

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

Janice W. Hapell
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Howard Heffron :
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 :
1969 - 1971. :

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 Maurice N. Nessen, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

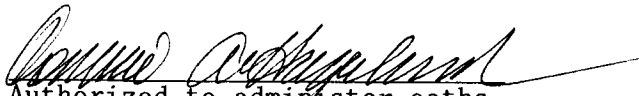
Maurice N. Nessen
Kramer, Lowstein, Nessen, Kamin & Soll
919 Third Ave.
New York, NY 10022

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 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, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

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

April 6, 1984

Howard Heffron
8311 Westmont Terrace
Bethesda, MD 20034

Dear Mr. Heffron:

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: Petitioner's Representative
Maurice N. Nessen
Kramer, Lowstein, Nessen, Kamin & Soll
919 Third Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
HOWARD HEFFRON	:	DECISION
for Redetermination of Deficiencies or for	:	
Refunds of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1969, 1970 and	:	
1971.	:	

Petitioner, Howard Heffron, 8311 Westmont Terrace, Bethesda, Maryland 20034, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1969, 1970 and 1971 (File Nos. 16298 and 19442).

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 November 18, 1977 at 9:15 A.M., with all briefs to be submitted by January 9, 1978. Petitioner appeared by Kramer, Lowenstein, Nessen, Kamin & Soll, Esqs. (Maurice N. Nessen, Esq., of counsel). The Audit Division appeared by Peter J. Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioner was a nonresident member partner in a New York law partnership with offices within and without this state and thus subject to New York personal income tax.

FINDINGS OF FACT

1. Petitioner, Howard Heffron, a resident of the State of Maryland, did not file a New York State Income Tax Nonresident Return for any of the years in issue.

2. On May 24, 1976, the Audit Division issued to petitioner a Statement of Audit Changes and a Notice of Deficiency showing personal income tax due for 1969 and 1970 in the respective amounts of \$399.51 and \$5,556.30, plus interest. On May 23, 1977, the Audit Division issued another Statement of Audit Changes and a Notice of Deficiency for 1971 showing personal income tax due of \$6,955.50, plus interest. The two notices of deficiency asserted penalties pursuant to sections 685(a)(1) and (a)(2) of the Tax Law for failure to file a New York State income tax return and to pay the tax shown due thereon.

3. On October 1, 1969, petitioner entered into a written agreement with Stroock & Stroock & Lavan ("Stroock"), a law firm with offices in New York State, Washington, D.C., and Paris, France. The term of the agreement was two years, during which time petitioner was to devote his professional time to the firm, which agreed to pay him a fixed annual amount irrespective of its profits or losses. Petitioner asserted that he made no contribution to and acquired no interest in the property, capital or profits of Stroock and that he was not a co-owner or subject to the risks of the venture.

4. The agreement with Stroock provided that his activities would be based in the Washington, D.C. offices of the firm and that he would be furnished with office space and secretarial services. Stroock maintained separate accounts covering the operations of the Washington, D.C. office. During the years in question, the partners of Stroock had separate agreements in effect among themselves covering the calculation and distribution, according to stated percentages, of the net fees of the firm among the partners and the distribution of the profits and losses of the operations of the Washington, D.C. office. Petitioner asserted he was not a party to any of such agreements, had no interest in distributions of net fees or profits, and was not subject to

liabilities of the firm. The fixed amounts received by petitioner from Stroock were deducted as an expense of the Washington, D.C. office.

5. Petitioner left Stroock in September of 1971 when his two-year contract terminated.

6. The first paragraph of the agreement made between petitioner and Stroock dated October 1, 1969, stated: "Heffron is herewith admitted to partnership in the Firm under the terms and conditions set forth in this agreement." Petitioner asserted that this paragraph "was put in the agreement to make it possible for me to sign papers which would be filed in court and to indicate that the firm had a level of confidence in me, in my professional ability to handle work. It was not put in to admit me to partnership in the firm...".

7. Petitioner stated that he did hold himself out as a partner to clients and did sign papers in Federal court, but had no economic interest in the firm as a partner.

8. The New York State partnership returns filed by Stroock for 1969 and 1971 listed petitioner on its distribution schedule as receiving the following income:

<u>1969</u>		<u>1971</u>	
<u>Payment to Partners</u> <u>Salary</u>	<u>Net Earnings From</u> <u>Self Employment</u>	<u>Payments to Partners</u> <u>Salary</u>	<u>Net Earnings From</u> <u>Self Employment</u>
\$11,250.00	\$11,250.00	\$62,709.00	\$62,709.00

Petitioner was also listed as a partner on Form IT-204-A, "Nonresident Partner Allocation Schedule", which was attached to the partnership returns for 1969 and 1971. Said schedules did not indicate the business allocation percentage of Stroock. The 1970 New York State Partnership Return was not introduced into evidence during the hearing.

9. Petitioner reported the income received from Stroock as "Wages, salaries, tips, et cetera" on his 1969 and 1970 Federal income tax returns and as "Income from other than wages, dividends and interest" for 1971. No taxes were withheld on the amounts paid by Stroock.

10. Petitioner asserted that he filed joint Federal income tax returns for the years in issue claiming itemized deductions and five (5) exemptions and that the Audit Division erred in failing to allow the various deductions and credits to which he would be entitled if any income received was properly taxable by the State of New York. Subsequent to the hearing, petitioner's representative submitted an affidavit which was sworn to on January 11, 1978 and which showed a recomputation of petitioner's liability for New York State personal income taxes for the years in issue based on joint returns, proration of federal itemized deductions, less state income taxes, and proration of five exemptions. The recomputation for 1971 showed an amount of \$46,549.00, designated only as Schedule C,¹ less \$2,500.00 for payments made to a self-employed retirement plan, resulting in New York gross income of \$44,049.00. The partnership return of Stroock showed a payment made to petitioner of \$62,709.00 (Finding of Fact "8").

11. Petitioner asserted that penalties assessed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law should be cancelled because he properly relied on the advice of the tax experts of the law firm with which he was associated.

¹ The hearing memorandum filed on behalf of petitioner indicates that he practiced law on his own in Washington, D.C. in September of 1971 when his two-year contract was terminated. It appears that petitioner was required to file Federal Schedule C as a sole proprietor.

12. Petitioner asserted that the Audit Division's interpretation and application of the New York Tax Law constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

CONCLUSIONS OF LAW

A. That although petitioner Howard Heffron had no percentage interest in the profit or loss of Stroock & Stroock & Lavan, he was compensated at a fixed monthly rate. This compensation was characterized as a guaranteed payment by the partnership which listed him as a partner on its distribution schedules for the years in issue (see Matter of Harold F. Blasky v. State Tax Comm., 69 A.D.2d 940; Matter of Faulkner, Dawkins & Sullivan v. State Tax Comm., 63 A.D.2d 764). Petitioner's claim that he was not a partner of Stroock since he did not participate in the management of said firm and because he was based in the Washington, D.C. office of Stroock is unpersuasive (see Matter of Weinflash v. Tully, 93 A.D.2d 369; Matter of Axel Baum et al. v. State Tax Comm., 89 A.D.2d 646). Therefore, petitioner was a nonresident partner of the New York City firm in 1969, 1970 and 1971. Accordingly, his adjusted gross income as a nonresident partner should include his distributive share of all items of partnership income, gain, loss and deduction entering into his federal adjusted gross income to the extent that 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 is entitled to a recomputation of his New York State income tax liability on a joint basis allowing itemized deductions, less state and local income taxes, full exemptions and a statutory credit of \$25.00 for each year; however, for tax year 1971, petitioner has not shown that he received an amount of partnership income other than what was reported on the partnership

return of \$62,709.00. Therefore, petitioner is entitled to an allocation of his distributive share of partnership income received from Stroock of \$62,709.00, less payment made to a self-employed retirement plan, on the basis of a ratio, the numerator of which represents partnership income from New York sources and the denominator of which represents partnership income from sources within and without New York State.

C. That the constitutionality of the laws of the State of New York is presumed at the administrative level of and by the New York State Tax Commission. There is no jurisdiction at the administrative level to declare a tax law unconstitutional.


D. That reliance on the advice of others does not in and of itself constitute reasonable cause for failing to file a tax return. However, considering the entire record in this matter, petitioner did act with reasonable cause rather than willful neglect. Accordingly, penalties asserted under sections 685(a)(1) and (a)(2) of the Tax Law are cancelled.

E. That the petitions of Howard Heffron are granted to the extent of Conclusions of Law "B" and "D". The Audit Division is hereby directed to recompute the notices of deficiency issued on May 24, 1976 and May 23, 1977, in connection therewith; and that, except as so granted, the petitions are denied.

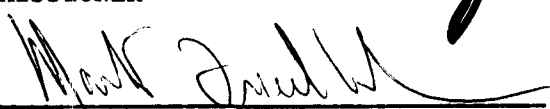
DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1984


PRESIDENT


COMMISSIONER


COMMISSIONER