

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Francis X. & Marjorie A. Byrn : 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 :
1973 & 1974.

State of New York
County of Albany

Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Francis X. & Marjorie A. Byrn, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

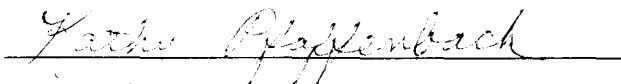
Francis X. & Marjorie A. Byrn
709 W. Carl Ave.
Baldwin, NY 11510

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
24th day of January, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

January 24, 1983

Francis X. & Marjorie A. Byrn
709 W. Carl Ave.
Baldwin, NY 11510

Dear Mr. & Mrs. Byrn:

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 TAX COMMISSION

Petitioners waived their right to a hearing and requested that a decision be rendered based upon the record as contained in their file. Upon review of the file and petitioners' brief, the State Tax Commission hereby renders the following decision.

ISSUES

I. Whether the Audit Division properly increased petitioners' reported New York income for the years 1973 and 1974 by the amount of petitioner Francis X. Byrn's distributive share of the New York City unincorporated business tax deduction taken on the 1973 and 1974 partnership returns of Haight, Gardner, Poor & Havens.

II. Whether the modifications referred to in Issue "I", if required to be made, are subject to the limitation provided for in section 615(c)(1) of the Tax Law.

III. Whether petitioners should be charged interest on any deficiencies found to be due as the result of this decision.

FINDINGS OF FACT

1. Petitioners herein, Francis X. Byrn and Marjorie A. Byrn¹, timely filed joint New York State income tax resident returns for the years 1973 and 1974. There were no additions shown on said returns increasing federal adjusted gross income.

2. On January 24, 1977, the Audit Division issued a Notice of Deficiency to petitioners for the year 1973, assessing additional personal income tax of \$264.56 plus interest. The Audit Division issued a second Notice of Deficiency to petitioners on March 24, 1978 for the year 1974, assessing additional personal income tax of \$259.25 plus interest. Both of the aforementioned notices were accompanied by Statements of Audit Changes, wherein essentially the same explanation was offered. Said explanation was as follows:

"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 the amount of \$1,763.72 (for 1973 and \$1,728.35 for 1974) which represents your share of the New York City unincorporated business tax deduction taken on the partnership return of Haight, Gardner, Poor & Havens."

3. During the years at issue, petitioner was a resident partner of the law firm of Haight, Gardner, Poor & Havens (hereinafter "Haight"). Haight carried on its business within the City of New York and, accordingly, was required to pay New York City unincorporated business tax for the years 1973 and 1974. Petitioner's distributive share of the New York City unincorporated business tax deduction which was claimed on Haight's partnership returns was \$1,763.72 for 1973 and \$1,728.35 for 1974.

¹ Petitioner Marjorie A. Byrn is involved in this proceeding due solely to the filing of joint income tax returns with her husband. Accordingly, the use of the term petitioner hereinafter shall refer only to Francis X. Byrn.

4. Petitioner argues that the New York City unincorporated business tax is not an "income tax" within the meaning and intent of section 612(b)(3) of the Tax Law, but rather a tax levied for the privilege of doing business in the City. Petitioner further argues that should it be determined that the New York City unincorporated business tax is an income tax, that said tax is no different from the New York City earnings tax on nonresidents. Accordingly, petitioner asserts that, pursuant to section 615(c)(1) of the Tax Law, a deduction is permitted for that part of the New York City unincorporated business tax which exceeds a tax computed as if the rates were three-eighths ($3/8$) of one percent of net earnings from self employment.

5. Petitioner lastly argues that due to protracted delays on the part of the Department of Taxation and Finance in auditing his returns, issuing the notices of deficiency and providing for an administrative hearing, that the State Tax Commission should be estopped from charging interest on any tax due.

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 computed 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 modification 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 the New York City unincorporated business tax constitutes an "income tax" within the meaning and intent of section 612(b)(3) of the Tax Law. That petitioner is required to increase his federal adjusted gross income for the years 1973 and 1974 by his distributive share of the New York City unincorporated business tax deduction taken on Haight's 1973 and 1974 partnership returns. (See Berardino v. New York State Tax Commission, 78 A.D.2d 936 and Bower v. New York State Tax Commission, 448 N.Y.S.2d 568.)

D. That section 615(c)(1) of the Tax Law provides for a modification reducing federal itemized deductions for:

"(1) income taxes imposed by this state or any other taxing jurisdiction, except city earnings taxes on nonresidents that are imposed... pursuant to the authority of section twenty-five-m of the general city law, to the extent that the amount of such tax exceeds the tax computed as if the rates were... three-eighths of one percent of net earnings from self employment...".

E. That the New York City unincorporated business tax can not properly be considered as a city earnings tax on nonresidents imposed pursuant to section twenty-five-m of the general city law. Accordingly, petitioner's application of section 615(c)(1) of the Tax Law in the instant matter is inappropriate.

F. That there is no provision in Article 22 of the Tax Law which would permit the waiver of interest because of a delay in auditing a taxpayer's return, issuing a Notice of Deficiency or in providing for an administrative hearing.

G. That the petitions of Francis X. Byrn and Marjorie A. Byrn are denied and the notices of deficiency dated January 24, 1977 and March 24, 1978 are

sustained, together with such additional interest as may be legally due and owing.

DATED: Albany, New York

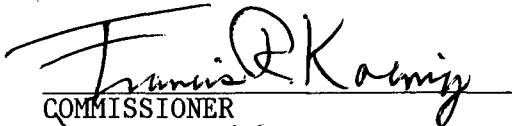
JAN 24 1983

STATE TAX COMMISSION

ACTING PRESIDENT



COMMISSIONER



COMMISSIONER

