax Law applicable to non-resident taxpayers to the extent their income is derived from or connected with New York sources. Accordingly, New York City unincorporated business tax is not properly deductible by either residents or non-residents in computing New York State personal income tax. See Matter of Samuel L. Nadler, State Tax Commission Decision, May 16, 1980.

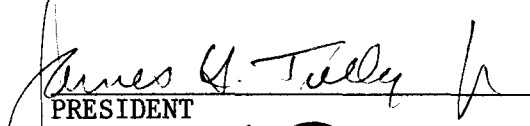
C. That since all of the income upon which the unincorporated business tax was based is conceded to have been derived from or connected with New York sources, petitioner John D. Koenig's distributive share of such tax is not properly deductible in computing New York State personal income tax.

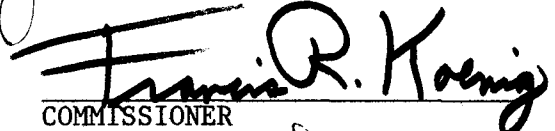
D. That the petition of John D. and Nancy A. Koenig, is granted to the extent conceded by miscalculation in the Statement of Audit Changes, (Finding of Fact "8" supra) and except as so granted, it is in all other respects denied.

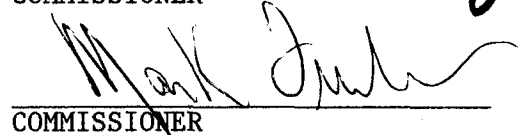
DATED: Albany, New York

NOV 13 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER