

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Stephen E. Kelly

:

:

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
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 Stephen E. Kelly, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen E. Kelly
755 Park Ave.
New York, NY 10021

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
ALBANY, NEW YORK 12227

April 9, 1982

Stephen E. Kelly
755 Park Ave.
New York, NY 10021

Dear Mr. Kelly:

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	:	
STEPHEN E. KELLY	:	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, Stephen E. Kelly, 755 Park Avenue, New York, New York 10021, 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. 19318).

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 April 30, 1981 at 10:45 A.M. Petitioner, Stephen E. Kelly, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Andrew Haber and Michael Gitter, Esqs., of counsel).

ISSUE

Whether petitioner is entitled to a credit, pursuant to section 620(a) of the Tax Law, for taxes withheld from his wages and paid to the State of New Jersey.

FINDINGS OF FACT

1. Petitioner, Stephen E. Kelly, timely filed a 1973 New York State resident income tax return wherein he reported total New York income of \$11,157.00. On said return petitioner excluded from total New York income wages of \$11,676.10 received from the Barnert Memorial Hospital Center (hereinafter "Barnert").

2. On March 28, 1977 the Audit Division issued to petitioner a Notice of Deficiency asserting that for the year 1973 additional personal income tax of \$861.80 was due together with interest. Said Notice of Deficiency was based on an explanatory Statement of Audit Changes, originally dated January 30, 1976, wherein reported total New York income was increased by \$11,468.00. Said adjustment was computed by including in New York income wages received from Barnert of \$11,676.00, less a \$208.00 subtraction representing a modification for state and local income tax refunds which petitioner had failed to take on his return.

3. During 1973 petitioner received wages totaling \$26,762.00. Of this amount, \$15,086.00 was derived solely from New York State sources, while the remaining \$11,676.00, representing the wages earned from Barnert, was derived entirely from services performed in New Jersey. New Jersey Emergency Transportation Tax of \$603.85 was withheld from the Barnert wages.

4. Prior to 1973 petitioner was a domiciliary of New York State, maintaining a permanent place of abode at 46 East 65th Street, New York, New York. During 1973 petitioner continued to maintain his New York apartment, but also maintained an apartment for the entire year in Paterson, New Jersey, close to the Barnert Memorial Hospital Center. Petitioner concedes that he is domiciled in New York for the year 1973 and taxable as a resident individual since his stay in New Jersey was for a limited period (one year during a layoff between his internship and residency programs) and since it was always his intention to return to New York.

5. Petitioner testified that upon learning of the Audit Division's intention to tax the wages received from Barnert, that he immediately filed a return with the State of New Jersey requesting a full refund of the tax

withheld on the grounds that he was a resident of said State and therefore not taxable. Further testimony indicated that the aforementioned claim for refund with the State of New Jersey was still pending. No documentary evidence was submitted to support the filing of a return with the State of New Jersey or verify that the refund claim is still pending.

6. On May 28, 1981, 28 days after the close of the hearing held herein, petitioner submitted a photocopy of a 1973 New Jersey Emergency Transportation Tax Nonresident Return. Said return was executed by petitioner on May 25, 1981 and reported as New Jersey source income the wages of \$11,676.10 received from Barnert. Total New Jersey tax due shown on the return was \$421.07 and, after considering New Jersey tax withheld of \$603.85, a refund of \$182.78 was shown.

7. Petitioner's Federal and New York State income tax returns reported a \$4,287.00 adjustment to income. Said adjustment was comprised of a \$900.00 exclusion for a fellowship grant and a \$3,387.00 deduction for employee business expenses. The 1973 New Jersey return submitted as being filed by petitioner on May 25, 1981 did not attribute any of the employee business expenses to the wages received from Barnert.

CONCLUSIONS OF LAW

A. That petitioner is entitled to a resident tax credit, pursuant to section 620(a) of the Tax Law, for income taxes imposed by the State of New Jersey on the wage income received from Barnert.

B. That petitioner's New Jersey income tax liability must be recomputed since a portion of employee business expenses of \$3,387.00 are considered derived from or connected with New Jersey sources based on the following formula:

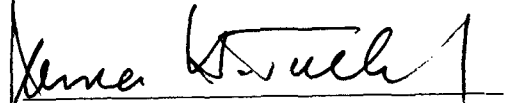
$$\frac{\$11,676.00 \text{ (Barnert Wages)}}{\$26,762.00 \text{ (Total Wages)}} \times \$3,387.00$$

C. That the petition of Stephen E. Kelly is granted to the extent indicated in Conclusions of Law "A" and "B", supra, that the Audit Division is directed to recompute petitioner's liability in accordance with said conclusions, and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER