

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Daniel J. O'Neill
and June M. O'Neill

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
1976.

State of New York
County of Albany

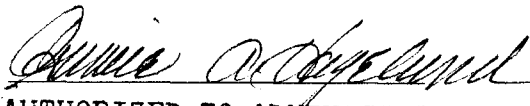
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Daniel J. O'Neill and June M. O'Neill, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

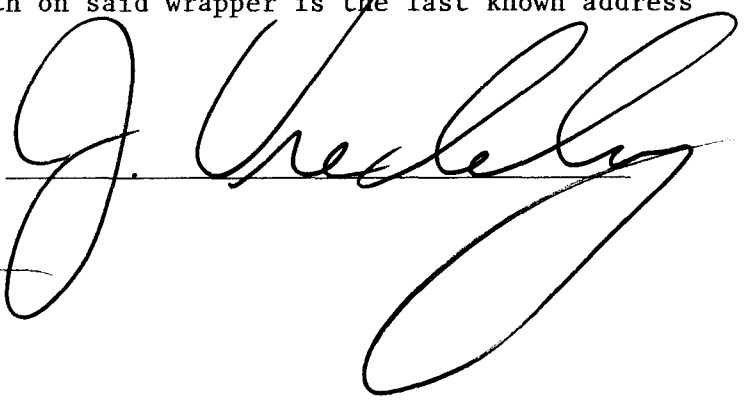
Daniel J. O'Neill
and June M. O'Neill
118 Hilton Ave.
Garden City, NY 11530

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
14th day of December, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Daniel J. O'Neill	:	
and June M. O'Neill	:	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	:	
1976.	:	

State of New York
County of Albany

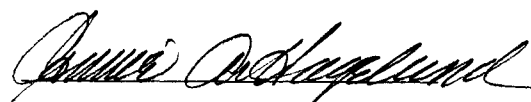
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon William J. Geen the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William J. Geen
Chadbourne, Parke, Whiteside & Wolff
30 Rockefeller Plaza
New York, NY 10112

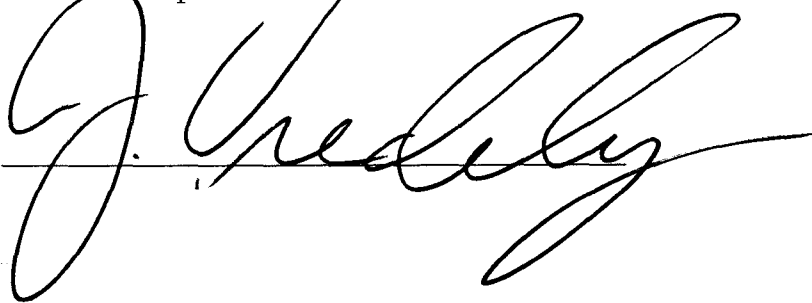
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
14th 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 14, 1982

Daniel J. O'Neill
and June M. O'Neill
118 Hilton Ave.
Garden City, NY 11530

Dear Mr. & Mrs. O'Neill:

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
William J. Geen
Chadbourn, Parke, Whiteside & Wolff
30 Rockefeller Plaza
New York, NY 10112
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DANIEL J. O'NEILL AND JUNE M. O'NEILL	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1976.	:	

Petitioners, Daniel J. O'Neill and June M. O'Neill, 118 Hilton Avenue, Garden City, New York 11530, 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 1976 (File No. 27461).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 18, 1981 at 2:45 P.M. Petitioner Daniel J. O'Neill appeared with William J. Geen, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner Daniel J. O'Neill is properly entitled to a resident tax credit for his distributive share of the District of Columbia Unincorporated Business Franchise Tax paid by the partnership Chadbourne, Parke, Whiteside & Wolff.

II. Whether petitioners are required to report the Unincorporated Business Franchise Tax as a modification in accordance with section 612(b)(3) of the Tax Law.

III. Whether the Audit Division has the right to retroactively disallow a resident credit based on a court decision which declared the tax invalid three years later.

FINDINGS OF FACT

1. Petitioners, Daniel J. O'Neill and June M. O'Neill, timely filed a joint New York State Income Tax Resident Return for the year 1976 whereon, pursuant to a Claim for Resident Tax Credit filed in conjunction therewith, Daniel J. O'Neill (hereinafter petitioner) claimed a credit of \$75.32. Said credit represented petitioner's distributive share of the District of Columbia Unincorporated Business Franchise Tax paid by the New York law partnership Chadbourne, Parke, Whiteside & Wolff. Petitioner also reported said tax as an addition to Total Income in accordance with section 612(b)(3) of the Tax Law, since the partnership properly deducted said tax paid for that year as a business deduction.

2. On January 17, 1979, the Audit Division issued a Statement of Audit Changes to petitioners wherein said credit was disallowed on the basis that the District of Columbia tax was a franchise tax rather than an income tax, and as such, no credit is allowable. Accordingly, a Notice of Deficiency was issued against petitioners on April 5, 1979 asserting additional personal income tax of \$75.32, plus interest of \$12.63, for a total due of \$87.95.

