STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Harry Heller	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 1965 & 1966.	

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 Harry Heller, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry Heller
3730 Appleton St., N.W.
Washington, DC 20016

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

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Harry Heller	AFFIDAVIT OF MAILING
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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 Paul Buscemi, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul Buscemi
Simpson, Thacher & Bartlett
1 Battery Park Plaza
New York, NY 10004

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.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

April 6, 1984

Harry Heller
3730 Appleton St., N.W.
Washington, DC 20016

Dear Mr. Heller:

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
Paul Buscemi
Simpson, Thacher & Bartlett
1 Battery Park Plaza
New York, NY 10004
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of HARRY HELLER for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1965 and 1966.	DECISION

Petitioner, Harry Heller, 3730 Appleton Street, Northwest, Washington, D.C. 20016, 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 1965 and 1966 (File No. 27617).

A formal hearing was held before Gasper S. Fasullo, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 27, 1980 at 1:15 P.M. Petitioner appeared by Simpson, Thacher & Bartlett, Esqs. (Paul Buscemi, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Ellen Purcell, Esq., of counsel).

ISSUE

Whether the petitioner, Harry Heller, was a nonresident partner in the New York law firm of Simpson, Thacher & Bartlett during the years 1965 and 1966 and whether, as such, the income received by him therefrom is attributable to New York sources and subject to personal income tax.

FINDINGS OF FACT

Petitioner's counsel has submitted proposed findings of fact, 71 in all. No counter-proposed findings have been submitted by counsel for the Audit Division.

20 NYCRR 601.9(d)(5) provides in pertinent part: "After the parties have completed the submission of evidence...they may also submit written legal memoranda...(and) proposed findings of fact and conclusions of law."

Section 307.1 of the State Administrative Procedure Act provides in pertinent part: "If, in accordance with agency rules, a party submitted proposed findings of fact, the decision, determination or order shall include a ruling upon each proposed finding of fact."

CPLR Section 4213(a) provides: "FINDINGS OF FACT. Before the case is finally submitted, the court shall afford the parties an opportunity to submit requests for findings of fact. Each request shall be numbered and so phrased that the court may conveniently pass upon it."

The Manual for Hearing Officers in Administrative Adjudication (Rev. Manual No. 16), under the heading Findings of Fact, at page 89 thereof, states as follows:

> "It must be stressed that only the ultimate, the final and accepted facts found to be true, credible, material and relevant, forming the basis for the conclusion, shall be recited. Every finding must be supported by satisfactory evidence in the record.
>
> It is not necessary to summarize in sequence the respective testimony of each party or witness. He (the hearing officer) must judicially select that testimony and evidence which are deemed credible and accepted as true. The findings must represent a sifting of conflicting testimony and evidence and a judicious selection of the credible facts, warranting the final conclusion thereon."

As aforestated, the petitioner has submitted 71 proposed findings of fact. They are determined not to be valid Findings in that they are a restatement of petitioner's testimony given at the hearing, and are "not based on all of the ultimate, the final and accepted facts found to be true, credible, material and relevant, forming the basis for the conclusion...(and) do not represent a sifting of all the evidence." (See Revised Manual No. 16 for Hearing Officers

in Administrative Adjudications, supra.) Portions thereof are evidentiary, other portions repetitious, and still other portions thereof are immaterial and/or not supported by the evidence.

As the court stated in Ryan & Son v. Lancaster Homes, 22 A.D.2d 186, aff'd. 15 N.Y.2d 812, pages 191-192:

> "We feel constrained to comment upon the requests for findings of fact which were submitted by the plaintiffs to the Trial Justice pursuant to CPLR 4213 [subd. (a)]. In rendering his decision the Trial Justice followed the common practice of indicating which of the proposed findings he had adopted, and which he had refused. However, many of the proposed findings, while not being wholly without some basis in the record, are evidentiary, immaterial, argumentative, repetitious and, in some instances, misleading. Others are not supported by evidence. The CPLR directs that '[t]he decision of the court...shall state the facts it deems essential.' [CPLR 4213, subd. [b].) As this court has stated previously: 'That obviously means the facts upon which the rights or liability of the parties depend and does not include evidentiary facts which are merely relevant to the facts which determine the rights or liability of the parties.' (Metropolitan Life Ins. Co. v. Union Trust Co., 268 App. Div. 474, 479, aff'd. 294 N.Y. 254). We disapprove of the practice of submitting proposed findings which contain evidentiary matter or factual matter not essential to the decision of the court. The CPLR provides that each requested finding shall be 'so phrased that the court may conveniently pass upon it.' [CPLR 4213, subd. (a).] Requests to find facts which are immaterial or which are so drafted as to be argumentative or misleading fail to satisfy this requirement. Our determination of the invalidity of certain findings is based upon these general rules.'"

On the basis of the principles of law and rules enunciated above, each of the proposed findings of fact numbered 1 through 71 submitted by petitioner are refused, and the following are the FINDINGS OF FACT adopted herein:

1. Petitioner, Harry Heller, filed U.S. Individual Income Tax Returns (Form 1040) for the years 1965 and 1966. Petitioner failed to file New York State personal income tax returns for said years.

2. On May 3, 1968, the Audit Division issued a Statement of Audit Changes against petitioner imposing personal income tax due for the year 1965 in the sum of $6,407.73, plus penalty of $1,601.93 and interest of $787.83, for a

total due for said year the sum of $8,797.49; and for the year 1966 imposed a personal income tax due in the sum of $4,581.58, plus penalty in the sum of $1,145.40 and interest in the sum of $288.41, for a total due for said year the sum of $6,015.39. The total due for 1965 and 1966 is $14,812.88.

3. On May 3, 1968, the Audit Division also issued a Notice of Deficiency against petitioner for the years 1965 and 1966 in the same amounts set forth in the Statement of Audit Changes abovementioned.

4. The deficiency was issued on the grounds petitioner was a non-resident partner in the law firm of Simpson, Thacher & Bartlett, a New York partnership (the "New York firm") and the income received therefrom was subject to personal income tax. The Audit Division determined that petitioner's distributive share of partnership income attributable to New York State was as follows:

	1965	1966
Partnership income from Simpson, Thacher & Bartlett	$73,329.25	$54,354.99
Partnership allocation percentage	98.429%	99.192%
New York Income	$72,177.25	$53,915.80

In addition, penalties were imposed in accordance with section 685(a) of the Tax Law.

5. During the years 1965 and 1966, and prior thereto, the petitioner was a resident of and domiciled in the District of Columbia.

6. During the years 1965 and 1966, and prior thereto, the petitioner was an attorney licensed to practice law in the District of Columbia.

7. During the years 1965 and 1966, the New York firm maintained offices for the practice of law at 120 Broadway, New York, New York.

8. During the years 1965 and 1966, the New York firm was not licensed to practice law in the District of Columbia.

9. During 1965 and 1966, and prior thereto, the New York firm also maintained an office at 1700 K Street Northwest, Washington, D.C. and the New York firm paid all the expenses therefor.

10. In 1961, petitioner resumed the private practice of law after 25 years with the Securities & Exchange Commission. At the time of his resignation therefrom, petitioner was Assistant Director of the Division of Corporation Finance.

11. In 1961, petitioner became associated, as additional Washington correspondent, with the Washington, D.C. law firm of Hensel & Vom Baur, then Washington correspondents for the New York firm practicing out of the offices maintained by the New York firm at 1700 K Street Northwest in Washington. Because of his expertise and knowledge of securities law, petitioner's principal duties were to represent the New York firm's clients before federal agencies, particularly the Securities and Exchange Commission in the District of Columbia.

12. As his compensation for the legal services rendered by petitioner in Washington on behalf of the New York firm's clients, the New York firm agreed to pay petitioner the sum of $25,000 annually. In addition, the New York firm agreed that petitioner was free to have and acquire his own clients in the District of Columbia on condition that all fees were to be turned over to the New York firm after which it would retain 40 percent thereof and remit to the petitioner the remaining 60 percent thereof.

13. In 1964, petitioner terminated his relationship with the Washington law firm of Hensel & Vom Baur, but his arrangement with the New York firm continued as heretofore set forth and he continued to occupy office space in the offices maintained by the New York firm at 1700 K Street Northwest in Washington, D.C.

14. On January 1, 1965, petitioner was designated a junior partner of the New York firm. However, his financial arrangement with the New York firm continued as heretofore set forth except that his fixed annual compensation was increased from $25,000 to $27,500.

15. In Martindale-Hubbell's directory for 1965, the New York firm is listed as "Practicing in association with Harry Heller, Washington, D.C.", and in the 1966 directory, petitioner is listed as a partner in the New York firm in its New York office and Washington office.

16. The New York firm's directory of personnel for the years 1965 and 1966 lists petitioner as its Washington partner.

17. The New York firm's partnership return for the year 1965 lists petitioner as a partner and reports that he was paid $73,329.25 "Ordinary Net Income" and $461.99 "Expense Account" allowance.

18. In the New York firm's partnership return for the year 1966, the petitioner is again listed as a partner. The return also indicates that petitioner received the sum of $54,354.99 as "Ordinary Net Income" and $915.92 as "Expense Allowance". The net income received ($54,354.99) includes his annual fixed compensation of $27,500. Petitioner asserted that he did not receive federal income tax form K-1[1], which is given to partners who share in the income, deductions and credits of a partnership.

19. In Schedule "B" of petitioner's U.S. Individual Income Tax Return (Form 1040) for the year 1965, under the heading "Income from partnerships", etc., petitioner wrote the following: "Simpson, Thacher & Bartlett, 120 Broadway, N.Y.C., N.Y. & 1700 K Street, N.W., Washington, D.C., Legal Fees - $73,329.25". That amount is identical to the amount set forth as having been

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[1] It should be noted that Federal Schedule K-1 was not in existence until the 1972 tax year.

paid to petitioner in the New York firm's 1965 partnership return (See para. 17 above).

20. On petitioner's U.S. Income Tax (1040) return for the year 1966, petitioner reported partnership income from Simpson, Thacher & Bartlett in the sum of $54,454.99 which was similar to the amount set forth in the New York firm's 1966 partnership return as having been paid to the petitioner.

21. There were times when petitioner billed his own clients for services rendered by him in Washington, D.C., on the New York firm's letterhead. In those instances when the checks in payment for said services were made payable to the New York firm, they were forwarded by petitioner to the New York firm; in those instances when petitioner received checks made payable to his order, he endorsed same over to the New York firm and mailed the said checks to the New York firm, which deposited all said checks in its New York bank account.

22. The New York firm maintained no bank account in the District of Columbia.

23. All expenses for maintaining the Washington, D.C. office were paid by the New York firm from its bank account in New York.

24. Periodically, the New York firm would remit 60 percent of all sums received from petitioner for legal services rendered by him in the District of Columbia for and on behalf of his own clients, and the New York firm would retain 40 percent thereof.

25. Petitioner asserted that his failure to file New York income tax returns was due to reasonable cause not willful neglect; therefore, if New York tax is determined to be due then penalties asserted for 1965 and 1966 should be abated because he had reason to believe that New York State did not have the

power to tax him on income which was fully taxed in Washington, D.C. and derived wholly from services rendered in such state.

26. Petitioner claimed that the Audit Division's assertion that virtually all of his professional income received during 1965 and 1966 was derived from New York sources is arbitrary and unreasonable and denies him equal protection of the laws guaranteed by the United States Constitution.

27. Petitioner asserted that denial of a credit to a nonresident against New York State taxes for taxes paid to the District of Columbia violates the Privileges and Immunities clause of Article IV and also the Fourteenth Amendment to the United States Constitution.

CONCLUSIONS OF LAW

A. That although petitioner asserted he did not share in the profits or losses of Simpson, Thacher & Bartlett during the years in issue, he was paid fixed monthly compensation as shown on the partnership distribution schedules which listed petitioner as a partner for the years in issue (see Matter of Axel Baum et al. v. State Tax Comm., 89 A.D.2d 646; Matter of Harold Blasky v.State Tax Comm., 69 A.D.2d 940). Petitioner's assertion that he was not a partner because he did not participate in the management of said firm (see Matter of Weinflash v. Tully, 93 A.D.2d 373) and did not render services in the State of New York (see Matter of Axel Baum, supra) is unpersuasive. