

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

J. Edward & Gabrielle McDonough :

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 6th day of March, 1981, he served the within notice of Decision by certified mail upon J. Edward & Gabrielle McDonough, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. Edward & Gabrielle McDonough

62-18 80th St.

Middle Village, NY 11379

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

6th day of March, 1981.

Annie P. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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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 6th day of March, 1981, he served the within notice of Decision by certified mail upon John Gardner 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 Gardner
Bower & Gardner
415 Madison Ave.
New York, NY 10017

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
6th day of March, 1981.

Annie A. Hagelund

Jay Vredenburg

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

March 6, 1981

J. Edward & Gabrielle McDonough
62-18 80th St.
Middle Village, NY 11379

Dear Mr. & Mrs. McDonough:

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 Gardner
Bower & Gardner
415 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
J. EDWARD MCDONOUGH and GABRIELLE MCDONOUGH
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.

DECISION

Petitioners, J. Edward McDonough and Gabrielle McDonough, 62-18 80th Street, Middle Village, New York 11379, 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. 24254).

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 April 24, 1980 at 9:15 A.M. Petitioner appeared by John Gardner, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether the 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.

II. Whether section 612(b)(3) of the Tax Law is constitutional if applicable to the New York City unincorporated business tax.

III. Whether the Notice of Deficiency should be cancelled as a result of the Law Bureau's failure to serve an answer to the petition of J. Edward McDonough and Gabrielle McDonough.

FINDINGS OF FACT

1. Petitioners, J. Edward McDonough and Gabrielle McDonough, filed joint New York State income tax resident returns for the years 1974 and 1975 wherein Federal adjusted gross income was reported without any modifications thereto as provided for in section 612 of the Tax Law.

2. Petitioner J. Edward McDonough is an attorney and a partner in the law firm of Bower & Gardner, 415 Madison Avenue, New York City. Said firm deducted 1974 and 1975 New York City unincorporated business tax as an expense item on its Federal partnership returns.

3. On December 15, 1977, the Audit Division issued a Statement of Audit Changes to petitioners wherein it was stated that "Unincorporated Business Taxes imposed by New York City are not deductible in determining personal income tax." Based on the above, petitioners reported "total income" was increased by \$1,631.29 for 1974 and \$2,293.75 for 1975. Said amounts represented petitioner J. Edward McDonough's distributive share of the New York City unincorporated business tax deduction taken on the partnership returns of Bower and Gardner for said years. Accordingly, a Notice of Deficiency was issued against petitioners on March 24, 1978 asserting additional personal income tax of \$597.35, plus interest of \$119.14, for a total due of \$716.49.

4. Petitioner J. Edward McDonough contended that the New York City unincorporated business tax is a business excise tax rather than an income tax, and that no modification with respect thereto is required by the Tax Law. Additionally, he argued that to require such modification results in the same money being taxed twice, thereby making such modification, if in fact required, unconstitutional.

5. Petitioners contended that since the Law Bureau has not served an answer to their petition, the allegations of fact set forth in their petition

are deemed to be admitted. Accordingly, they argue that the Notice of Deficiency should be cancelled on this ground.

CONCLUSIONS OF LAW

A. That the New York City unincorporated business tax is an "income tax" pursuant to chapter 46, title S of the Administrative Code of the City of New York.

B. That the amounts representing petitioner J. Edward McDonough's distributive share of New York City unincorporated business tax deductions taken on the partnership returns of Bower & Gardner must be added to Federal adjusted gross income in accordance with the meaning and intent of section 612(b)(3) of the Tax Law and 20 NYCRR 116.2(c).

C. That there is no jurisdiction at the administrative level to declare such law unconstitutional. Therefore, it must be presumed that section 612(b)(3) of the Tax Law is constitutional to the extent it relates to the imposition of a personal income tax liability on petitioners.

D. That where the Law Bureau fails to answer (the petition) within the prescribed time, petitioner may make a motion to the State Tax Commission on notice to the Law Bureau, for a determination on default. The State Tax Commission shall either grant that motion and issue a default decision or shall determine such other appropriate relief that it deems is warranted (20 NYCRR 601.6(4)). That the petitioner has failed to comply with the motion practice requirements pursuant to 20 NYCRR 601.10. Accordingly, no motion exists. However, whether the Notice of Deficiency should be cancelled as a result of the Law Bureau's failure to service an answer to the petition shall be an issue herein.

That the record does not indicate that the actions or inactions of the Department of Taxation and Finance have unduly prejudiced or adversely

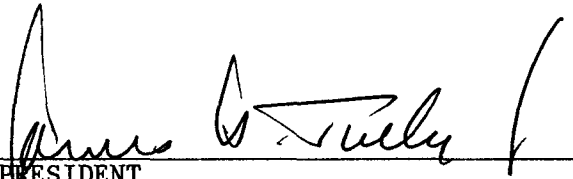
affected the petitioners' position in this matter, nor is there any evidence or indication of a denial of due process, therefore the Notice of Deficiency is sustained.

E. That the petition of J. Edward McDonough and Gabrielle McDonough is denied and the Notice of Deficiency dated March 24, 1978 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

MAR 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER