

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Charles A. Scharf :
and Ruth K. Scharf :
: 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 19th day of June, 1981, he served the within notice of Decision by certified mail upon Charles A. Scharf and Ruth K. Scharf the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles A. Scharf
and Ruth K. Scharf
3 Bay Ave.
Larchmont, NY 10538

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
19th day of June, 1981.

Carmie A. Hegeland

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Charles A. Scharf :
and Ruth K. Scharf :

: 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 19th day of June, 1981, he served the within notice of Decision by certified mail upon Charles A. Scharf 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. Charles A. Scharf
60 E. 42nd St., Rm. 2033
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
19th day of June, 1981.

Connie A. Haglund

J. Vredenburg

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

June 19, 1981

Charles A. Scharf
and Ruth K. Scharf
3 Bay Ave.
Larchmont, NY 10538

Dear Mr. & Mrs. Scharf:

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
Charles A. Scharf
60 E. 42nd St., Rm. 2033
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
CHARLES A. SCHARF and RUTH K. SCHARF	:	DECISION
for Redetermination of Deficiencies	:	
or for Refund of Personal Income Tax	:	
under Article 22 of the Tax Law for	:	
the Years 1973 and 1974.	:	

Petitioners, Charles A. Scharf and Ruth K. Scharf, 3 Bay Avenue, Larchmont, New York 10538, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1973 and 1974 (File Nos. 18804 & 21761).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1980 at 9:15 A.M. Petitioner Charles A. Scharf appeared pro se and for his wife. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioners, in computing total New York income, must increase reported Federal adjusted gross income by their share of the New York City unincorporated business tax deductions taken on the partnership returns of Ide and Haigney.

II. Whether the imposition of New York State personal income tax on non-realized income was in violation of the United States and New York State constitutions.

FINDINGS OF FACT

1. Petitioners, Charles A. Scharf and Ruth K. Scharf, timely filed New York State resident income tax returns for the years 1973 and 1974. Total New York income reported on said returns equaled the amounts reported as Federal adjusted gross income on petitioners' 1973 and 1974 Federal income tax returns.

2. On February 28, 1977, the Audit Division issued a Notice of Deficiency against petitioners for the year 1973, asserting that additional personal income tax of \$667.24 was due together with interest. A second Notice of Deficiency was issued against petitioners for the year 1974 on March 24, 1978, asserting additional personal income tax due of \$196.20, together with interest.

3. Both of the aforementioned notices of deficiency were based on the grounds that petitioners failed to increase reported Federal adjusted gross income for 1973 and 1974 by the respective amounts of \$4,448.27 and \$1,308.00. It is the Audit Division's position that these amounts represent petitioner Charles A. Scharf's share of the New York City unincorporated business tax deduction taken on the partnership returns of Ide and Haigney (hereinafter "partnership") and that, pursuant to section 612(b)(3) of the Tax Law, said amounts must be added to Federal adjusted gross income to compute total New York income.

4. Petitioner Charles A. Scharf was a member partner of the law firm Ide and Haigney for a period of approximately five years prior to his resignation from said firm, effective as of the close of business on December 31, 1972. After his resignation, petitioner Charles A. Scharf was no longer connected with the partnership in the practice of law or the conduct of any other business.

5. Although no longer associated with the partnership after 1972, petitioner Charles A. Scharf was still entitled to share in various percentages of fees yet to be realized for past services rendered to clients of the partnership. His share of these anticipated fees was fixed upon his resignation and said fees were remitted to petitioner Charles A. Scharf when collected from the clients. Both the partnership and petitioners were cash basis taxpayers.

6. During the years 1973 and 1974, petitioner Charles A. Scharf received from the partnership the sums of \$106,758.54 and \$30,344.98, respectively. These amounts represent the fees herein discussed in Finding of Fact "5", supra.

7. Petitioner Charles A. Scharf argued that he did not conduct an unincorporated business during 1973 and 1974 as a member or a participant in the business of the partnership. He also argued that the sums in question, i.e. \$4,448.27 and \$1,308.00, were not received by him and that to tax non-realized income would be unconstitutional under both the New York State and Federal constitutions.

8. Schedule P on page 3 of the 1973 and 1974 New York State partnership returns filed by Ide and Haigney indicate that petitioner Charles A. Scharf's share of income and unincorporated business taxes totaled \$4,448.27 and \$1,308.58, respectively.

CONCLUSIONS OF LAW

A. That the sums to which petitioner Charles A. Scharf was entitled to receive from the partnership in 1973 and 1974 constituted a portion of the gross income of the partnership, for which said partnership was liable to pay to the City of New York an unincorporated business tax thereon. That the sums received by petitioner Charles A. Scharf from the partnership in 1973

and 1974 were computed after taking into consideration a deduction for the unincorporated business tax paid by the partnership to the City of New York on said income.

B. That the New York adjusted gross income of a resident individual is his Federal adjusted gross income increased, pursuant to section 612(b) (3) of the Tax Law, by:

Income taxes imposed by this state or any other taxing jurisdiction, to the extent deductible in determining federal adjusted income and not credited against federal income tax.

That the sums of \$4,448.27 for 1973 and \$1,308.00 for 1974 constituted petitioner Charles A. Scharf's distributive share of the income taxes imposed by a taxing jurisdiction which were deducted by the partnership in determining its net income and, accordingly, these amounts must be added to petitioners' reported Federal adjusted income to determine New York adjusted gross income within the meaning and intent of sections 612(b) (3) and 617 of the Tax Law and 20 NYCRR 116.2(c) and 119.3.

C. That petitioners have failed to sustain the burden of proof imposed by section 689(e) of the Tax Law to show that the 1973 and 1974 partnership returns of Ide and Haigney were incorrectly prepared or that the sums of \$4,448.27 for 1973 and \$1,308.00 for 1974 were not income taxes imposed by a taxing jurisdiction which were deducted in determining his distributive share of partnership income.

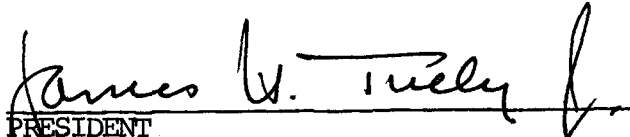
D. That the constitutionality of the laws of the United States of America and State of New York is presumed by the State Tax Commission. There is no jurisdiction at the administrative level to declare such laws unconstitutional; therefore, it must be presumed that the relevant sections of the law are constitutional to the extent that they relate to the imposition of the income tax liability on petitioners.

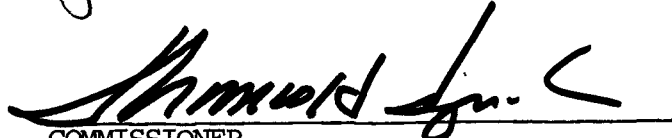
E. That the petitions of Charles A. Scharf and Ruth K. Scharf are denied and the notices of deficiency dated February 28, 1977 and March 24, 1978 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1981


PRESIDENT


COMMISSIONER


COMMISSIONER