3. During the hearing the Audit Division conceded that the District of Columbia Unincorporated Business Franchise Tax was properly considered an income tax during the years it was in effect (including the year at issue) pursuant to the decision rendered by the District of Columbia Court of Appeals on April 20, 1979 in the Matter of Richard A. Bishop et. al. v. D.C. (Affirmed same court February 12, 1980; writ of certiorari denied U.S. Supreme Court, May 27, 1980.)

Nevertheless, the Audit Division now maintains that the credit at issue is not properly allowable since said court subsequently declared the District of Columbia Unincorporated Business Franchise Tax invalid and there is no provision in the New York State Tax Law for credit of an "invalid and illegal tax" paid to another state.

4. Petitioner maintained that since the District of Columbia Unincorporated Business Franchise Tax was a proper, legal "income tax" during the year 1976 he is entitled to a resident tax credit.

5. The District of Columbia, Department of Finance and Revenue, notified the partnership, Chadbourne, Parke, Whiteside & Wolff that they had processed their claim for refund with respect to the Unincorporated Business Tax which they paid and that the refunds would be refunded on or after April 1, 1981.

CONCLUSIONS OF LAW

A. That section 620 of the Tax Law allows a resident a credit against New York tax for any income tax imposed by another state of the United States, a political subdivision of such state or by the District of Columbia, upon income both derived therefrom and subject to tax under Article 22 of the Tax Law. Said credit cannot exceed the tax payable to the other jurisdiction [20 NYCRR 121.2(a)]. Since the District of Columbia Unincorporated Business Franchise Tax was declared invalid and the partnership Chadbourne, Parke, Whiteside & Wolff received a refund of said tax, no income tax was paid to the District of Columbia. Therefore, petitioner Daniel J. O'Neill is not entitled to a resident tax credit.

B. That section 612(b)(3) of the Tax Law provides for a modification increasing federal adjusted gross income by:

"Income taxes imposed by this state or any other taxing jurisdiction, to the extent deductible in determining federal adjusted gross income and not credited against federal income tax."

Petitioner reported the Unincorporated Business Franchise Tax as an addition modification on his New York income tax return, since said tax was deducted as a business expense in determining his distributive share of partnership income. Since the tax was declared an income tax by the courts, the tax was reportable as a modification pursuant to section 612(b)(3) of the Tax Law. However, since the tax was also declared invalid by the courts, the issue is moot because the tax was refunded and petitioner would be required to report the refund as income, if he had not already reported the tax as a modification.

C. That 20 NYCRR 121.2(a) states:

"The credit cannot exceed the tax payable to the other jurisdiction. If a taxpayer in his return claims a credit pursuant to this Part (20 NYCRR Part 121) for the tax of another jurisdiction or any portion thereof, and it is later determined that the amount of such tax (or the portion for which credit was claimed) is more or less than the amount of credit claimed in the taxpayer's return, he shall immediately notify the New York State Income Tax Bureau. The Bureau will then recompute the amount of the New York tax. Any additional tax due upon such recomputation must be paid by the taxpayer upon notice and demand by the Income Tax Bureau. Any overpayment of tax shown by such recomputation will be refunded to the taxpayer if claim for refund is filed within the period provided by section 687 of the Tax Law."

Petitioner was required to immediately notify the Audit Division of any change in his resident credit. As late as February 12, 1980, petitioner knew or should have known that he was due a refund of his distributive share of the District of Columbia Unincorporated Business Franchise Tax. In this respect it is noted that the partnership Chadbourne, Parke, Whiteside & Wolff timely filed a claim for refund with the District of Columbia within the three-year period of limitation provided by section 47-1812.11 of the District of Columbia Tax Law. Therefore, it is immaterial as to whether the disallowance of the resident credit is based on a court decision rendered three years later,

since petitioner failed to notify the Audit Division as required by 20 NYCRR 121.2(a) that a claim for refund of the tax had been filed with the District of Columbia.

Further, the Audit Division timely issued the Notice of Deficiency pursuant to section 683(a) of the Tax Law. The Notice of Deficiency does not become invalid even though a portion of the explanation accompanying the Notice is incorrect. Therefore, the State Tax Commission is not estopped from making a claim against petitioners (Matter of Philip D. Levy, S.T.C. October 3, 1980).

D. That the petition of Daniel J. O'Neill and June M. O'Neill is denied and the Notice of Deficiency dated April 5, 1979 is sustained.

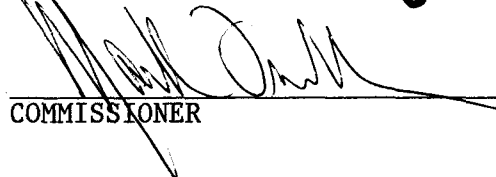
DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER