

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Myer D. Mermin :
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 :
1971 & 1972. :

State of New York
County of Albany

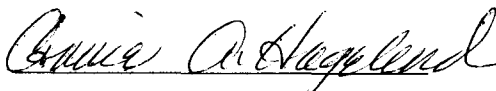
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of November, 1982, he served the within notice of Decision by certified mail upon Myer D. Mermin, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

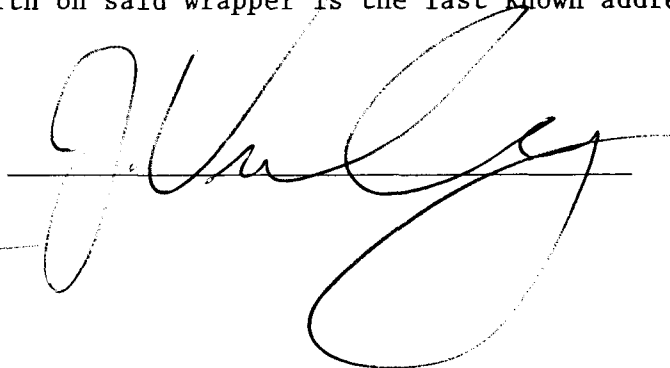
Myer D. Mermin
100 Colony Rd.
New Haven, CT 06511

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 November, 1982.





 LAW

STATE OF NEW YORK

STATE TAX COMMISSION

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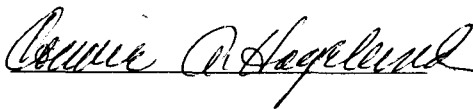
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of November, 1982, he served the within notice of Decision by certified mail upon Paul, Weiss, Rifkind, Wharton & Garrison, Esqs., the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

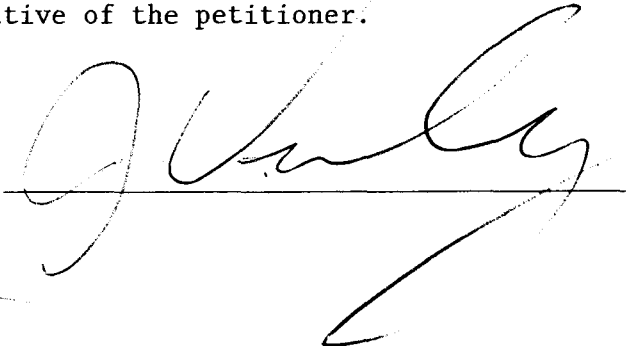
Paul, Weiss, Rifkind, Wharton & Garrison, Esqs.
345 Park Ave.
New York, NY 10154

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 November, 1982.





LAW

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

November 9, 1982

Myer D. Mermin
100 Colony Rd.
New Haven, CT 06511

Dear Mr. Mermin:

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
Paul, Weiss, Rifkind, Wharton & Garrison, Esqs.
345 Park Ave.
New York, NY 10154
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MYER D. MERMIN	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1971 and 1972.	:	

Petitioner, Myer D. Mermin, 100 Colony Road, New Haven, Connecticut 06511, 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 1971 and 1972 (File No. 25851).

On July 21, 1981, petitioner, Myer D. Mermin, advised the State Tax Commission, in writing, that he desired to waive a small claims hearing and to submit the case to the State Tax Commission based upon the entire record contained in the file. After due consideration of said record, the Commission renders the following decision.

ISSUES

I. Whether the income petitioner, Myer D. Mermin, received from the partnership Paul, Weiss, Rifkind, Wharton and Garrison (hereinafter, "Paul, Weiss") constituted an annuity not subject to New York State income tax.

II. Whether the penalties imposed under sections 685(a)(1) and 685(a)(2) of the Tax Law were proper.

FINDINGS OF FACT

1. On December 10, 1975, the Audit Division issued a Statement of Audit Changes against petitioner, Myer D. Mermin, for his failure to substantiate the filing of a 1971 and 1972 New York State income tax nonresident return as

requested in its letter of April 30, 1975. Based on his allocated New York distributive share of income from the partnership of Paul, Weiss, the Audit Division computed petitioner's income tax liability for 1971 using the standard deduction, one exemption, and single statutory credit. Penalties were imposed under sections 685(a)(1) and (a)(2) of the Tax Law for failure to file a return and failure to pay the tax due.

2. On October 13, 1978, the Tax Compliance Bureau issued a Notice of Deficiency against petitioner for 1971 and 1972 asserting a tax due of \$1,032.73, plus penalty and interest of \$830.10, for a total due of \$1,862.83.

3. Petitioner, Myer D. Mermin, timely filed a petition for redetermination of the Notice of Deficiency for tax years 1971 and 1972. On February 26, 1979, a "Notice and Demand for Payment of Income Tax Due" was issued to petitioner showing that tax, penalties, and interest were assessed for 1971 and 1972 in the respective amounts of \$348.62 and \$1,542.03. On September 30, 1980, pursuant to a recomputation of the personal income tax for 1971, petitioner submitted a signed withdrawal of petition and a check for payment of tax and interest assessed for 1971. The penalty for said year was cancelled. Therefore, the part of the Notice of Deficiency attributable to tax year 1971 is not at issue as the tax and interest has been fully agreed to and paid by Mr. Mermin.

4. Petitioner, Myer D. Mermin, is an attorney who joined the law firm of Paul, Weiss in 1939. In 1962, Mr. Mermin became ill and his condition was diagnosed as viral encephalitis. He returned to work on a part-time basis in 1963. However, after three years he decided to retire, since he lacked both the physical and mental energy to function effectively because of his illness.

5. Paul, Weiss did not have a pension or retirement plan covering its partners. Therefore, an agreement was entered into between Mr. Mermin and Paul, Weiss because of his illness.

6. The agreement, dated September 28, 1966, and the subsequent modifications provided, in part, the following:

Mermin will become an inactive partner on January 1, 1967. Mermin's contribution to capital of the Partnership in excess of \$3,000.00 will be paid to him on or before December 31, 1966. During the period that Mermin is an inactive partner, he will maintain his contributions to capital of the Partnership in the sum of \$3,000.00 and will be entitled to interest on such contribution at the same rate as shall be regularly paid by the Partnership during such period to the active partners.

During the period that Mermin is an inactive partner, his share of the net income of the Partnership shall be \$15,000.00 per annum, payable at the rate of \$1,250.00 per month on the 25th day of each month commencing with January, 1967. Mermin's annual share of the net income of the Partnership will be reduced for any year during such period in which the Partnership's net income is less than \$750,000.00, so that Mermin's total share of the net income for such year shall equal but shall not exceed 2% of the Partnership's net income for that year.

So long as Mermin shall continue to be an inactive partner, and if he shall become a retired partner pursuant to the terms of this agreement, all compensation and all business interest and investment opportunities received by him after December 31, 1966, including, without limitation, executor's, trustee's, administrator's or guardian's commissions, shall belong to Mermin, without any requirement to account to the Partnership therefor.

During the period that Mermin shall be an inactive partner, he will not practice law, have his name listed as a partner in any law directory or on the Partnership's letterhead, be expected to attend the offices of Partnership, have any room in the Partnership's offices for his use or be entitled to any secretarial or other services usually afforded by the Partnership to partners, or take part in or vote at Partnership meetings or upon Partnership decisions, or be counted as a partner for the purpose of quorum or required vote for action by the Partnership.

If before December 31, 1971, Mermin shall have recovered from his physical disability, he may give written notice that he has recovered from his disability, and that he desire to resume the status of an active partner. He shall thereupon cease to be an inactive partner and shall become an active partner of the Partner-

ship, subject to the provisions of the Partnership Agreement applicable to active partners as then in force. On resuming the status of an active partner, Mermin's share of the net income of the Partnership shall be in such amount or percentage as shall be determined by the Deciding Group of the Partnership, as then constituted, and as constituted from time to time thereafter.

If Mermin shall not have recovered from his physical disability by December 31, 1971, or shall not have given the notice referred to in the preceding paragraph, he shall cease to be an inactive partner and shall become a retired partner on January 1, 1972. The Partnership shall pay to Mermin, as a retired partner: on or before January 10, 1972, the amount then remaining to his credit as a contribution to the capital of the Partnership; monthly payments of \$1,000.00 per month on the 25th day of each month commencing with January, 1972, so long as Mermin shall live. Such payments will terminate with the payment made for the month in which Mermin's death shall occur, subject, however, to the provisions of the preceding paragraph.

The Agreement was modified May 10, 1971 as follows:

During the period that Mermin is an inactive partner, his share of the net income of the Partnership shall be at the rate of \$1,500.00 per month, commencing with a payment of \$1,500.00 on the 25th day of the month following the last month for which Mermin shall have received insurance disability payments of the nature set forth in his letter of August 13, 1967 to Messrs. DeWind and Rochlin. Mermin's annual share of the net income of the Partnership will be reduced for any year during such period in which the Partnership's net income is less than \$750,000.00, so that Mermin's total share of the net income for such year shall equal but shall not exceed 2.4% of the Partnership's net income for that year.

In years subsequent to 1972, the Agreement was modified on four occasions. These modifications are contended by petitioner not to be relevant to the issues involved in this case.

7. On January 1, 1972, Mr. Mermin became a retired partner. He was repaid the balance of his capital contribution and he began to receive his \$1,500.00 monthly payment from Paul, Weiss.

8. Petitioner, Myer Mermin, filed, for 1972, a joint federal income tax return with his wife Mildred. On the return they claimed four exemptions and itemized deductions of \$6,051.00. A copy of the federal return which was submitted to the Audit Division showed, on Schedules E & R, partnership income

from Paul Weiss of \$18,000.00. The pension and annuity part of said schedule was left blank.

9. Mr. Mermin stated that he had more than reasonable grounds to believe that the payments to him by Paul, Weiss under the Agreement constituted an annuity and as such were exempt from tax in New York State. He also claimed he is an employee in accordance with section 401(c)(4) of the Internal Revenue Code.

CONCLUSIONS OF LAW

A. That 20 NYCRR 131.4(d)(2) states in part that to qualify as an annuity, a pension or other retirement benefit must meet the following requirements:

(A) It must be paid in money only, not in securities of the employer or other property;

(B) It must be payable at regular intervals at least annually, for the life of the individual receiving it, or over a period not less than half his life expectancy, as of the date payments begin.

(C) It must be payable at a rate which remains uniform during such life or period or at a rate which varies only with the fluctuation in (i) the market value of the assets from which such benefits are payable, or (ii) a specified and generally recognized cost-of-living index; and

(D) The individual's right to receive it must be evidenced by a written instrument executed by his employer, or by a plan established and maintained by the employer in the form of a definite written program communicated to his employees.

B. That the payments were made from net income of the partnership and are not from any securities set aside by the partnership for the purpose of payment or from any contributions made by the partnership or Mr. Mermin to any fund for

the purpose of payment. The amount of payment was increased by the modification of May 10, 1971 and the Agreement was modified on four other occasions. The increase was due to a cessation of insurance disability payments and it was not based upon the market value of any assets or a specified and generally recognized cost-of-living index. Further, no evidence was submitted to show that the payments were not increased by the other modifications to the Agreement. The Agreement is only between Mr. Mermin and Paul, Weiss and it does not cover any other partners in the partnership. The Agreement does not qualify as a trust under section 401 of the Internal Revenue Code. Since the Agreement does not meet the requirements of section 401 of the Internal Revenue Code, Mr. Mermin cannot claim to be an employee and the partnership an employer in accordance with section 401(c)(4) of the Internal Revenue Code. Based on the facts stated, the Agreement entered into between Mr. Mermin and Paul, Weiss does not meet the requirements of 20 NYCRR 131.4(d)(2) and, further, said section applies to employees and Mr. Mermin is not an employee. Therefore, the payments made pursuant to the Agreement do not constitute a pension or retirement benefit which qualifies as an annuity. Therefore, the income is taxable to New York State.

C. That the penalties asserted under section 685(a)(1) and (a)(2) of the Tax Law for 1972 are sustained. In view of petitioner Myer D. Mermin's profession, and based on Conclusion of Law "B" above, he did not have reasonable cause for failure to file a return and pay the tax due in a timely manner.

D. That the Audit Division is directed to recompute the tax due based on the information provided in Finding of Fact "8", above.

E. That the petition of Myer D. Mermin is denied and the Notice of Deficiency dated October 13, 1978, as modified by the Audit Division (Conclusion of Law D), is sustained.

DATED: Albany, New York

NOV 09 1982

STATE TAX COMMISSION

ACTIVE PRESIDENT

COMMISSIONER

COMMISSIONER