

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Murray J. & Selma Mickenberg	:	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	:	
1975.	:	

State of New York
County of Albany

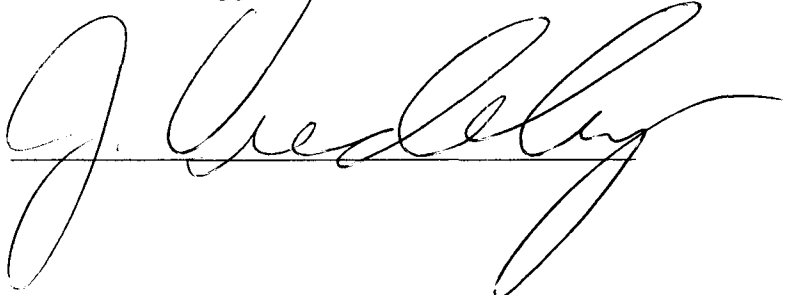
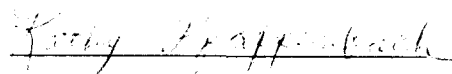
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Murray J. & Selma Mickenberg, the petitioners in the within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

Murray J. & Selma Mickenberg
87-12 Clio St.
Holliswood, NY 11423

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
ALBANY, NEW YORK 12227

December 29, 1982

Murray J. & Selma Mickenberg
87-12 Clio St.
Holliswood, NY 11423

Dear Mr. & Mrs. Mickenberg:

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
MURRAY J. MICKENBERG AND SELMA MICKENBERG
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Year 1975.

DECISION

Petitioners, Murray J. Mickenberg and Selma Mickenberg, 87-12 Clio Street, Holliswood, New York 11423, 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 1975 (File No. 27513).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 7, 1981 at 9:00 A.M. Petitioner Murray J. Mickenberg appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the Notice of Deficiency for the year in issue was barred by the Statute of Limitations.

II. Whether a Notice of Deficiency becomes invalid if it is determined that the amount of the adjustment is invalid.

III. Whether the New York City unincorporated business tax is an "income tax" which must be added to Federal adjusted gross income in determining New York adjusted gross income.

FINDINGS OF FACT

1. Petitioners, Murray J. Mickenberg and Selma Mickenberg, filed a joint New York State Income Tax Resident Return for 1975 wherein Federal adjusted gross income was reported without any modification thereto as provided for in section 612 of the Tax Law.

2. Petitioner Murray J. Mickenberg is an attorney and a partner in the law firm of Polan & Mickenberg, 277 Broadway, New York City. Said firm deducted \$2,599.59 in New York City unincorporated business tax as an expense item on its New York State Partnership Return for 1975.

3. On April 13, 1979, the Audit Division issued a Statement of Audit changes to petitioners wherein it was stated that "New York City unincorporated business taxes are not deductible in determining personal income tax. On your personal income tax return, you failed to increase your income by the distributive share of New York City unincorporated business tax deductions taken on the partnership return(s) of Polan & Mickenberg." Based on the above, petitioners reported "total income" was increased by \$1,299.79 for 1975. Said amounts represented petitioner Murray J. Mickenberg's distributive share of the New York City unincorporated business tax deduction taken on the partnership return of Polan & Mickenberg for said year. Accordingly, a Notice of Deficiency was issued against petitioners on April 13, 1979 asserting additional personal income tax of \$199.84, plus interest of \$50.82, for a total due of \$250.66.

4. The City of New York Income and Unincorporated Business Tax Partnership Return for 1975 filed by the firm of Polan & Mickenberg reported an unincorporated business tax due of \$1,638.62.

5. The Notice of Deficiency was sent by certified mail and was postmarked April 12, 1979, actually a day earlier than the date shown on the Notice of Deficiency.

6. Petitioners contended that the alleged adjustment should have been \$819.31 (one half of \$1,638.62)¹ and not \$1,299.79 (one half of \$2,599.59)² as shown on the Statement of Audit Changes, therefore the Notice of Deficiency is invalid. Accordingly, they argued that the Notice of Deficiency should be cancelled on this ground.

7. The petitioners argued that the date of the Notice of Deficiency does not govern. They contend what governs is the date of receipt of the Notice of Deficiency and the Notice was not received until about April 19, 1979. The petitioners also contended that the Notice was also sent by regular mail and not in accordance with section 681(a) of the Tax Law which requires it to be sent by certified mail. Accordingly, they argued that the Notice of Deficiency should be cancelled on this ground.

8. Petitioner Murray J. Mickenberg further contended that the New York City unincorporated business tax is a business excise tax rather than an income tax, and that no modification with respect thereto is required by the Tax Law. He argued that to require such modification results in paying unincorporated business tax to the state and results in the same money being taxed twice.

¹ See Findings of Fact "4".
² See Findings of Fact "2".

CONCLUSION OF LAW

A. That sections of Tax Law provides in pertinent parts as follows:

§681. Notice of deficiency

(a) General.-If upon examination of a taxpayer's return under this article the tax commission determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer***A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state.

* * *

§683. Limitations on assessment

(a) General.-Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed).

(b) Time return deemed filed.-

(1) Early return.-For purposes of this section a return of income tax, except withholding tax, filed before the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof, shall be deemed to be filed on such last day.

* * *

§691. Mailing rules; holidays

(a) Timely mailing.-If any return, declaration of estimated tax, claim, statement, notice, petition, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the tax commission, bureau, office, officer or person with which or with whom such document is required to be filed, or to which or to whom such payment is required to be made, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of such document, or for making the payment, including any extension granted for such filing or payment, and only if such document or payment was deposited in the mail, postage prepaid, properly addressed to the tax commission, bureau, office, officer or person with which or with whom the document is required to be filed or to which or to whom such payment is required to be made. If any document is sent by United States registered mail, such registration shall be prima facie evidence that such document was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall

prescribe by regulation, certified mail may be used in lieu of registered mail under this section. This subsection shall apply in the case of postmarks not made by the United States Post Office only if and to the extent provided by regulations of the tax commission. (Emphasis supplied)

* * *

That since the Audit Division mailed the Notice of Deficiency by certified mail before the prescribed date required this Notice of Deficiency is not barred by the Statute of Limitations.

That the record does not indicate that the actions or inactions of the Department of Taxation and Finance have unduly prejudiced or adversely affected the petitioners' position in this matter, nor is there any evidence or indication of a denial of due process, therefore the Notice of Deficiency is sustained.

B. That the modification for New York City unincorporated business tax shall be determined by the amount shown on the New York State Partnership Return, therefore the adjustment used in the Notice of Deficiency is valid and is sustained.

C. That the New York City unincorporated business tax is an "income tax" pursuant to chapter 46, title S of the Administrative Code of the City of New York (Berardino v. State Tax Commission, 78 A.D.2d 936).

D. That the amounts representing petitioner Murray J. Mickenberg's distributive share of New York City unincorporated business tax deductions taken on the partnership returns of Polan & Mickenberg must be added to Federal adjusted gross income in accordance with the meaning and intent of section 612(b)(3) of the Tax Law and 20 NYCRR 116.2(c).

E. That the petition of Murray J. Mickenberg and Selma Mickenberg is denied and the Notice of Deficiency dated April 13, 1979 is sustained together with such additional interest as may be lawfully owing.

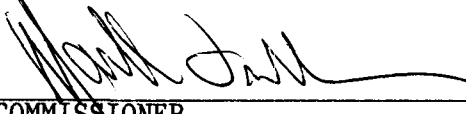
DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER