

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Bertram R. Lowenfels	:	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	:	
1974.	:	

State of New York  
County of Albany

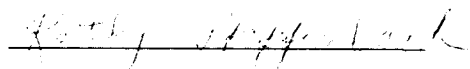
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Bertram R. Lowenfels, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

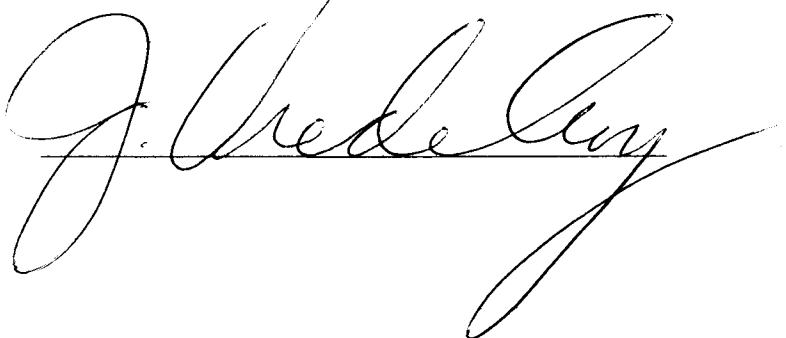
Bertram R. Lowenfels  
960 N. Ocean Blvd.  
Palm Beach, FL 33480

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  
29th day of December, 1982.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Bertram R. Lowenfels :  
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 :  
1974.  
\_\_\_\_\_ :

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Sanford Becker the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sanford Becker  
165 W. 46th St.  
New York, NY 10036

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  
29th day of December, 1982.

Kerry Proffitt  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

J. Vredenburg

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

December 29, 1982

Bertram R. Lowenfels  
960 N. Ocean Blvd.  
Palm Beach, FL 33480

Dear Mr. Lowenfels:

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  
Sanford Becker  
165 W. 46th St.  
New York, NY 10036  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
BERTRAM R. LOWENFELS	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1974.	:	

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Petitioner, Bertram R. Lowenfels, 960 North Ocean Boulevard, Palm Beach, Florida 33480, 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 1974 (File No. 27048).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on Tuesday, March 16, 1982 at 1:15 P.M. Petitioner appeared by Sanford Becker, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the interest income received by a nonresident former partner of a New York partnership represented a distributive share of partnership income subject to New York personal income tax and, if so, whether the amount of interest income was properly determined.

FINDINGS OF FACT

1. On January 24, 1979, the Audit Division issued a Notice of Deficiency to petitioner which asserted a deficiency of New York personal income tax for the year 1974 in the amount of \$5,420.44 plus penalty and interest in the amount of \$4,205.71 for a total due of \$9,626.15. According to the previously

issued Statement of Audit Changes, petitioner's personal income tax liability was computed as follows:

Salary, interest and ordinary income	\$45,463.00	
New York State and New York City unincorporated business tax deduction	4,589.92	
Total New York income	<u>\$50,052.92</u>	
Standard deduction	2,000.00	
Balance	<u>\$48,052.92</u>	
Exemptions	650.00	
New York taxable income	<u>\$47,402.92</u>	
 Tax per tax rate schedule	 \$ 5,420.44	
Tax previously reported	<u>-0-</u>	
 PERSONAL INCOME TAX DUE		\$5,420.44

In addition to the foregoing personal income tax liability, penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to file a tax return and failure to pay tax shown due on a return required to be filed.

2. Prior to July 31, 1973, petitioner was a general partner of the stock-brokerage firm of Kaufmann, Alsberg & Co. (the "partnership").

3. In a letter dated May 29, 1973, petitioner advised the partnership that he was withdrawing from the firm effective July 31, 1973.

4. On or about July 31, 1973, Irwin Gutttag, on behalf of the partnership, confirmed petitioner's withdrawal as a general partner. At this time the partnership made arrangements to pay petitioner his interest in the partnership. The amount due petitioner was based upon the capital which petitioner had paid into the partnership and loans which petitioner had made to the partnership. In accordance with the provisions of the partnership agreement, petitioner was to receive \$80,000.00 on the last day of August, 1973 and \$80,000.00 on each of the succeeding ten months through and including June 30, 1974. The balance was to be paid on July 31, 1974. The partnership agreed to pay with each monthly

installment 6 percent per annum on the declining balance of the aggregate amount due petitioner.

5. The Schedule K-1, Partner's Share of Income, Credits, Deductions, etc., attached to the Federal partnership return, showed payments to petitioner of salary, interest, and ordinary income of \$45,463.00. This amount was reported as net earnings from self-employment on both the New York State and Federal partnership returns. The New York State partnership return for the foregoing period allocated \$4,589.92 of the partnership's unincorporated business tax deduction to petitioner.

6. In a letter dated December 15, 1977, the accounting firm which prepared the partnership's New York tax return stated that petitioner was listed as a partner solely because he had not withdrawn all of his capital by the end of the year and that petitioner was not entitled to a distribution of profits from the partnership once he retired.

7. Petitioner's capital account in the partnership's records reveals that the amount of \$45,463.00 which was reported on the partnership's returns filed in 1974 consisted of interest credited to petitioner's capital account in two separate years - \$23,293.00 was credited to his account as interest in 1973 and \$22,170.00 was credited to his account as interest in 1974.

8. Petitioner did not perform any services for the partnership in 1974.

9. Petitioner was domiciled and resided in Florida in 1974.

10. Petitioner did not file a New York State income tax return in 1974 in reliance upon his accountant's advice that interest income received by a nonresident was non-taxable by New York State.

11. The Audit Division acknowledged at the hearing that petitioner was entitled to Federal itemized deductions and exemptions claimed by petitioner

on his 1974 United States Individual Income Tax Return as modified by the New York State Tax Law.

CONCLUSIONS OF LAW

A. That during the period in issue Treas. Reg. §1.736-1 provided that "...a retired partner...will be treated as a partner until his interest in the partnership has been completely liquidated". Accordingly, although petitioner retired from the partnership, petitioner remained a partner for Federal income tax purposes.

B. That during 1974 Treas. Reg. §1.707-1(c) provided in substance that, to the extent guaranteed payments are made without regard to the partnership's income, such payments are considered as made to a person who is not a partner, but only for purposes of Internal Revenue Code sections 61(a) and 162(a). Nevertheless, a partner is required to "...include such payments as ordinary income for his taxable year within or with which ends the partnership taxable year in which the partnership deducted such payments as paid or accrued under its method of accounting." (Treas. Reg. §1.707-1(c)). Thus, the interest income in issue was a distribution of New York partnership income and subject to New York personal income tax since it was derived from New York sources within the meaning of sections 637(a)(1) and 637(b)(1) of the Tax Law. (See also, Matter of Baum v. State Tax Commission, \_\_\_ A.D.2d \_\_\_ (July 8, 1982).) In addition, since the partnership deducted the \$45,463.00 in issue on its return for the period ending July 31, 1974, petitioner was properly taxed upon this amount for the year in issue.

C. That petitioner's failure to file a New York tax return was due to reasonable cause and not willful neglect; therefore, the penalties are cancelled.


D. That the Audit Division is directed to modify the Notice of Deficiency to allow for exemptions and itemized deductions claimed on petitioner's U.S. Individual Income Tax Return for 1974 with the modifications prescribed by the New York State Tax Law.

E. That the petition of Bertram R. Lowenfels is granted to the extent of Conclusions of Law "C" and "D"; and that, except as so granted, the petition is in all other respects denied.

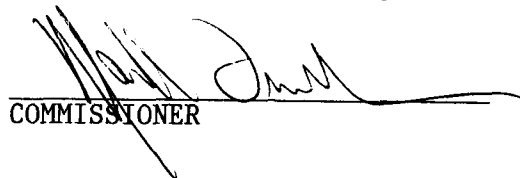
DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER