

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

Wendell & Penelope Davis, Jr.

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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 :  
1974.

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Wendell & Penelope Davis, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wendell & Penelope Davis, Jr.  
1261 Madison Ave., Apt. 1-S  
New York, NY 10028

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  
9th day of April, 1982.

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

April 9, 1982

Wendell & Penelope Davis, Jr.  
1261 Madison Ave., Apt. 1-S  
New York, NY 10028

Dear Mr. & Mrs. Davis:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

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  
WENDELL DAVIS, JR. and PENELOPE C. DAVIS  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1974.

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DECISION

Petitioners, Wendell Davis, Jr. and Penelope C. Davis, 1261 Madison Avenue, Apt. 1-S, New York, New York 10028, 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 1974 (File No. 24059).

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 June 4, 1981 at 10:45 A.M. Petitioner, Wendell Davis, Jr., appeared pro se and for his wife. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

#### ISSUES

I. Whether the New York City unincorporated business tax imposed on the net income of the partnership McConnell, Scheuermann & Davis constitutes an income tax imposed upon petitioner Wendell Davis, Jr., thereby requiring him to add his distributive share of said tax to his individual Federal adjusted gross income.

II. Whether the expiration of a three-year period from the time a petition was filed until the time an evidentiary hearing was held constitutes undue and unwarranted delay, thereby violating the Rules of Practice and Procedure (20

NYCRR 601) and the due process clauses of the United States and New York State constitutions.

FINDINGS OF FACT

1. Petitioners, Wendell Davis, Jr. and Penelope C. Davis, timely filed a 1974 New York State Income Tax Resident Return wherein they reported total New York income of \$55,959.84. Included in total New York income was petitioner Wendell Davis' \$27,506.31 distributive share of partnership income earned from the law firm of McConnell, Scheuermann & Davis (hereinafter MSD). Petitioner Penelope C. Davis is involved in this proceeding due solely to the filing of a joint income tax return and, accordingly, the use of the term petitioner hereinafter will refer only to Wendell Davis, Jr.

2. On March 24, 1978, the Audit Division issued to petitioners a Notice of Deficiency asserting that, for the year 1974, additional personal income tax of \$289.85 was due together with interest. Said Notice was based on a Statement of Audit Changes dated December 15, 1977 wherein the adjustment to petitioner's return was explained in the following manner:

"Unincorporated business taxes imposed by New York City are not deductible in determining personal income tax. On your personal income tax return you failed to increase your Federal income by \$1,932.33 representing your distributive share of the New York City unincorporated business tax deduction taken on the partnership return of McConnell, Scheuermann & Davis."

3. During the tax year in question petitioner was a resident partner of MSD having a one-third interest in the profits and losses of said firm. The 1974 New York State partnership return filed by MSD reported net income of \$82,517.00, with petitioner's one-third share totaling \$27,506.00. In computing the net income shown on its partnership return, MSD took a deduction of \$5,797.00 for unincorporated business taxes paid to the City of New York. Petitioner's

one-third share of the New York City unincorporated business tax deduction amounted to \$1,932.33.

4. Petitioner argues that the New York City unincorporated business tax was an income tax imposed on the partnership, and not him, and therefore, it is not an income tax which he must add to his individual Federal adjusted gross income within the meaning and intent of section 612(b)(3) of the Tax Law.

5. The petition for redetermination of the aforementioned Notice of Deficiency was filed on June 12, 1978, with the administrative hearing being held on June 4, 1981. Petitioner argues that a lapse of almost three years in the scheduling of a hearing constitutes undue and unwarranted delay which violates the Rules of Practice and Procedure and the due process clauses of the United States and New York State constitutions. Petitioner failed to adduce any documentary or other evidence to show that the delay damaged or prejudiced his case.

#### CONCLUSIONS OF LAW

A. That petitioner Wendell Davis' proportionate share of the New York City unincorporated business tax deduction claimed on the partnership return of MSD constitutes an income tax which is required to be added to his Federal adjusted gross income in the computation of total New York income within the meaning and intent of sections 617(a) and 612(b)(3) of the Tax Law and 20 NYCRR 119.3(a) and 116.2(c) (Berardino v. State Tax Commission, 78 A.D.2d 936; Kern v. State Tax Commission, Albany County Special Term, Doran, R.F., May 14, 1981).

B. That the argument to dismiss on the ground of undue and unwarranted delay is denied on authority of Matter of Jamestown Lodge 1681 Loyal Order of Moose, Inc., (Catherwood) 31 A.D.2d 981, where it is said that "Laches, waiver

or estoppel may not be imputed to the State in the absence of statutory authority" and that "This rule is generally applied in connection with tax matters". Also, see G. H. Walker & Co., et al., v. State Tax Commission, 62 A.D.2d 77.

Said argument is also denied for the further reason that the record does not establish that petitioner has been damaged or prejudiced by delay.

C. That the petition of Wendell Davis, Jr. and Penelope C. Davis is denied and the Notice of Deficiency dated March 24, 1978 is sustained, together with such additional interest as may be lawfully due and owing.

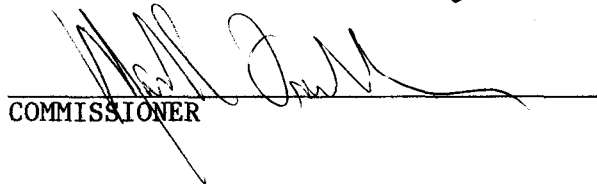
DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER