

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Richard F. & Diane L. Horowitz :
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. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

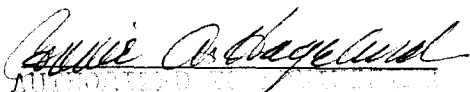
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Richard F. & Diane L. Horowitz, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

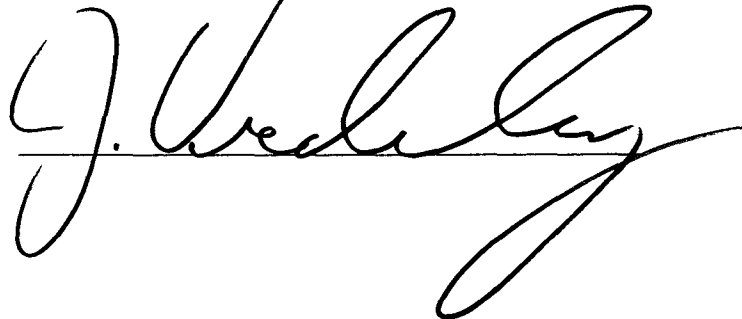
Richard F. & Diane L. Horowitz
15 Emerson Terrace
Bloomfield, NJ 07003

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 October, 1982.


JAY VREDEBURG
CLERK OF THE COMMISSION
STATE OF NEW YORK



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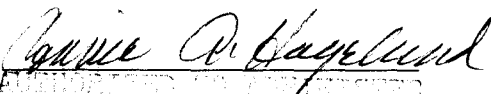
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Richard F. Horowitz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

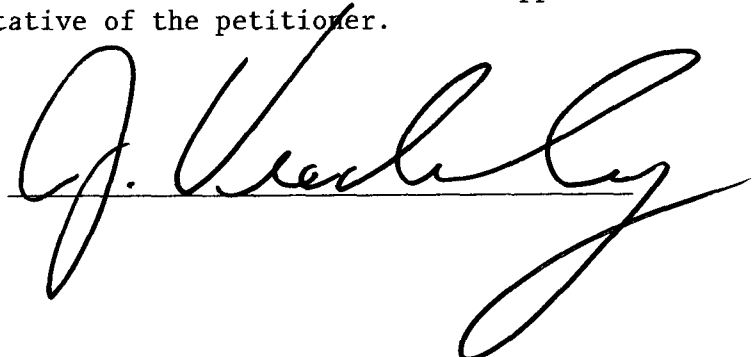
Richard F. Horowitz
Heller, Horowitz & Feit
292 Madison Ave.
New York, NY 10017

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 October, 1982.


JAMES D. HAGELUND
CLERK OF THE COMMISSION
SECTION 171



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

October 6, 1982

Richard F. & Diane L. Horowitz
15 Emerson Terrace
Bloomfield, NJ 07003

Dear Mr. & Mrs. Horowitz:

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
Richard F. Horowitz
Heller, Horowitz & Feit
292 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE TAX COMMISSION

DECISION

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 September 22, 1981 at 2:45 P.M. Petitioner Richard F. Horowitz appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel).

I. Whether petitioner Richard F. Horowitz, a nonresident of New York State, may allocate his distributive share of partnership income from a New York partnership to sources without New York State where the partnership did not allocate.

FINDINGS OF FACT

1. Richard F. Horowitz and Diane L. Horowitz filed a joint New York State Income Tax Nonresident Return for the year 1974. On said return, Richard F. Horowitz (hereinafter petitioner) allocated his partnership income derived from

the New York law partnership of Weiss, Rosenthal, Heller and Schwartzman to sources within and without New York State based on his New York work days as compared to his total days worked both within and without New York State.

2. On January 31, 1978 the Audit Division issued a Statement of Audit Changes wherein petitioner's entire distributive share of \$47,613.00 derived from said partnership was held subject to New York State personal income tax since the partnership did not allocate. Additionally, an adjustment was made increasing petitioner's income by his share of the New York City unincorporated business tax deduction taken on the return of said partnership, but since this adjustment was not contested by petitioner, it is therefore not at issue herein. Accordingly, a Notice of Deficiency was issued against petitioners on April 12, 1978 asserting additional personal income tax of \$1,198.20 plus interest of \$304.70, for a total due of \$1,502.90.

3. During the year at issue petitioner's activities as a partner in said partnership generally dealt with civil commercial litigation which required a portion of his time to be spent, as a matter of necessity, without New York State. Petitioner argued that to draw a distinction between being a nonresident partner and nonresident employee for allocation purposes is in violation of the New York State and Federal Constitutions.

CONCLUSIONS OF LAW

A. That pursuant to section 637(b)(2) of the Tax Law, a nonresident partner may not allocate "...as income or gain from sources outside New York, a greater proportion of his distributive share of partnership income or gain than the ratio of partnership income or gain from sources outside New York to partnership income or gain from all sources...".

Such income is allocated to New York sources on the same basis as the firm uses to allocate the distributive share of each partner. (See Matter of Thomas M. Debevoise et al. v. State Tax Commission, 52 A.D. 2d 1023, 383 N.Y.S. 2d 698.)

Accordingly, petitioner Richard F. Horowitz is not properly entitled to allocate any portion of his distributive share of income from Weiss, Rosenthal, Heller and Schwartzman to sources outside New York State.

B. That the constitutionality of the laws of the State of New York and the United States are presumed at the administrative level of the State Tax Commission. There is no jurisdiction at the administrative level to declare such laws unconstitutional.


C. That the petition of Richard F. Horowitz and Diane L. Horowitz is denied and the Notice of Deficiency dated April 12, 1978 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER