

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Frank F. Flegal :  
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 :  
1971. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Frank F. Flegal, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank F. Flegal  
Georgetown University Law Center  
600 New Jersey Ave. N.W.  
Washington, DC 20001

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  
27th day of May, 1983.

David Parchuck

James A. Hageland

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 27, 1983

Frank F. Flegal  
Georgetown University Law Center  
600 New Jersey Ave. N.W.  
Washington, DC 20001

Dear Mr. Flegal:

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 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

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In the Matter of the Petition	:	
	:	
of	:	
	:	
FRANK F. FLEGAL	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1971.	:	

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Petitioner, Frank F. Flegal, Georgetown University Law Center, 600 New Jersey Avenue N.W., Washington, D.C. 20001, 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 1971 (File No. 13180).

On May 18, 1982, petitioner filed a waiver of a small claims hearing and requested that this matter be decided by the State Tax Commission on the basis of the entire file, a stipulation of facts dated June 30, 1981, and submitted memoranda of law. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether petitioner is entitled to separate allocations for his share of the partnership net income as of June 30, 1971, the date he resigned, and as of December 31, 1971, the end of the partnership calendar year.

FINDINGS OF FACT

1. On April 14, 1975, the Income Tax Bureau (now the Audit Division) issued a Notice of Deficiency against petitioner Frank F. Flegal in the amount of \$2,342.40, plus interest of \$421.47, for a total of \$2,763.87 for the taxable year 1971. A Statement of Audit Changes dated April 11, 1975 stated

that the total 1971 allocated New York distributive share of income from petitioner's partnership of \$39,126.75 was reportable for New York tax purposes.

2. From January 1, 1971 until June 30, 1971, petitioner was a partner in the law firm of Dickstein, Shapiro & Galligan. That law firm maintained offices in Washington, D.C. and New York City, New York. During 1971, petitioner was a resident of the District of Columbia and Virginia and a member of the bar of the District of Columbia but was not a resident of New York nor a member of the bar of New York.

3. On June 30, 1971, petitioner resigned as a partner in the law firm of Dickstein, Shapiro & Galligan. On that day, petitioner's capital account in said partnership showed the following:

	<u>Balance</u> <u>Jan. 1, 1971</u>	<u>Net Income For</u> <u>The Six Months</u> <u>Ended June 30, 1971</u>	<u>Withdrawals</u>	<u>Balance</u> <u>June 30, 1971</u>
Frank F. Flegal	(2004.89)	49760.83	31402.29	16353.65

On July 1, 1971, petitioner commenced employment as a professor of law at Georgetown University Law Center, Washington, D.C.

4. In its tax return filed with the State of New York for 1971, the partnership of Dickstein, Shapiro & Galligan showed petitioner's resignation effective as of June 30, 1971, and also showed distributions to petitioner in the total amount of \$74,663.00 for the calendar year ending December 31, 1971. The capital account of petitioner on the partnership books for the calendar year ending December 31, 1971 showed the following:

	<u>Balance</u> <u>Jan. 1, 1971</u>	<u>1971</u> <u>Capital</u> <u>Contributions</u>	<u>Net Income For</u> <u>The Year Ended</u> <u>Ended Dec. 31, 1971</u>	<u>Withdrawals</u>	<u>Balance</u> <u>Dec. 31, 1971</u>
Frank F. Flegal	(2004.89)	500.00	74663.27	66593.24	6565.14

The record shows that the partnership's total net income as of December 31, 1971 was \$787,018.74, of which \$412,431.34 was from New York State sources.

5. The \$74,663.00 received by petitioner during 1971 from the partnership of Dickstein, Shapiro & Galligan represented: (i) his capital account as reflected on the books of the partnership at June 30, 1971 in the amount of \$49,761.00 (see Finding of Fact "3" supra) and (ii) payments on matters substantially completed at the time of his resignation in the amount of \$24,903.00.

6. The books and records of the partnership of Dickstein, Shapiro & Galligan regularly allocate to New York sources that portion of the partnership income thereby attributable. As of June 30, 1971, 14.97 percent of the partnership's income was attributable to New York sources. As of December 31, 1971, 52.40 percent of the partnership's income was attributable to New York sources.

7. Petitioner, by his initial submission of a 1971 New York non-resident income tax return and by further proceedings at a conference, has reported all of the \$74,663.00, (as shown in computation below), as reflected on the partnership's 1971 New York tax return. Petitioner has properly allocated to New York sources, and has properly computed and paid all tax and interest due New York on the \$24,903.00 representing payments to him on matters substantially completed at the time of his resignation from the partnership.

Petitioner submitted a schedule revising his 1971 tax computations as follows:

	<u>Federal Amount</u>	<u>New York Amount</u>
Total income	\$65095	*\$20498.
Itemized deductions $\frac{20498}{65095} \times 16623$		<u>5234.</u>
Balance		<u>\$15264.</u>
Exemptions		<u>650.</u>
New York taxable income		<u>\$14614.</u>

Tax due	\$ 825.
Statutory credit	<u>13.</u>
Personal income tax due	812.
Less tax paid with return	<u>193.</u>
Tax due	619.
Interest due	<u>230.59</u>
Total tax and interest due (check enclosed)	<u>\$ 849.59</u>

\* Basis for allocation to New York sources;

Total 1971 income	<u>\$74664</u>	
Capital account as of 6/30/71	\$49761	
Capital account allocation		
(49761 x .1497%)		\$ 7449
Other fee income	24903	
Other fee income allocation		
(24903 x .5240%)		<u>13049</u>
Total New York allocation		<u>\$20498</u>

8. The sole issue in this matter is the proper basis for allocating to New York sources the remaining \$49,761.00 representing petitioner's capital account as reflected on the books of the partnership as of June 30, 1971. Petitioner contended that only 14.97 percent of the remaining \$49,761.00 is properly allocable to New York sources. The Audit Division contended that 52.40 percent of the remaining \$49,761.00 is properly allocable to New York sources.

9. By agreement with the partnership, petitioner did not receive his final payment on his capital account until January, 1972 although the \$49,761.00 amount became fixed and irrevocable as of June 30, 1971, the date of petitioner's resignation.

CONCLUSIONS OF LAW

A. That section 637(a)(1) of the Tax Law and 20 NYCRR 134.1 provide that in determining the adjusted gross income of a non-resident partner of a partnership, for the purpose of the New York personal income tax, there must be

included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income.

B. That under Federal Law a retired partner is treated as a continuing partner until all his interest in the partnership has been completely liquidated (Treas. Reg. §1.736-1(a)(1)(ii). Cf. Matter of Stern, State Tax Commission, August 29, 1972). Inasmuch as petitioner's interest in the partnership was not completely liquidated until January, 1972, he is treated as a continuing partner for all of 1971 and therefore his total distributive share is subject to the New York allocation percentage of the partnership for the entire year 1971.

C. That section 637(b)(2) of the Tax Law provides that in determining the source of a nonresident partner's income, no effect is given to a partnership provision which allocates to the partner, as income from sources outside New York, a greater proportion of his distributive share of partnership income than the ratio of partnership income from sources outside New York to income from all sources. Thus the intent of section 637 is that each individual partner is to assume the allocation of the partnership as a whole for the entire taxable year. Therefore, even if petitioner had received his entire interest on the date of his resignation, his distribution would have been subject to the full year partnership allocation of 52.40 percent.

D. That petitioner's reliance on Yohalem v. State Tax Commission, 70 A.D.2d 996 and McLaughlin v. New York State Tax Commission, 87 A.D.2d 712 is misplaced. In Yohalem the petitioner had joined a law firm part-way into the taxable year and the income held to be non-taxable was money received for legal services rendered as a sole practitioner and thus not a distributive share of the partnership's profits. In the instant case the income sought to be taxed was concededly a share of the partnership profits and not income from another


source as in Yohalem. In McLaughlin the petitioner was a German citizen who immigrated to the United States. The issue in that case centered on whether foreign partnership income, was taxable for the entire year where a partner had only resided in New York for the last month of the year. Neither Yohalem nor McLaughlin involved the issue of the correct allocation percentage to be used in the case of a partner who leaves the partnership before the end of the partnership's taxable year. The aforementioned cases cited by petitioner are, therefore, inapposite to the present case.

E. That the petition of Frank F. Flegal is denied and the Notice of Deficiency issued April 14, 1975, as adjusted by the tax paid as shown in Finding of Fact "7", is sustained.

DATED: Albany, New York

**MAY 27 1983**

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER