

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Sidney C. Linick : 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 :
1974 - 1976.

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 6th day of April, 1983, he served the within notice of Decision by certified mail upon Sidney C. Linick, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Sidney C. Linick
Backnine Drive
Boca Raton, FL 33434

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
6th day of April, 1983.




AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Sidney C. Linick

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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 :
1974 - 1976.

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 6th day of April, 1983, he served the within notice of Decision by certified mail upon Terence J. Devine the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Terence J. Devine
DeGraff, Foy, Conway, Holt-Harris & Mealey
90 State St.
Albany, NY 12205

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
6th day of April, 1983.

David Parchuck

Carrie A. Haglund
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 6, 1983

Sidney C. Linick
Backnine Drive
Boca Raton, FL 33434

Dear Mr. Linick:

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
Terence J. Devine
DeGraff, Foy, Conway, Holt-Harris & Mealey
90 State St.
Albany, NY 12205
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SIDNEY C. LINICK	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1974 through	:	
1976 and New York City Nonresident Earnings Tax	:	
under Chapter 46, Title U of the Administrative	:	
Code of the City of New York for the Year 1976.	:	

Petitioner, Sidney C. Linick, 19820 Backnine Drive, Boca Raton, Florida 33434, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1974 through 1976 and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1976 (File No. 27360).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Room 107, Albany, New York 12227 on July 22, 1982 at 1:15 P.M. Petitioner appeared by Degraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (Terence J. Devine, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Harry Kadish, Esq., counsel).

ISSUE

Whether payments made to the petitioner by S.D. Leidesdorf & Co. during the years 1974, 1975, and 1976 were payments to a retiring partner and are allocable to New York State on the basis of the partnership allocation percentage.

FINDINGS OF FACT

1. On July 24, 1978, the Audit Division issued a Statement of Audit Changes against petitioner for the taxable years 1974, 1975, and 1976 showing tax due of \$561.84, \$2,283.85 and \$2,364.69, respectively, plus penalties pursuant to Tax Law sections 685(c), 685(a)(1), and 685(a)(2). The tax claimed due for 1976 of \$2,364.69 includes New York City nonresident earnings tax of \$176.47 imposed under Chapter 46, Title U of the Administrative Code of the City of New York. The following explanation was provided:

"The partnership returns and schedules of S.D. Leidesdorf and Co.... clearly show that you are... a retired partner receiving retirement payments.

A retired partner continues to be a partner for income tax purposes until his interest in the partnership has been completely liquidated pursuant to Internal Revenue Regulations Section 1.736-1(a)(6)a.

Accordingly, your retirement (sic) payments from S.D. Leidesdorf and Co. constitutes (sic) a distribution of ordinary income and as such is (sic) allocable to New York State on the basis of the partnership allocation percentage.

The standard deduction and one exemption are allowed in determining your tax liability.

Penalty is imposed under Section 685(c) for underestimation of personal income tax."

2. On April 5, 1979, the Audit Division issued a Notice of Deficiency against petitioner for the taxable years 1974, 1975, and 1976 showing additional tax due of \$5,210.38 plus total penalty and/or interest of \$3,400.35.

3. During the years in issue, petitioner neither resided in New York nor provided any services for S.D. Leidesdorf & Co. ("Leidesdorf") in New York.

4. Leidesdorf is a partnership that does business in New York and has offices in this state, including New York City.

5. Leidesdorf, on its partnership returns filed for its taxable years ending September 30, 1974, September 30, 1975, and September 30, 1976, reported payments to petitioner of \$20,000.00, \$40,000.00, and \$40,000.00, respectively, as payments to a retired partner.

6. Petitioner has been a certified public accountant since 1947. Prior to his association with Leidesdorf, he was a senior partner with the firm of Arthur S. Pos and Company in Chicago, Illinois which merged into Leidesdorf on November 17, 1969. Petitioner, under a letter agreement dated November 17, 1969, became a general partner of Leidesdorf.

7. On October 1, 1971, pursuant to a written agreement, petitioner withdrew from partnership in Leidesdorf and became an employee of Leidesdorf for an employment period commencing October 1, 1971 and ending at the earlier of seven years after the date of commencement, or the occurrence of petitioner's death or permanent disability. Compensation during this employment period was set in the agreement at the following rate per annum:

<u>FISCAL YEAR ENDING</u> <u>SEPTEMBER 30</u>	<u>AMOUNT</u>
1972	\$60,000
1973	\$52,000
1974	\$48,000
1975	\$45,000
1976	\$42,000
1977	\$36,000
1978	\$36,000

8. Social Security tax, federal withholding tax, and Illinois withholding taxes were deducted from petitioner's semi-monthly paychecks during the employment period from October 1, 1971 until May 1, 1974 when the employment agreement was terminated.

9. On September 29, 1972, Leidesdorf remitted to petitioner a check in the amount of \$1,000.00 representing payment of the balance in petitioner's

capital account with the partnership and a check in the amount of \$56.14 representing the interest for the period from January 1, 1972 to September 30, 1972 on such balance in petitioner's capital account.

10. Confidential diaries issued by Leidesdorf to its personnel for 1971 and 1972 list petitioner as a partner in its Chicago, Illinois office. In the 1973 and 1974 confidential diaries, petitioner was not listed as a partner in the Chicago office or in any other Leidesdorf office. Petitioner testified that since the confidential diaries were printed in England, he was listed in the 1972 diary as a partner since the diaries for 1972 were printed up prior to his change in status from partner to employee on October 1, 1971.

11. On May 1, 1974, petitioner terminated his employment agreement dated October 1, 1971 and agreed that he would not practice public accounting in any state except Florida and Arizona (although he could retain a few accounts in Chicago) in exchange for the following payments from Leidesdorf:

WITH RESPECT TO THE FISCAL YEAR ENDING SEPTEMBER 30	AMOUNT
1974	\$20,000
1975	\$40,000
1976	\$40,000
1977	\$30,000
1978	\$30,000

Petitioner, on his federal individual income tax returns for 1974, 1975, and 1976, reported the receipt of \$20,000, \$40,000, and \$40,000 in 1974, 1975, and 1976, respectively, on Schedule C, "Profit or (Loss) From Business or Profession". The sum of \$16,000, which was received from Leidesdorf in 1974 pursuant to the 1971 employment agreement, was reported by petitioner under item 9, "Wages, salaries, tips, and other employee compensation" on his federal individual income tax return for 1974.

CONCLUSIONS OF LAW

A. That Tax Law section 637(a)(1) provides as follows:

"In determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income..."

Since Leidesdorf is a partnership that does business in New York and has offices in this state, if petitioner was a partner of Leidesdorf during the years at issue, he would be liable for New York State taxes notwithstanding the fact that he neither resided in New York nor provided any services for the partnership in New York.

B. That the New York City Administrative Code §U46-1.0(f) defines "net earnings from self-employment", on which the New York City nonresident earnings tax is imposed, as net earnings from self-employment as defined in I.R.C. §1402(a). I.R.C. §1402(a) defines "net earnings from self-employment" as follows:

"(T)he gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed by this subtitle which are attributable to such trade or business, plus his distributive share (whether or not distributed) of income or loss described in section 702(a)(8) from any trade or business carried on by a partnership of which he is a member..."

Therefore, if petitioner was a partner of Leidesdorf during 1976, he would be liable for New York City nonresident earnings tax on the portion of his distributive share of partnership income from New York City sources.

C. That petitioner would be considered a partner for the years at issue for purposes of Tax Law section 637(a)(1) and New York City Administrative Code §U46-1.0(f) if the payments received by him from Leidesdorf were considered as payments to a retiring partner under I.R.C. §736 since "(a) retiring partner..."

receiving payments under section 736 is regarded as a partner until the entire interest of the retiring...partner is liquidated." Treas. Reg. §1.736-1(a)(6).

D. That I.R.C. §736 applies only to payments made to a retiring partner in liquidation of such partner's entire interest in the partnership. Treas. Reg. §1.736-1(a)(1)(i).

E. That the payments received by petitioner from Leidesdorf during the tax years at issue were not in liquidation of his partnership interest. Rather they were made in consideration of petitioner's terminating his employment arrangement with Leidesdorf and agreeing not to compete with the partnership. There is no evidence that the payments were formulated as such for the purpose of evading New York State taxes. The fact that petitioner was a bona fide employee of Leidesdorf also suggests that the transaction herein was not a sham. Therefore, the payments received by petitioner did not constitute partnership distributons.

F. That the petition of Sidney C. Linick is granted, and the Notice of Deficiency issued on April 5, 1979 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1983

ACTING

Rodwin Aslan
PRESIDENT

Francis R. Koeng
COMMISSIONER

[Signature]
COMMISSIONER