

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John E. & Annette M. Fitzgerald :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law and Chapter 46, Title U of the Administrative :
Code of the City of New York for the Years 1976 :
and 1977. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

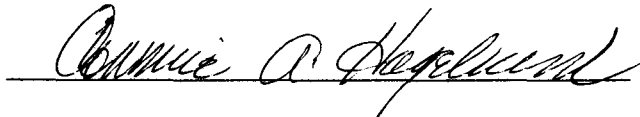
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon John E. & Annette M. Fitzgerald, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John E. & Annette M. Fitzgerald
44 O'Shaughnessy Lane
Closter, NJ 07624

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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

July 15, 1983

John E. & Annette M. Fitzgerald
44 O'Shaughnessy Lane
Closter, NJ 07624

Dear Mr. & Mrs. Fitzgerald:

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 & 1312 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 Law 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
Building #9 State Campus
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 :
JOHN E. AND ANNETTE M. FITZGERALD : DECISION :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law and Chapter 46, Title U of the :
Administrative Code of the City of New York for :
the Years 1976 and 1977. :

Petitioners, John E. and Annette M. Fitzgerald, 44 O'Shaughnessy Lane, Closter, New Jersey 07624, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1976 and 1977 (File Nos. 29335 and 29336).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 16, 1982 at 2:10 P.M., with all briefs to be submitted by January 11, 1983. Petitioners appeared by John E. Fitzgerald, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the law firm of petitioner John E. Fitzgerald had a place of business outside New York, so as to entitle him to allocate his business income within and without this state.

FINDINGS OF FACT

1. On March 3, 1980, the Audit Division issued to petitioners, John E. and Annette M. Fitzgerald, a Notice of Deficiency asserting New York State

personal income tax due under Article 22 of the Tax Law and New York City nonresident earnings tax due under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1976 in the total amount of \$11,584.75, plus interest. On the same date, the Audit Division issued to petitioner John E. Fitzgerald a Notice of Deficiency asserting New York State personal income tax due and New York City nonresident earnings tax due for 1977 in the total amount of \$2,860.17, plus interest.

At a pre-hearing conference, the Audit Division cancelled a portion of the 1976 deficiency asserted against Mrs. Fitzgerald, as well as a separate Notice of Deficiency which had been issued to her for 1977. On or about December 21, 1981, the Audit Division asserted a greater deficiency against Mr. Fitzgerald in the amount of \$776.29 for 1977, pursuant to Tax Law section 689(d)(1). The increased deficiency resulted from a change in the limitation percentage applied to itemized deductions and personal exemptions (which in turn had resulted from the cancellation of the deficiencies asserted against Mrs. Fitzgerald). The revised amounts of tax asserted to be due are thus as follows:

<u>PETITIONER(S)</u>	<u>YEAR</u>	<u>AMOUNT</u>
John and Annette Fitzgerald	1976	\$3,688.50
John Fitzgerald	1977	3,636.46

2. During the audit period, Mr. Fitzgerald was the sole proprietor of a law firm, whose principal office was located at 888 Grand Concourse, Bronx, New York. Mr. Fitzgerald and all the staff attorneys, including Mrs. Fitzgerald who was an employee of the firm, were admitted to practice only in the State of New York.

3. Sometime prior to the audit period, the law firm had established and equipped an office situated in the Fitzgeralds' residence in Closter, New

Jersey, because of office space limitations at the New York location and also because Mrs. Fitzgerald had an infant child. The residence had two telephone listings, one devoted exclusively to the business of the law firm, although the local telephone directory did not indicate that number as a business listing. There was no sign or other indication on the outside of the residence that a law firm was located therein, as petitioners had no intention of representing to the New Jersey public that they were New Jersey attorneys.

4. Mrs. Fitzgerald worked exclusively at the New Jersey location. Mr. Fitzgerald generally worked there on Wednesdays and Saturdays, and also in the evenings, on Sundays and on holidays. Mr. Fitzgerald interviewed clients at the New Jersey office, conducted conferences and directed the work of outside counsel employed to handle litigation in jurisdictions other than New York, and of course worked with Mrs. Fitzgerald on those cases assigned to her.

5. The firm's business stationery and cards had imprinted thereon the Bronx address. When appropriate, the New Jersey telephone number was typed on correspondence.

6. The firm did not maintain separate books and records for the New Jersey office, which would reflect, for example, expenditures for supplies for that office or income derived from referrals to New Jersey attorneys.

7. The firm sought the leave of the New Jersey courts to file pleadings and papers therein in its name, with a New Jersey attorney "of counsel". The firm was informally denied permission to do so and advised that papers must be submitted in the name of an attorney admitted to the New Jersey bar, with a New Jersey office address.

CONCLUSIONS OF LAW

A. That the New York adjusted gross income of a nonresident individual is an aggregate of, inter alia, the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, derived from or connected with New York sources. Items of income, gain, loss or deduction derived from or connected with New York sources include items attributable to a profession carried on in this state. Tax Law sections 632(a)(1) and (b)(1)(B); Administrative Code of the City of New York sections U46-1.0(f) and U46-4.0(a).

B. That the Audit Division properly denied Mr. Fitzgerald any allocation of his business income derived from his law practice. This income, whether for services performed at the Bronx address or at the office situated in petitioners' New Jersey residence, is from a profession carried on in this state.

"He was not engaged in any ordinary business which he could legally transact anywhere. To the contrary he could lawfully hold himself out as only entitled to practice law in the State of New York, and services performed elsewhere were incidental to the practice he maintained in this state. Except for petitioner's admission to practice in this state it would be beyond his authority to act as an attorney elsewhere." Carpenter v. Chapman, 276 App. Div. 634, 636 (3d Dept. 1950).

C. That the petition of John E. and Annette M. Fitzgerald is hereby denied; and the Notices of Deficiency, issued on March 3, 1980 and revised as stated in Finding of Fact "1", are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983


PRESIDENT


COMMISSIONER


COMMISSIONER