

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 of
Richard H. & Jean R. Appert :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income Tax :
under Article 22 of the Tax Law for the Year 1978. :

AFFIDAVIT OF MAILING

State of New York }
 ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 5th day of October, 1984, he served the within notice of Decision by certified mail upon Richard H. & Jean R. Appert, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard H. & Jean R. Appert
11500 Skipwith Lane
Potomac, MD 20854

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
5th day of October, 1984.

David Parchuck

James J. Appert
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Richard H. & Jean R. Appert
11500 Skipwith Lane
Potomac, MD 20854

Dear Mr. & Mrs. Appert:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
RICHARD H. APPERT and JEAN R. APPERT	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1978.	:	

Petitioners, Richard H. Appert and Jean R. Appert, 11500 Skipwith Lane, Potomac, Maryland 20854, 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 1978 (File No. 37426).

Petitioners waived their right to a small claims hearing and requested that a decision be rendered based on the entire record contained in their file. All briefs were to be submitted by October 24, 1983. After due consideration of the record, the State Tax Commission hereby renders the following decision.

ISSUE

Whether petitioners can include in the computation of personal service net income the sum of \$13,101.22, said amount representing petitioner Richard H. Appert's share of the New York City unincorporated business tax paid by the law firm in which he was a partner.

FINDINGS OF FACT

The petitioners and the Department of Taxation and Finance stipulated to the following facts:

1. Petitioners Richard H. Appert and Jean R. Appert reside at 11500 Skipwith Lane, Potomac, Maryland.

2. Petitioner Richard H. Appert was a partner in a private law firm which derived income from New York State and New York City sources as well as sources outside of New York State and which filed Federal, New York State and New York City partnership returns on the basis of a taxable year ended September 30, 1978.

3. Petitioners timely filed a joint New York State Income Tax Nonresident Return on Form IT-203/209 for the calendar year 1978 in which they included in New York income on Schedule A the sum of \$310,317.18 representing Richard H. Appert's distributive share of the ordinary income of the law firm as reported for Federal income tax purposes for the law firm's fiscal year ended September 30, 1978 multiplied by 90.60% representing the law firm's ratio of New York State income to total income.

4. As required by Section 612(b)(3) of the Tax Law on line 2, column B of the return, petitioners added back to the \$310,317.18 of New York income from the law firm the sum of \$13,101.22 representing petitioner Richard H. Appert's share of the New York City Unincorporated Business Tax paid by the law firm on its income from New York City sources which had been deducted in computing the ordinary income of the law firm.

5. All of the income of the law firm except dividend income was income from the practice of law and was personal service income as defined in Section 1348 of the Internal Revenue Code of 1954 as that section was in effect in 1978. As required by Federal law, the dividend income was separately reported and not included in computing the "ordinary income of the law firm".

6. In computing the maximum tax on personal service income on Form IT-250 attached to their 1978 New York State Nonresident Return, petitioners included in personal service income on line 1 of that form the amount of \$323,418.40,

representing petitioner Richard H. Appert's share of the ordinary income of the law firm as reported for Federal income tax purposes which was allocable to the State of New York in the amount of \$310,317.18 plus the \$13,101.22 of New York City Unincorporated Business Tax which had been deducted in computing the \$310,317.18 but which was disallowed as a deduction and required to be added back to the Federal income figure pursuant to Section 612(b)(3) of the Tax Law.

7. The Notice of Deficiency dated April 7, 1982 shows a determination of deficiencies in New York State Income Tax and New York City Nonresident Earnings Tax aggregating \$392.69 plus interest, of which \$362.40 is an alleged deficiency in New York State Income Tax and is attributable in its entirety to the elimination of the \$13,101.22 adjustment for the disallowance of the New York City Unincorporated Business Tax in the computation of Personal Service Income. The remaining \$30.29 of the deficiency relates to the New York City Nonresident Earnings Tax.

It is further stipulated that petitioners hereby withdraw their petition with respect to the \$30.29 deficiency in New York City Nonresident Earnings Tax and consent to the immediate assessment of that portion of the total deficiency, plus interest on that amount.

CONCLUSIONS OF LAW

A. That section 603-A(b)(1) of the Tax Law, in effect in 1978, defined New York personal service income as those:

"...items of income includible as personal service income for purposes of section one thousand three hundred forty-eight of the internal revenue code..."

Section 603-A(b)(2) of the Tax Law defines New York personal service income of a nonresident individual to be those items of income enumerated in

section 603-A(b)(1) of the Tax Law which are derived from or connected with New York sources.

B. That section 603-A(c) of the Tax Law provides for a definition of New York personal service net income as New York personal service income reduced by any deductions allowable under section 62 of the Internal Revenue Code which are properly allocable to or chargeable against such New York personal service income. The deduction for New York City unincorporated business taxes is allowable under section 62 of the Internal Revenue Code and is, therefore, properly chargeable against petitioner's New York personal service income.

C. That section 603-A(b)(1) of the Tax Law does not provide for the modification required pursuant to section 612(b)(3) to be included in New York personal service income. The intent of the Legislature with regard to this matter is shown in the Laws of 1980, Chapter 417, Section 34, wherein New York personal service income was redefined to include the amount of the modifications which must be added to federal adjusted gross income pursuant to section 612(b) paragraphs (7), (8) and (9) of the Tax Law as personal service income. This change was applicable to taxable years beginning on or after January 1, 1978. No other modifications which are required to be added to federal adjusted gross income have been included in the definition of personal service income. "It is well established that '[w]hen one or more exceptions are expressly made in a statute, it is a fair inference that the Legislature intended that no other exceptions should be attached to the act by implication' (McKinney's Cons Laws of NY, Book 1, Statutes, §213)." (Marx et al. v. State Tax Commission __ A.D.2d __). Accordingly, the modification required pursuant to section 612(b)(3) of the Tax Law can not be included in New York personal service income.

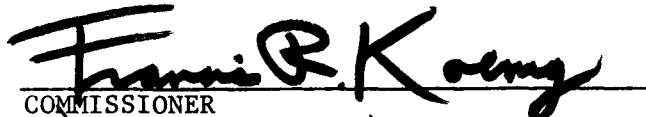
D. That the petition of Richard H. Appert and Jean R. Appert is denied and the Notice of Deficiency dated April 7, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


PRESIDENT


COMMISSIONER


COMMISSIONER