

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John A. & Millena M. Demetrius :
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 :
1976. :

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon John A. & Millena M. Demetrius, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John A. & Millena M. Demetrius
39 Weinmans Blvd.
Wayne, NJ 07470

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
4th day of August, 1982.

Anna A. Fogel

J. Vredenburg

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

August 4, 1982

John A. & Millena M. Demetrius
39 Weinmans Blvd.
Wayne, NJ 07470

Dear Mr. & Mrs. Demetrius:

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

In the Matter of the Petition
of
JOHN A. DEMETRIUS AND MILLENA DEMETRIUS
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1976.

DECISION

Petitioners, John A. Demetrius and Millena M. Demetrius, 39 Weinmans Blvd., Wayne, New Jersey 07470, 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 1976 (File No. 26024).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 28, 1981 at 2:45 P.M. Petitioners appeared with Warney Lowey, C.P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner John A. Demetrius, a nonresident, was a partner or an employee in the New York partnership of Brout and Company for New York State income tax purposes.

II. If petitioner John A. Demetrius is held to be a partner in the New York partnership, then whether he is entitled to allocate his distributive share of partnership income, as income from sources within and without New York State for the subject year.

III. Whether the imposition of tax on that portion of petitioner John A. Demetrius' partnership income attributable to services performed by him outside of the State of New York is violative of his Federal constitutional rights.

FINDINGS OF FACT

1. Petitioners, John A. Demetrius and Millena M. Demetrius, his wife, filed a New York State Income Tax Nonresident Return for 1976. Petitioner John A. Demetrius allocated the income received from a New York partnership, of which he was a proprietary partner, on the basis of days worked within and without New York State.

2. On April 17, 1978, the Audit Division issued a Statement of Audit Changes against petitioners on the ground that petitioner John A. Demetrius, as a proprietary partner in the New York partnership of the accounting firm of Brout and Company ("Brout"), may not allocate income derived therefrom on the basis of days worked within and without New York State. Accordingly, it issued a Notice of Deficiency, under date of July 10, 1978, against petitioners asserting personal income tax of \$1,791.89, plus interest of \$186.53, for a total of \$1,978.42.

3. At the hearing, it was stipulated by the Bureau's representative and the petitioners that reported business income in the amount of \$663.00, earned by petitioner John A. Demetrius from his individual proprietorship, should have been reported as a loss, and, accordingly, applied against the limitation percentage for computing the itemized deductions allowed a nonresident taxpayer.

4. During the year 1976, petitioner John A. Demetrius, a resident of New Jersey, was a partner in an accounting firm whose only office was in New York. Acting on behalf of the partnership, he performed various accounting services outside of New York for clients which neither maintained offices nor did any

business in New York. The services were performed by petitioner both at the clients office and/or his home, but the fees which these services generated were paid directly to the partnership.

5. The partnership return for 1976 made no provisions for the allocation of income for a nonresident partner.

6. Petitioner John A. Demetrius contended that his distributive share of the partnership income resulting from his work days outside of New York in the service of foreign clients should be excluded in computing his New York taxable income. Petitioner argued that in computing the income tax properly due on his income from the partnership he should be allowed to apply the same allocation formula to his income with respect to services performed within New York and without New York as would be applied if the services had been performed by him for a corporation with an office outside of New York State. Petitioner also argued that by imposing a tax on that portion of his partnership income attributable to services performed by him outside the State of New York, the state is proceeding in violation of the United States Consitution.

CONCLUSIONS OF LAW

A. That petitioner John A. Demetrius was a partner, and not an employee in the New York State partnership of Brout and Company. A partnership arises out of contract of the parties [Porter v. Cooke, 127 F.2d 853, 858 (5th Cir.), cert. denied, 317 U.S. 670 (1942)]. Petitioner joined the enterprise as a proprietary partner pursuant to an agreement.

B. That petitioner John A. Demetrius' distributive share of the partnership income was derived from or connected with New York sources, and is, therefore, New York State income within the meaning and intent of section 632 of the Tax Law. Further, the fees generated by his services were paid directly to "Brout",

and petitioner received only his distributive share thereof. In addition, petitioner's home in New Jersey did not constitute a regular place of business of the partnership outside of New York State during said year, in accordance with the meaning and intent of section 707(a) of the Tax Law and 20 NYCRR 207.2.

C. That the constitutionality of the laws of the State of New York is presumed at the administrative level. Additionally, there is no jurisdiction at the administration level to declare such laws unconstitutional. Therefore, it must be presumed that the Tax Law is constitutional to the extent that it relates to the imposition of income tax on the petitioner.

D. That the petition of John A. Demetrius and Millena Demetrius is granted to the extent indicated in Findings of Fact "3", and that, except as so granted, the Notice of Deficiency dated July 10, 1978 is sustained, together with such additional interest as may be legally due and owing.

DATED: Albany, New York

AUG 04 1982

STATE TAX COMMISSION

ACTING


PRESIDENT


COMMISSIONER


COMMISSIONER