

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benito & Frances Gaguine :

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

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 8th day of April, 1982, she served the within notice of Corrected Decision by certified mail upon Benito & Frances Gaguine, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Benito & Frances Gaguine
3628 Appleton Station N.W.
Washington, DC 20008

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
8th day of April, 1982.

Connie P. Hagelund

Kathy Pfaffenbach

STATE OF NEW YORK
STATE TAX COMMISSION

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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 8th day of April, 1982, she served the within notice of Corrected Decision by certified mail upon Leonard S. Schwartz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard S. Schwartz
850 Third Ave.
New York, NY 10022

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
8th day of April, 1982.

Connie P. Hagelund

Kathy Pfaffenbach

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

April 8, 1982

Benito & Frances Gaguine
3628 Appleton Station N.W.
Washington, DC 20008

Dear Mr. & Mrs. Gaguine:

Please take notice of the Corrected 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
Leonard S. Schwartz
850 Third Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BENITO GAGUINE and FRANCES GAGUINE	:	CORRECTED
	:	DECISION
	:	
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.	:	

Petitioners, Benito Gaguine and Frances Gaguine, 3628 Appleton Station N.W., Washington, DC 20008, 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. 23389).

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 February 15, 1980 at 1:15 P.M. Petitioners appeared by Leonard S. Schwartz, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the "alternate allocation formula" used on the partnership returns of Fly, Shuebruk, Blume & Gaguine accurately reflects its income derived from New York sources.

FINDINGS OF FACT

1. Petitioners, Benito Gaguine and Francis Gaguine, filed joint New York State income tax nonresident returns for the years 1974 and 1975 wherein they reported petitioner Benito Gaguine's distributive share of income allocable to New York from the partnership of Fly, Shuebruk, Blume & Gaguine (hereinafter the partnership) for each of said years.

2. On February 1, 1978, the Audit Division issued a Statement of Audit Changes wherein petitioner Benito Gaguine's distributive shares from the partnership for 1974 and 1975 were increased to conform with the Audit Division's adjustments to the business allocation percentage of the partnership. Accordingly, a Notice of Deficiency was issued to the petitioners on April 4, 1978 asserting additional personal income tax of \$2,071.04, plus interest of \$442.32, for a total due of \$2,513.36.

3. Fly, Shuebruk, Blume & Gaguine, a law partnership specializing in Federal Communication Commission matters, maintained offices in Washington, D.C. and New York. On filing its returns for the fiscal years ended April 30, 1974 and April 30, 1975, the partnership allocated its income between the offices using an alternative method comprised of two factors, specifically, the gross income percentage and the payroll percentage. As a result of audit, the Audit Division adjusted the partnership's allocation percentage by computing same under the method prescribed within 20 NYCRR 131.13(b). Such method uses three factors which, in addition to the factors used by the partnership, incorporates a property percentage factor.

4. Petitioner argued that the property percentage factor was deleted from the partnership's alternative method since use of said factor would yield an inequitable allocation percentage which does not accurately reflect the location where the partnership income was earned. The major portion of the partnership's business was conducted through the Washington, D.C. office, where five partners were assigned, rather than the New York office, where only two partners were assigned. The rent paid for office space in New York was far greater than that paid in Washington, D.C., even though the New York office was the smaller of

the two. Accordingly, it is the petitioner's position that the property percentage is unsuitable for use as an allocation factor in the instant case.

5. The partnership's allocation percentages, as computed on its returns under its alternative two factor method, yielded percentages of 35.375 percent for fiscal year ended April 30, 1974 and 32.785 percent for fiscal year ended April 30, 1975, whereas the Audit Division's adjusted allocation percentages under the three factor method prescribed under 20 NYCRR 131.13(b) yielded percentages of 45.83 percent and 43.12 percent respectively.

6. During the hearing, petitioner's representative submitted worksheets, prepared on behalf of the firm, showing eight different methods of allocating income and expenses to the New York office and to the Washington D.C. office. The allocation percentages for the fiscal year ending April 30, 1974, varied from 25.6 percent, which percentage was based on the books and records of the partnerships, to 45.83 percent, which percentage represented the three-factor percentage as determined by the Audit Division. The allocation percentages for the fiscal year ending April 30, 1975, varied from 26.6 percent to 43.12 percent. Petitioners contended that amounts determined on the basis of the books and records of the partnership accurately reflect the correct amount of New York income and expense. Included with the worksheets submitted at the hearing were two worksheets showing expenditures for payments to a Keogh Plan and several other expenses which normally would be allocated but which were expensed to the New York office in full. However, these expenses were allocated between the New York and Washington, D.C. offices in other worksheets. The worksheets labeled "New York Business Income Determined From Books and Records Maintained By Partnership", for the fiscal year ending April 30, 1974, show the New York Office as receiving income from fees of \$372,524.00 and expenses of

\$227,272.00 for a net profit of \$145,252.00. Said profit represented 25.6 percent of the net income of the firm while expenses represented 52 percent of the total amount paid. The percentages for the fiscal year ending April 30, 1975, were approximately the same. Petitioners "other allocation methods" yielded an average New York allocation percentage of 33 percent.

7. The Audit Division's position during the course of the hearing was that the partnership's alternative allocation method was unacceptable because approval was not sought and granted for use of such method prior to the partnership's filing of the returns for the years at issue.

CONCLUSIONS OF LAW

A. That if a nonresident individual is a member of a partnership which carries on a business both within and without this State, there must be apportioned to this State a fair and equitable portion of the items of income, gain, loss and deduction attributable to such business within the meaning and intent of section 632(c) of the Tax Law and 20 NYCRR 131.13. The "Direct Accounting" method is to be used unless a "fair and equitable" apportionment of net income/loss cannot be determined by that means (Piper, Jaffray & Hopwood v. State Tax Commission, 42 A.D.2d 381, 348 N.Y.S.2d 242). This method does not fairly reflect the partnership's net income from this State; accordingly the use of such method is not allowed. The next recourse is to the three-factor allocation formula in accordance with the meaning and intent of section 632(c) of the Tax Law and 20 NYCRR 131.13(b).

B. That petitioners have failed to sustain their burden of proof imposed by section 689(e) of the Tax Law to show that the three factor formula is inequitable. Therefore, said method is to be used in determining that portion

of petitioner Benito Gaguine's partnership distribution required to be included in New York income.

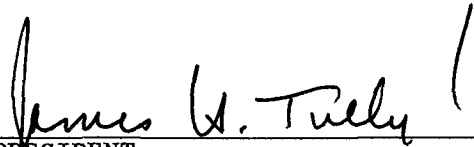
C. That "other allocation methods" submitted by petitioners do not fairly and equitably reflect the net income from this State; as a result, said methods are disallowed.

D. That the petition of Benito Gaguine and Frances Gaguine is denied and the Notice of Deficiency issued on April 4, 1978 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

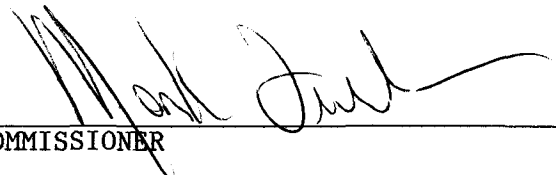
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PRESIDENT



COMMISSIONER



COMMISSIONER