

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herbert Schectman :

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 Herbert Schectman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert Schectman
Indian Mill Rd.
Cos Cob, CT 06807

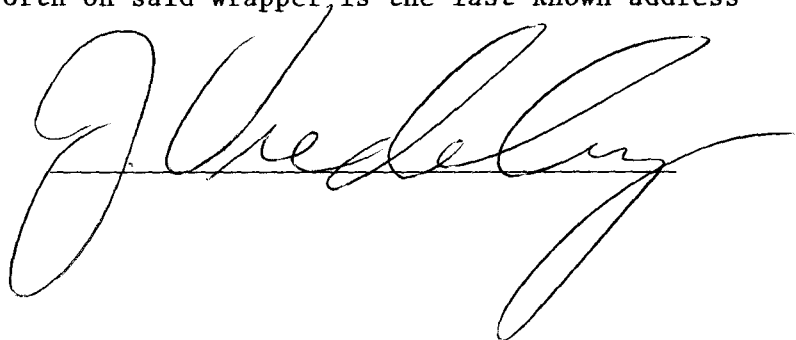
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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.

For my Office Use

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herbert Schectman :
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 Howard Misthal 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 Misthal
David Berdon & Company
415 Madison Ave.
New York, NY 10017

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.

John H. Hopper, Jr.

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

Herbert Schectman
Indian Mill Rd.
Cos Cob, CT 06807

Dear Mr. Schectman:

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 Misthal
David Berdon & Company
415 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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

Petitioner, Herbert Schectman, Indian Mill Road, Cos Cob, Connecticut 06807, 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. 22314).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 8, 1981 at 9:00 A.M. and continued to a conclusion before James Hoefer, Hearing Officer, at the same location on April 20, 1982 at 9:15 A.M. Petitioner, Herbert Schectman, appeared by Howard J. Misthal, C.P.A., of the accounting firm of David Berdon & Co. The Audit Division appeared by Ralph J. Vecchio, Esq. and Paul B. Coburn, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division properly increased petitioner's reported New York income by \$2,243.00, said amount purported to represent petitioner's distributive share of the New York City unincorporated business tax deduction taken on the partnership return of Belfer, Bogart & Schectman.

FINDINGS OF FACT

1. Petitioner herein, Herbert Schectman, filed a New York State resident income tax return for the year 1974 on December 11, 1975. On said return,

petitioner reported no plus or minus modifications to income pursuant to sections 612(b) or (c) of the Tax Law. Accordingly, total New York income was identical to Federal adjusted gross income of \$38,484.00.

2. On March 27, 1978, the Audit Division issued a Notice of Deficiency to petitioner for the year 1974, imposing additional personal income tax of \$336.45 and interest of \$84.30, for a total due of \$420.75. The aforementioned notice was premised on a Statement of Audit Changes dated July 5, 1977, wherein the following explanation was offered:

"Unincorporated business taxes imposed by New York City are not deductible in determining personal income tax. On your personal income tax return you failed to increase your Federal income by \$2,243.00 representing your distributive share of the New York City unincorporated business tax deduction taken on the partnership return of Belfer & Bogart."

3. From January 1, 1974 to September 21, 1974, petitioner was a partner in the New York law firm of Belfer, Bogart & Schectman (hereinafter "B, B & S"). Petitioner and Ira M. Belfer were the only partners of B, B & S.

4. The 1974 New York State partnership return filed by B, B & S reported ordinary income of \$119,835.00. In computing its ordinary income, B, B & S claimed a deduction of \$12,421.00 for unincorporated business taxes paid to the City of New York. The partnership return also reported petitioner's distributive share of partnership ordinary income to be \$28,889.00, while his reported share of the New York City unincorporated business tax deduction totaled \$2,243.00.

5. In February, 1969, petitioner became a member partner of B, B & S pursuant to a verbal agreement. In accordance with the terms of said verbal agreement, petitioner received compensation from B, B & S in the form of a guaranteed salary of \$40,000.00 per annum. Petitioner was entitled to receive the guaranteed salary even if B, B & S had a loss or did not generate ordinary income in excess of said guaranteed salary.

6. The ordinary income of \$28,889.00 attributed to petitioner on the B, B & S partnership return for 1974 represents the \$40,000.00 guaranteed salary prorated to September 21, 1974, the date petitioner separated from B, B & S. The guaranteed salary was the only income received by petitioner from B, B & S. He did not participate in B, B & S profits or losses on a percentage of interest basis. No Federal, State, City or Social Security taxes were withheld by B, B & S from petitioner's guaranteed salary.

7. Petitioner held himself out to the general public as being a partner of B, B & S and he had authority to bind the partnership regarding business matters. Petitioner considered himself a partner of B, B & S.

8. Petitioner's Federal and New York State personal income tax returns for the year 1974 reported the guaranteed salary received from B, B & S as a distributive share of partnership income. During the year at issue, petitioner maintained a capital account with B, B & S.

9. It is petitioner's contention that since he did not share in B, B & S's income, losses or deductions on a percentage basis, that the partnership return incorrectly charged him with a distributive share of the New York City unincorporated business tax deduction. Petitioner argues that he was guaranteed a \$40,000.00 salary regardless of how much ordinary income B, B & S generated or how much New York City unincorporated business tax the partnership paid and, for this reason, no New York City unincorporated business taxes were deducted in determining his Federal adjusted gross income.

CONCLUSIONS OF LAW

A. That the New York adjusted gross income of a resident individual is his Federal adjusted gross income increased by, inter alia, the amount of income taxes imposed by this State or any other taxing jurisdiction, which were

deducted in computing Federal adjusted gross income. Tax Law section 612(b)(3) and 20 NYCRR 116.2(c).

B. That section 617(a) of the Tax Law provides in pertinent part that:

"In determining New York adjusted gross income and New York taxable income of a resident partner, any modifications described in subsections (b), (c) or (d) of section six hundred twelve,...which relates to an item of partnership income, gain, loss or deduction shall be made in accordance with the partner's distributive share, for federal income tax purposes, of the item to which the modification relates."

C. That section 617(b) of the Tax Law provides that:

"Each item of partnership income gain, loss or deduction shall have the same character for a partner under this article as for federal income tax purposes."

D. That Treasury Regulations section 1.707-1(c) provides in part that guaranteed payments are considered as made to one who is not a member of the partnership, only for the purposes of section 61(a) (relating to gross income) and section 162(a) (relating to trade or business expenses) and further provides that for the purposes of other provisions of the internal revenue laws, guaranteed payments are regarded as a partner's distributive share of ordinary income (emphasis added).

E. That petitioner's guaranteed salary is properly considered a distributive share of partnership ordinary income. That petitioner, in the computation of 1974 New York income, must increase his Federal adjusted gross income by \$2,243.00, said sum representing his share of the New York City unincorporated business tax deduction taken on B, B & S's partnership return for the year 1974. Tax Law sections 617(a), 612(b)(3) and 20 NYCRR 119.3(a) and 116.2(c).

F. That the petition of Herbert Schectman is denied and the Notice of Deficiency dated March 27, 1978 is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

Robert T. Bland
ACTING PRESIDENT

Francis R. Koeng
COMMISSIONER

William J. Hall
COMMISSIONER