

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Kareem Abdul Jabbar	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1973.	:	

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 Kareem Abdul Jabbar, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kareem Abdul Jabbar
c/o Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, NY 10020

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.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Kareem Abdul Jabbar :

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 :
1973 :

State of New York
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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 Robert H. M. Ferguson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert H. M. Ferguson
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, NY 10020

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
9th day of April, 1982.

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

April 9, 1982

Kareem Abdul Jabbar
c/o Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, NY 10020

Dear Mr. Jabbar:

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
Robert H. M. Ferguson
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, NY 10020
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
KAREEM ABDUL JABBAR	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1973.	:	

Petitioner, Kareem Abdul Jabbar, c/o Patterson, Belknap, Webb & Tyler, 30 Rockefeller Plaza, New York, New York 10020, 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 1973 (File No. 18243).

A formal hearing was held before Edward Goodell, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 1, 1978 at 10:45 A.M. Petitioner appeared by Patterson, Belknap, Webb & Tyler, Esqs. (Robert H. M. Ferguson, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Irving Atkins and Alfred Rubinstein, Esqs., of counsel).

ISSUES

I. Whether the stipulation and the motion to compel stipulation should be granted in its entirety because of the failure of the Law Bureau to respond in a timely fashion under the State Tax Commission's Rules of Practice and Procedure and whether the response was evasive or not fairly directed to the proposed stipulation.

II. Whether petitioner, a well-known nonresident professional basketball player, was selectively taxed in violation of the constitutional requirement for equal treatment.

III. Whether the correct method of attribution to New York sources of income received by a nonresident professional basketball player, for his services as a basketball player, is the "days worked" method, the "games played" method, or some other "fair and equitable" method.

IV. Whether \$9,500.00 paid to petitioner pursuant to a written contract, regarding the making of a single on-camera television commercial, should be attributed to income derived from New York sources.

FINDINGS OF FACT

1. During 1973, petitioner, Kareem Abdul Jabbar, a well-known professional basketball player, was a resident of Wisconsin and a nonresident of New York.

2. Petitioner filed a New York State income tax nonresident return for 1973. Schedule A of said return reported as petitioner's total "New York State amount", \$3,000.00 for "Wages, salaries, tips, etc.", less "Adjustments" of \$62.54, for a "Total New York Income" of \$2,937.46. It further reported \$2,339.61 as "New York taxable income", subject to tax thereon of \$60.19.

3. On April 11, 1977, the Audit Division issued a Statement of Audit Changes and a Notice of Deficiency against petitioner. These were for personal income tax due for 1973 of \$2,350.25, less New York tax withheld of \$296.24, or a basic tax of \$2,053.61, together with interest thereon of \$460.36, for a total amount of \$2,513.97. This was done on the ground that petitioner's "Total New York income adjusted" for 1973 was \$33,797.50, and that the "New York taxable income adjusted" for said period was \$26,934.98.

4. On August 17, 1978, counsel for petitioner caused a proposed stipulation of facts to be served upon the Law Bureau of the Department of Taxation and Finance, pursuant to section 601.7(a)(1) of the State Tax Commission's Rules of Practice and Procedure.

5. Thereafter, counsel for petitioner made a motion dated November 9, 1978, pursuant to section 601.7(f)(1) of the Commission's Rules of Practice and Procedure, to compel stipulation or admission of the facts set forth in the proposed stipulation.

6. A reply dated November 28, 1978 to the proposed stipulation was served by the Department's Law Bureau upon counsel for petitioner, who received the same by mail on November 30, 1978. It was contained in an envelope bearing a machine-metered stamp.

7. Said reply expressed agreement with the items of the proposed stipulation numbered "1", "2", "5a", "5b", "6", and "8"; in addition, it reduced the basic tax from \$2,053.61 to \$1,496.29.

8. At the formal hearing held on December 1, 1978, counsel for the Audit Division further limited the items at issue by assenting to item "5c" of the proposed stipulation, thereby leaving for determination the substantive issues described above.

9. (a) It is petitioner's claim that the Audit Division, in violation of the constitutional requirement of equal treatment for taxpayers similarly situated, singled him out and required him to pay a New York tax not required of other nonresident professional athletes.

(b) It is also petitioner's claim that the motivation for so singling him out was that his salary level made it "worthwhile" to require him to pay a New York tax.

10. (a) During 1973, petitioner participated in a total of 82 regular season games as a professional basketball player for the "Milwaukee Bucks", 4 of which were played in New York. In addition, petitioner's attendance was

required at 8 pre-season games and 6 playoff games, all of which were played outside of New York State.

(b) The Audit Division computed the income that petitioner derived from New York sources during 1973 on the basis of a fraction, the numerator of which was "4" and the denominator of which was "82". This was based on the total number of regular season games which petitioner played during 1973, and the number of games which he played in New York during said period.

11. (a) The total number of petitioner's working days as a professional basketball player for the Milwaukee Bucks during 1973, including pre-season, regular season, play-off games and practice sessions, at which the petitioner's presence was required by his employer during 1973, was not less than 200. Of those working days, he was present and performing services in New York on six days.

(b) It is petitioner's claim in this proceeding that his New York source income as a professional basketball player for the Milwaukee Bucks during 1973 should be computed on the basis of a fraction, the numerator of which is the number "6" and the denominator of which is the number "200". This is based on the total number of his paid working days during 1973, and the number of said working days in New York during the same period.

12. (a) Petitioner entered into a contract with Uniroyal, Inc. dated December 20, 1972. Pursuant to this contract, it was agreed, in part, that petitioner would render "services as an on-camera actor and announcer in connection with the production of one television commercial" on behalf of Uniroyal's "Pro-Keds" sneakers.

(b) Paragraph "8(b)" of this contract further provided that "in the event that the license agreement now being negotiated" between petitioner and Uniroyal, Inc.

"has not been signed by both parties by March 1, 1973, then the flat sum due you under Subparagraph (a) above shall be increased by ninety five hundred dollars (\$9,500.00), payable no later than March 10, 1973, so that you shall then have received a total set payment of twelve thousand five hundred dollars (\$12,500.00), plus applicable union scale payments."

(c) Paragraph "5" of said contract dated December 20, 1972 and entitled "Exclusivity and Competitive Protection" provided, in part, that:

"During the term hereof you will not render any service of any kind for or on behalf of, nor will you authorize the use of your name, photograph, likeness, endorsement, voice or biographical material to be used in any manner in advertising or publicizing any product or service (hereinafter called 'Competitive Product') that competes in anyway with Product."

13. The license agreement referred to in paragraph "12(b)" above was not signed by both parties by March 1, 1973.

14. Uniroyal, Inc. paid petitioner the sum of \$9,500.00 during 1973.

CONCLUSIONS OF LAW

A. That there is no demonstration in the record of prejudice to the petitioner by reason of the one day's delay in the service of the reply to petitioner's motion to compel stipulation to certain facts. The Civil Practice Law and Rules (CPLR) gives the courts broad discretion to extend time (section 2004 of the CPLR). The practice and procedure before the Tax Commission is not less liberal. The fact is that the Rules of Practice and Procedure provide that they "shall be liberally construed to secure the just, speedy and inexpensive determination of every controversy..." (section 601.0(c) of the Rules of Practice and Procedure).

A one day's delay in the service of a pleading does not commend itself as the basis for the granting of the motion to compel stipulation on a substantive issue of some importance

By his argument that the Law Bureau's response was partially evasive and, in effect, constituted agreement with the proposed stipulation, petitioner is making, what amounts to a motion to dismiss for legal insufficiency. For reasons already stated, this is not an issue which should be disposed of on the basis of technical rules of pleading.

B. That selectivity in taxation is not impermissible, unless based on "improper motivation" (United States v. Kahl, 583 F.2d 1351, 1353). Petitioner has not established the claim of selectivity in view of the absence of evidence in the record to support a finding of fact that he was singled out for taxation for impermissible considerations.

C. That petitioner has not established the claim that he was singled out for taxation by New York in view of the following cases, in each of which a nonresident professional athlete was subjected to New York personal income taxation: Petition of Stephen M. and Starla Thompson, (State Tax Commission, July 20, 1973); Petition of Bobby R. and Kay Murcer, (State Tax Commission, September 22, 1977 involving the years 1971, 1972 and 1973); and Petition of Roy H. and Linda White, (State Tax Commission, February 14, 1979 involving the tax years 1971 and 1972).

D. That petitioner has not established the claim of selectivity in view of the fact that the New York State revenue system, as well as the Federal tax structure, rely on self-reporting (United States v. Bisceglia, 420 U.S. 141; New York State Department of Taxation and Finance v. New York State Department of Law, Statewide Organized Crime Task Force, 44 N.Y.2d 575, 580).

E. That section 632(c) of the Tax Law provides in part that the portion of income of a nonresident derived from New York sources shall be determined under regulations of the State Tax Commission. Pursuant to 20 NYCRR 131.16 a nonresident employee who performs services for his employer both within and without the State shall include as income derived from New York sources that portion of his total compensation for services rendered as an employee which the total number of working days employed within the State bears to the total number of working days employed within and without the State. 20 NYCRR 131.21 provides:

"Sections 131.13 through 131.20 are designed to apportion and allocate to this State, in a fair and equitable manner, a nonresident's item of income, gain, loss and deduction attributable to a business trade, profession or occupation carried on partly within and partly without this State. Where the methods provided under those sections do not so allocate and apportion those items, the Commission may require a taxpayer to apportion and allocate those items under such method as it shall prescribe as long as the prescribed method results in a fair and equitable apportionment and allocation...."

The allocation of income earned by petitioner as a professional basketball player for services rendered as such on the basis of days worked within and without New York State during the year does not result in a fair and equitable allocation of income.

F. That in order to result in a fair and equitable apportionment and allocation, under section 632(c) of the Tax Law and 20 NYCRR 131.21, pre-season, regular season and play-off games must be included in an allocation ratio used to apportion income based on games played within and without New York State. (Roy H. and Linda White, State Tax Commission, February 14, 1979). The record in this case reveals that in addition to 82 regular season games, the number of exhibition and play-off games in which petitioner was required to participate

were 8 games and 6 games respectively. Accordingly, the Audit Division is directed to recompute the allocation ratio on the basis of fraction, the numerator of which is "4" and the denominator of which is "96".

G. That the sum of \$9,500.00 paid to petitioner by Uniroyal, Inc., pursuant to paragraph "8(b)" of the contract between petitioner and Uniroyal, which was dated December 20, 1972, did not constitute income attributable to New York sources.

H. That the petition of Kareen Abdul Jabbar is granted to the extent set forth in Conclusions of Law "E" and "F" and except as so granted the Notice of Deficiency is sustained.

DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER