

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Irwin D. & Estelle Marks : 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 :
1969, 1970 and 1972. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 22nd day of November, 1983, she served the within notice of Decision by certified mail upon Irwin D. & Estelle Marks, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

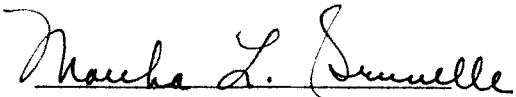
Irwin D. & Estelle Marks
15 Oak St.
Harrington Park, NJ 07640

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
22nd day of November, 1983.





MAUCHA L. SMUELLE
CLERK OF THE TAX LAW
ALBANY, N.Y.

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Irwin D. & Estelle Marks : AFFIDAVIT OF MAILING
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of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1969, 1970 and 1972.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 22nd day of November, 1983, she served the within notice of Decision by certified mail upon Melvin Paradise the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Melvin Paradise
Paradise & Alberts
1133 Ave. of the Americas
New York, NY 10036

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
22nd day of November, 1983.

Martha L. Scruelle

ADMINISTRATOR TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

Connie A. Hagelund

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

November 22, 1983

Irwin D. & Estelle Marks
15 Oak St.
Harrington Park, NJ 07640

Dear Mr. & Mrs. Marks:

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
Melvin Paradise
Paradise & Alberts
1133 Ave. of the Americas
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
IRWIN D. MARKS and ESTELLE MARKS	:	DECISION
	:	
for Redetermination of Deficiencies or	:	
for Refund of Personal Income Taxes under	:	
Article 22 of the Tax Law for the Years	:	
1969, 1970 and 1972.	:	

Petitioners, Irwin D. Marks and Estelle Marks, his wife, 15 Oak Street, Harrington Park, New Jersey 07640, filed petitions for redetermination of deficiencies or for refund of personal income taxes under Article 22 of the Tax Law for the years 1969, 1970 and 1972 (File Nos. 11746 and 12712).

A formal hearing was held before Harry Issler, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 14, 1977 at 9:15 A.M. and continued before Edward L. Johnson, Hearing Officer, at the same location on March 17, 1978 at 2:00 P.M. Petitioners appeared by Paradise & Alberts, Esqs. (Melvin Paradise, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner, a nonresident partner of a New York partnership, can properly allocate income on his 1969 and 1970 individual income tax return when the partnership did not allocate its income on its partnership tax return.

II. Whether monies paid to petitioner for personal services rendered outside New York and turned over to a New York partnership were subject to New York State income tax.

FINDINGS OF FACT

1. Petitioners, Irwin D. Marks and Estelle Marks, his wife, timely filed joint New York State income tax nonresident returns (Form IT-203) for 1969, 1970 and 1972.

2. Consents fixing the period of limitation upon assessment of personal income taxes were executed and filed March 6, 1973 and November 13, 1973 extending the time within which to make assessments for 1969 and 1970 to and including April 15, 1975.

3. On September 30, 1974, the Audit Division issued a Notice of Deficiency to petitioners, asserting personal income taxes due as follows:

<u>Year</u>	<u>Deficiency</u>	<u>Interest</u>	<u>Total</u>
1969	\$ 5,974.97	\$1,598.07	\$ 7,573.04
1970	<u>5,784.92</u>	<u>1,200.14</u>	<u>6,985.06</u>
Total	\$11,759.89	\$2,798.21	\$14,558.10

A Statement of Audit Changes advised petitioners:

"A distributive share of partnership income may be allocated only on the basis of the partnership allocation ratio.

Since the partnership of Frendel, Brown & Weissman did not allocate its 1969 and 1970 income, you may not allocate your distributive share of such partnership income."

A computation of the additional personal income tax due was shown on the Statement.

4. On November 24, 1975, the Audit Division issued a Notice of Deficiency to petitioners, asserting income tax due for 1972 of \$4,318.18, plus interest of \$845.59, for a total due of \$5,163.77. A Statement of Audit Changes as of the same date explained that petitioners' New York income had been increased to reflect the allocation percentage (78.77 percent) computed by the partnership (Frendel, Brown & Weissman) in computing distributive shares of partnership

income. The statement also indicated that petitioners had failed to increase income by the New York City unincorporated business tax deduction of \$2,188.68 taken on the partnership tax return. The recomputation of additional personal income tax due was shown.

5. Petitioners timely filed petitions for redetermination of the deficiencies for 1969, 1970 and 1972.

6. Petitioners were residents of the State of New Jersey throughout the period under review, 1969, 1970 and 1972. They resided at 15 Oak Street, Harrington Park, New Jersey.

7. Petitioner Irwin D. Marks (hereinafter "Marks") was one of the seven partners of the accounting firm of Frendel, Brown & Weissman, CPA's, maintaining a main office at 1700 Broadway, New York, New York. He was in charge of the partnership's branch office in Hackensack, New Jersey during 1969, 1970 and 1972. Marks performed audits on the premises of accounting clients of Frendel, Brown & Weissman in New York, New Jersey and Pennsylvania.

8. Petitioner Irwin D. Marks, in addition to his accounting work as a certified public accountant servicing clients of Frendel, Brown & Weissman, served since 1962 as treasurer and chief financial officer of All-American Realty Co., Inc. This Pennsylvania corporation, with offices in Hackensack, New Jersey and in Pennsylvania, was in the land development and home building business in the Pocono Mountains of Pennsylvania. Marks was paid a salary of \$60,188.00 in 1969, from which federal income taxes of \$21,409.00 were withheld by All-American.

9. On July 23, 1969, all of the capital stock of All-American Realty Co., Inc. was acquired by Presidential Realty Corporation of White Plains, New York. On the same day, petitioner Marks and All-American entered into a purported

employment contract for a period of ten years providing a salary of \$15,000.00 per annum plus 2 percent commissions on the retail sales of lots by the corporation. Petitioner Marks was obliged by the agreement to devote an average minimum of one and one-half business days per week to the business affairs of All-American, it being acknowledged in the contract "...that he is a partner in the accounting firm of Frendel, Brown & Weissman, and his major activities are as a Certified Public Accountant."

The agreement provided, inter alia, for petitioner to have the use of an automobile, life insurance, a continuation of the then existing pension plan, and contained a restrictive covenant regarding petitioner's engaging in the sale of lots. In the event of petitioner's death or physical disability during the term of the agreement, All-American agreed "...to enter into an employment agreement on the same terms and conditions herein set forth with Mr. Paul Weissman, Employee's partner."

10. The partnership Frendel, Brown & Weissman, CPA's provided accounting services to All-American prior to its acquisition by Presidential Realty Corporation and prepared All-American's closing statements for 1969. After Presidential Realty Corporation took over All-American, the new parent brought in its own accounting firm, Haskins & Sells. Petitioner Marks had not serviced All-American as auditor prior to the merger.

11. Petitioner Marks remitted his entire compensation from All-American to the partnership Frendel, Brown & Weissman. In a letter on his personal letterhead dated October 25, 1972, petitioner stated:

"I receive a salary from All-American Realty Co., Inc., 45 Essex St., Hackensack, N.J. I receive this compensation for services I render to the company in N.J. on behalf of Frendel, Brown & Weissman and the entire compensation is remitted to the Frendel, Brown & Weissman partnership."

12. Partnership tax returns filed by Frendel, Brown & Weissman for fiscal years ended June 30, 1969 and June 30, 1970 in Schedule K of the Form IT-204 (Partners shares of income and deductions) showed percentage of time devoted to partnership business reported to be "All" for petitioner as well as for the other partners listed. Petitioner's income from All-American was included in the partnership gross income and the amount subject to reported distribution.

13. Partnership returns of Frendel, Brown & Weissman for fiscal years ended June 30, 1969 and June 30, 1970 reported that business was conducted in New York and New Jersey but no allocation was made. The IT-204 for fiscal year ended June 30, 1973 showed a formula basis of business allocation of 72.30 percent to New York. Copies of unincorporated business tax returns for the New Jersey office for fiscal years ended June 30, 1969, June 30, 1970 and June 30, 1972 show gross receipts from New Jersey business as \$69,471.59, \$117,957.00 and \$114,385.00,¹ respectively; no allocation was made on the New Jersey returns. No evidence was submitted to show the total gross receipts for fiscal years ended June 30, 1969 or June 30, 1970.

14. No evidence was adduced as to the terms of the accounting partnership agreement or distribution. In a letter dated April 22, 1977 on the Frendel, Brown & Weissman letterhead, petitioner wrote:

"Please be advised that although I am a partner in the firm of Frendel, Brown & Weissman, Certified Public Accountants with offices at 1700 Broadway, New York, New York and 411 Hackensack Avenue, Hackensack, New Jersey, I am also the Vice President and Treasurer of All American Realty Co., Inc. located at 45 Essex Street, Hackensack, New Jersey. The salary I receive from All American Realty Co., Inc. is for services rendered outside the State of New York. However, in calculating the distributive share of my partnership income these earnings were taken into consideration by the partnership."

¹ The allocation schedule submitted for fiscal year ended June 30, 1972 for New York State indicated total gross receipts of \$854,409.00 and New York gross receipts of \$559,487.00, leaving total gross receipts outside New York of \$294,922.00. No explanation was given for the discrepancy.

15. All-American Realty Co., Inc. had no offices in New York, and performed no services in New York.

CONCLUSIONS OF LAW

A. That the Tax Law provides in pertinent part that the New York adjusted gross income of a nonresident individual shall include his distributive share of partnership income, gain, loss and deduction. Where a business, trade, profession or occupation is carried on partly within and partly without this state, the items of income, gain, loss or deduction derived from or connected with New York sources shall be determined by apportionment and allocation under regulations of the Tax Commission. [Section 632(a)(1)(A) and section 632(c) of the Tax Law; 20 NYCRR 131.4(a)].

That the partnership of Frendel, Brown & Weissman maintained an office in Hackensack, New Jersey under the supervision of the petitioner Marks from which it derived part of partnership income. Accordingly, petitioners would be entitled to allocate such income. However, as no allocation was shown on either the New York or New Jersey partnership returns for fiscal years ended June 30, 1969 and June 30, 1970, it is assumed that the partnership used the direct accounting method of allocation in accordance with 20 NYCRR 131.13(a) and that only New York income was reported on the New York partnership returns filed for said fiscal years. Therefore, there is no basis for an allocation for 1969 and 1970.

B. That petitioner's assertion that his income from All-American Realty Co., Inc. was for personal services as distinguished from professional services as partner of a certified public accounting firm is belied both by his statements and his conduct. Not only did petitioner Marks assert that he received salary compensation from All-American Realty Co., Inc. for services rendered to the

company on behalf of Frendel, Brown & Weissman, but he demonstrated that he considered the monies paid him to be partnership income by remitting the entire compensation to the accounting partnership. The alleged personal services agreement provides that upon petitioner's death or disability, his accounting partner shall be his replacement with All-American Realty Co., Inc. Frendel, Brown & Weissman not only included petitioner's salary in the partnership income for its distribution purposes, they reported on their New York partnership income tax returns that all petitioner's time was devoted to partnership business.

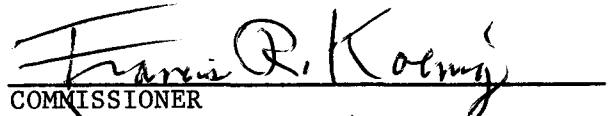
C. That the petitions of Irwin D. Marks and Estelle Marks are denied and the notices of deficiency dated September 30, 1974 and November 24, 1975 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 22 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

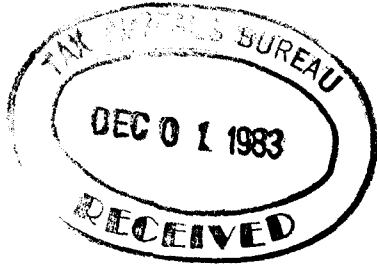
STATE CAMPUS

ALBANY, N. Y. 12227

CERTIFIED

P 470 315 014

MAIL



~~Melvin Paradise
Paradise & Alberts
1133 Ave. of the Americas
New York, NY 10036~~

*Moved to T-Ford.
G.M.*

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

November 22, 1983

Irwin D. & Estelle Marks
15 Oak St.
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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
Melvin Paradise
Paradise & Alberts
1133 Ave. of the Americas
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

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CONCLUSIONS OF LAW

A. That the Tax Law provides in pertinent part that the New York adjusted gross income of a nonresident individual shall include his distributive share of partnership income, gain, loss and deduction. Where a business, trade, profession or occupation is carried on partly within and partly without this state, the items of income, gain, loss or deduction derived from or connected with New York sources shall be determined by apportionment and allocation under regulations of the Tax Commission. [Section 632(a)(1)(A) and section 632(c) of the Tax Law; 20 NYCRR 131.4(a)].

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company on behalf of Frendel, Brown & Weissman, but he demonstrated that he considered the monies paid him to be partnership income by remitting the entire compensation to the accounting partnership. The alleged personal services agreement provides that upon petitioner's death or disability, his accounting partner shall be his replacement with All-American Realty Co., Inc. Frendel, Brown & Weissman not only included petitioner's salary in the partnership income for its distribution purposes, they reported on their New York partnership income tax returns that all petitioner's time was devoted to partnership business.

C. That the petitions of Irwin D. Marks and Estelle Marks are denied and the notices of deficiency dated September 30, 1974 and November 24, 1975 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 22 1983


PRESIDENT


COMMISSIONER


COMMISSIONER