

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alan F. & Audrey C. Doniger : AFFIDAVIT OF MAILING
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 Years :
1973 & 1974.

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 6th day of April, 1984, he served the within notice of Decision by certified mail upon Alan F. & Audrey C. Doniger, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alan F. & Audrey C. Doniger
P.O. Box 607
Greens Farms, CT 06436

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
6th day of April, 1984.

David Parchuck

Conrad A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 6, 1984

Alan F. & Audrey C. Doniger
P.O. Box 607
Greens Farms, CT 06436

Dear Mr. & Mrs. Doniger:

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	:	
	:	
ALAN F. DONIGER and AUDREY C. DONIGER	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1973 and 1974.	:	

Petitioners, Alan F. Doniger and Audrey C. Doniger, Post Office Box 607, Greens Farms, Connecticut 06436, 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 1973 and 1974 (File No. 19074).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 11, 1980 at 2:45 P.M. Petitioner Alan F. Doniger appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner Alan F. Doniger is an employee who is allowed to allocate his income based on the number of days worked in and out of New York State, or a partner who must report his full distributive share of the net New York partnership income.

FINDINGS OF FACT

1. Petitioners, Alan F. Doniger (hereinafter "petitioner") and Audrey C. Doniger, both residents of Connecticut, timely filed joint New York State income tax nonresident returns for the years 1973 and 1974 on which a portion

of partnership income was allocated based on the number of days worked within and without New York State.

2. On March 28, 1977, the Audit Division issued a Notice of Deficiency in the sum of \$1,755.15, plus interest, along with an explanatory Statement of Audit Changes, on which all income from the partnership was held fully reportable and taxable for New York State personal income tax purposes, on the ground that petitioner Alan F. Doniger was a partner and the partnership did not allocate its income.

3. Petitioner is an attorney who rendered services during the years 1973 and 1974 for the law firm of Wolf, Popper, Ross, Wolf & Jones (the Firm/Partnership). A written agreement between petitioner and the Partnership stated, in part, that:

- (a) petitioner was a junior partner.
- (b) petitioner was to receive, as compensation for services, an annual salary of \$37,000.00 payable weekly and three percent of net profits (after certain deductions outlined in the agreement).
- (c) petitioner had no right to examine the books of the Firm.
- (d) petitioner was "not required to contribute to the capital of the Firm," nor did he have any capital interest therein.
- (e) petitioner would not be charged with, nor responsible for, any part of the losses of the Firm.
- (f) petitioner was required to devote his entire time and attention to the business of the firm, and was restricted from rendering legal services outside the Firm.

4. In addition, the written agreement restricted petitioners authority within the Firm by providing:

"The right to manage and conduct the business of the Firm, and to make all decision affecting the Firm, its finances, its policies and its management shall vest exclusively in the senior partners of the Firm and shall be exercised pursuant to agreement now or hereafter in effect among them."

"The right to admit new partners to the Firm, to create retirement or other status for partners, to change relationships among partners, to dissolve the Firm and to determine the terms and conditions thereof on behalf of the Firm, shall vest exclusively in the senior partners."

5. Although petitioner considered himself an employee of the Firm, his compensation was not subjected to the withholding of payroll taxes. However, petitioner contended that the title "Partner" was given to him for "cosmetic" purposes and that, in fact, he was an employee.

6. Petitioner attached a copy of Federal schedule E and R to his New York State income tax nonresident return for 1974 showing partnership income from Wolf, Popper, Ross, Wolf & Jones of \$64,945.00. Said amount represented a guaranteed salary of \$37,000.00 and profits of \$27,945.00.

7. Petitioner contended that he erred in allocating his annual salary of \$37,000.00 based on the number of days worked within and without New York State. Rather, he argued that, as an employee, all his income from the Firm should be allocated based on the number of days worked within and without New York State, which should have included the three percent of net profits received during the years at issue.

Accordingly, petitioner revised his allocation schedule as follows:

	<u>1973</u>	<u>1974</u>
Annual Salary	\$37,000.00	\$37,000.00
Percentage of Profits	24,742.00	27,945.00
Total Compensation	<u>\$61,742.00</u>	<u>\$64,945.00</u>
 Total Working Days	 213	 196
Days Worked in New York	181	134

The total amount of compensation and the number of days worked within and without New York State were accepted by the Audit Division and are not at issue.

8. Petitioner did not submit any documentary evidence as to whether the partnership allocated its net income to sources within and without New York State.

CONCLUSIONS OF LAW

A. That petitioner Alan F. Doniger's claim that he was not a partner of Wolf, Popper, Ross, Wolf & Jones since he had only a 3 percent interest in the profits of the firm, received salary, was not required to share in partnership losses, and did not participate in the management of that firm is unpersuasive (see Matter of Weinflash v. State Tax Commission, 93 A.D.2d 373). The fact that petitioner was paid a guaranteed salary and reported such as partnership income for federal tax purposes is, with the above facts, sufficient to hold that he was a nonresident member partner during 1973 and 1974. Therefore, petitioner is required to report, for New York State income tax purposes, all items of partnership income, gain, loss and deduction entering into his federal adjusted gross income to the extent such items are derived from or connected with New York State sources (section 637(a) of the Tax Law and 20 NYCRR 134.1).

B. That petitioner was a partner and did not render services as an employee and accordingly is not entitled to allocate his partnership income on the basis of days worked within and without this State (see Matter of Thomas M. Debevoise et al. v. State Tax Commission, 52 A.D.2d 1023).

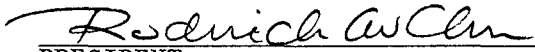
C. That petitioner failed to sustain his burden of proof imposed by section 689(e) of the Tax Law to show whether or not the partnership allocated its net income. Therefore, he is not entitled to an allocation.


D. That the petition of Alan F. Doniger and Audrey C. Doniger is denied and the Notice of Deficiency is sustained.

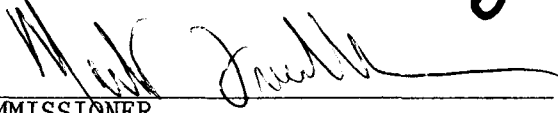
DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1984


PRESIDENT


COMMISSIONER


COMMISSIONER