

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Nicholas LaRocca

:

:

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 :
1967 - 1969.

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 26th day of March, 1982, he served the within notice of Decision by certified mail upon Nicholas LaRocca, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nicholas LaRocca
309 23rd St.
Union City, NJ

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
26th day of March, 1982.

Carrie A. Hagelund

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Nicholas LaRocca

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for Redetermination of a Deficiency or a Revision :
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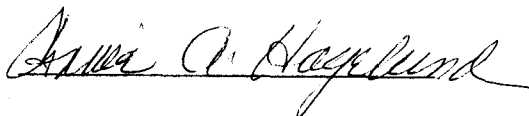
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of March, 1982, he served the within notice of Decision by certified mail upon Howard B. Presant the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

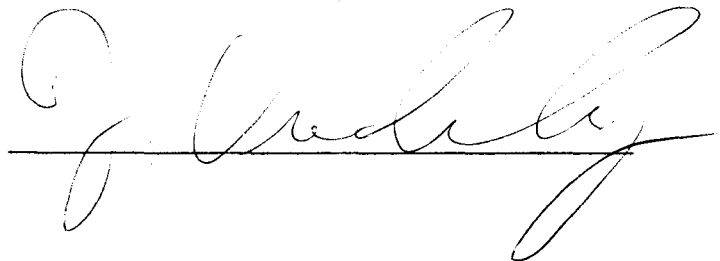
Howard B. Presant
Stein, Joseph & Rosen
222 South Marginal Rd.
Fort Lee, NJ 07024

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
26th day of March, 1982.





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

March 26, 1982

Nicholas LaRocca
309 23rd St.
Union City, NJ

Dear Mr. LaRocca:

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
Howard B. Presant
Stein, Joseph & Rosen
222 South Marginal Rd.
Fort Lee, NJ 07024
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Warren J. & Sydelle Kaps : 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 :
1967 - 1969.

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 26th day of March, 1982, he served the within notice of Decision by certified mail upon Warren J. & Sydelle Kaps, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Warren J. & Sydelle Kaps
34 Clover St.
Tenafly, NJ 07670

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
26th day of March, 1982.

Ernie A. Hughes

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Warren J. & Sydelle Kaps

:

:

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 :
1967 - 1969.

State of New York
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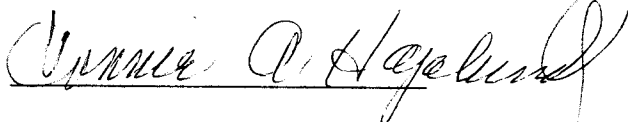
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of March, 1982, he served the within notice of Decision by certified mail upon Warren J. Kaps the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

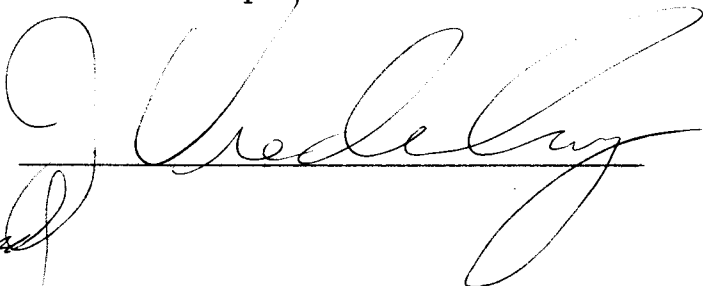
Warren J. Kaps
39 Hudson St.
Hackensack, NJ 07601

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
26th day of March, 1982.


James P. Haglund


Jay Vredenburg

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

March 26, 1982

Warren J. & Sydelle Kaps
34 Clover St.
Tenafly, NJ 07670

Dear Mr. & Mrs. Kaps:

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
Warren J. Kaps
39 Hudson St.
Hackensack, NJ 07601
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
NICHOLAS LA ROCCA :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1967, 1968 and :
1969.

In the Matter of the Petition : DECISION
of :
WARREN J. and SYDELLE KAPS :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1967, 1968 and :
1969.

Petitioner, Nicholas LaRocca, 309-23rd Street, Union City, New Jersey, 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 1967, 1968 and 1969 (File No. 01088).

Petitioners, Warren J. and Sydelle Kaps, 34 Clover Street, Tenafly, New Jersey 07670, 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 1967, 1968 and 1969 (File No. 01091).

A combined formal hearing in the above matter was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on the February 16, 1977 at 1:15 P.M. before Harvey Baum, Hearing Officer.

Petitioner Nicholas LaRocca appeared by Stein and Ohrenstein, Esqs. (Arnold J. Hoffman, Esq., of counsel). Warren J. Kaps, Esq. appeared pro se and for his

wife, Sydelle Kaps. The Audit Division appeared by Peter Crotty, Esq. (Alfred Rubenstein, Esq., of counsel).

A continued hearing in the above matters was held at Two World Trade Center, New York, New York on December 20, 1977 at 1:15 P.M. before Harvey Baum, Hearing Officer. The petitioners appeared by Stein, Rosen and Ohrenstein, Esqs. (Howard B. Presant, Esq., of counsel). The Audit Division, appeared by Peter Crotty, Esq. (Lawrence Stevens, Esq., of counsel).

ISSUES

I. Whether the law partnership of Stein, Abrams and Rosen conducted business both within and without the State of New York during the years in issue.

II. Whether petitioner Nicholas LaRocca was an employee of or a partner in the firm of Stein, Abrams and Rosen.

III. Whether the allocation formula used to allocate partnership income of Stein, Abrams and Rosen both within and without the State during the years in issue was proper.

IV. Whether petitioner Nicholas LaRocca performed any services in the State of New York during the years in issue.

V. Whether the allocation with respect to petitioner Warren J. Kaps during the years in issue was proper.

FINDINGS OF FACT

1. On March 26, 1973, the Audit Division issued a Notice of Deficiency against Nicholas LaRocca for the years 1967, 1968 and 1969 in the amount of \$1,443.54 plus penalty of \$40.41 and interest of \$326.02 for a total of \$1,809.97. Petitioner Nicholas LaRocca timely filed a petition with respect to said deficiency.

2. On March 26, 1973 the Audit Division issued a Notice of Deficiency against Warren J. and Sydelle Kaps for the years 1967, 1968 and 1969 in the amount of \$3,006.15 plus interest of \$650.70 for a total of \$3,656.85. Said petitioners timely filed a petition with respect to said deficiency.

3. Nicholas LaRocca and Mr. and Mrs. Kaps were nonresidents during the years in issue.

4. Stein, Abrams and Rosen, a partnership engaged in the practice of law, maintained offices located in New York, New York and Jersey City, New Jersey before, during and after the taxable years in issue, i.e. 1967, 1968 and 1969. The firm was originally organized in New Jersey about 1928 or 1929. In the early 1960's the firm decided to establish a New York office to provide services for a major client located in Philadelphia, Pennsylvania. The New York office also facilitated expansion of the firm with the intent of developing a corporate practice by including attorneys experienced in securities, tax and corporate matters.

5. The partnership tax returns both for Federal and New York State bear the name. "Stein, Abrams and Rosen". However, the firm letterhead carried the name "Stein & Rosen" and indicated that the firm had offices in New York, New Jersey and Washington, D.C.

6. The partnership and personal income tax returns were previously examined on a field audit for the years 1965 and 1966. Subsequently, a desk audit made adjustments in the firm's allocation of income attributable to sources within and without New York for the years 1967, 1968 and 1969 based upon the field audit findings for the prior years.

7. In the years 1965 and 1966 all income for both offices was recorded in one set of books shown on one partnership tax return filed under the name

"Stein, Abrams & Rosen". Although the 1965 partnership return and accompanying schedules bear the name "Stein, Abrams & Rosen" with the address "522 Fifth Avenue, New York, New York", a Form 2758 (Application for Extension of Time to File) bears the same firm name with the address "26 Journal Square, Jersey City, New Jersey". The firm also filed one partnership return for the years 1967, 1968 and 1969. However, separate books and records were maintained for New Jersey cases and New York cases.

8. During the years in issue, Warren Kaps attended to certain management affairs, particularly the Bookkeeping Department that was maintained in New York. Mr. Kaps signed the partnership tax returns. He allocated income to New York or New Jersey on the basis of "where the work was done, where the client was located and the nature of the work involved." Mr. Kaps was admitted to practice law in the states of New York and New Jersey during the years in issue. On the 1967 partnership return Mr. Kaps is shown as a full partner with a capital account for the year ending January 31, 1968 of \$19,353.00.

9. The firm included attorneys admitted to practice only in the State of New York, attorneys admitted to practice only in the State of New Jersey and attorneys admitted to practice in both jurisdictions. The schedule of deductions attached to the 1967 partnership return indicates that the New Jersey office was a comparatively small operation. FICA expense, Federal unemployment tax expense and salaries (other than payments to partners) and wages of \$166,363.00 were all allocated entirely to New York. Of association dues totalling \$3,578.00 for the fiscal year ending January 31, 1968, only \$242.00 was allocated to New Jersey. Rent allocated to New York was \$51,914.00 while that allocated to New Jersey was only \$3,800.00. Entertainment, promotion and travel of \$3,991.00

was entirely allocated to New York. Of the total "other deductions" of \$90,341.00, for fiscal year ending January 31, 1968, \$82,803.00 was allocated to New York.

10. The small size of the New Jersey office and the allocation of income on the basis of the situs of each transaction indicate that the allocation of income within and without New York on the partnership returns did not reflect actual income for services performed at each office. The allocation was designed to conform to New Jersey Supreme Court rules regarding sharing fees for legal services regarding New Jersey matters and was not designed to reflect the location where these services were performed. The actual expenses for the firm indicated that most services during the years in issue were performed through the New York Office.

11. Petitioner Nicholas LaRocca was admitted to the practice of law in the State of New Jersey only. Mr. LaRocca was associated with the Journal Square, Jersey City, New Jersey, office of the firm for about 20 years. When the firm decided to have a New York office as well as a New Jersey office, Mr. LaRocca was placed in charge of the New Jersey office, pursuant to an oral agreement. He was listed as a partner on the New York stationery with an asterisk indicating that he was not admitted to practice in New York. Mr. LaRocca testified he received a monthly check plus a bonus at the end of the year. Withholding or social security taxes were not withheld from the payments received by Mr. LaRocca. The partnership returns indicated payments were made to Mr. LaRocca as a partner devoting full time to the business and showed a capital account for him with a beginning balance and an increase at the end of the year. Mr. LaRocca performed no services within the State of New York during the years in issue.

12. The desk audit, upon which the deficiencies for the years in issue were made against the petitioners, adjusted the allocation of partnership distributions to sources within and without the State of New York in accordance with an allocation computation developed on a field audit for the prior years 1965 and 1966. It was determined that the office-to-office allocation used on the returns did not adequately reflect New York income. The auditor decided that the three factor formula would be more equitable in accordance with 20 NYCRR 131.13(b). The former representative for petitioners objected to the use of the three factor formula. The objection was treated as an application for an alternate computation. After review of additional information the allocation computation was modified by including in the average percentages a fourth factor for time spent by partners within and without the State of New York. The desk audit used the formula developed on field audit to compute the allocation of partnership income for the years in issue.

13. The partnership of Stein, Abrams and Rosen conducted business both within and without the State of New York during the tax years in issue.

CONCLUSIONS OF LAW

A. That petitioner Nicholas LaRocca was not an employee, but rather a partner in the partnership of Stein, Abrams and Rosen during the years in issue. He was not treated as an employee for payroll purposes. There was no proof that he was under the direct supervision and control of any principal.

B. That Section 637 of the Tax Law provides, in part, that in determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership

income, gain, loss and deduction entering into his federal adjusted gross income, as such portion shall be determined under regulations of the tax commission consistent with the applicable rules of section six hundred thirty-two.

C. That section 632 of the Tax Law provides, in part, that if a business trade, profession or occupation is carried on partly within and partly without this State, as determined under regulations of the tax commission, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

D. That Income Tax Regulations (20 NYCRR 131.13(b)) provide in part, that if the books and records of a business do not disclose to the satisfaction of the Tax Commission the proportion of the net amount of the items of income gain, loss and deduction attributable to the activities of the business carried on in New York, such proportion shall be...determined by multiplying (1) the net amount of the items of income, gain, loss and deduction of the business by (2) the average of the following percentages: (i) property percentage; (ii) payroll percentage and (iii) gross income percentage, commonly known as the three factor method. 20 NYCRR 131.21 provides for other methods of allocation.

E. That the allocation formula used by the Audit Division to allocate partnership income of Stein, Abrams and Rosen both within and without the State of New York during the years in issue was neither unreasonable nor arbitrary, but proper.

F. That the allocation of the distributive share of partnership income of the nonresident partners Nicholas LaRocca and Warren Kaps attributable to New York sources was neither arbitrary nor unreasonable but proper within the

intent and meaning of section 632 of the Tax Law and 20 NYCRR 131.13 and 131.21.

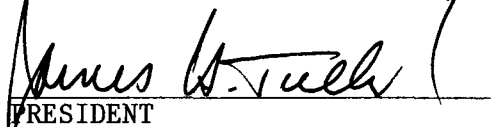
G. That the petition of Nicholas LaRocca is hereby denied and the Notice of Deficiency issued against him dated March 26, 1973 in the amount of \$1,443.54, plus penalty and interest is sustained.

H. That the petition of Warren J. and Sydelle Kaps is hereby denied and the Notice of Deficiency issued March 26, 1973 in the amount of \$3,006.15 plus interest, is sustained.

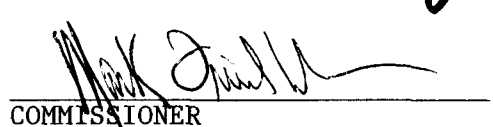
DATED: Albany, New York

MAR 26 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER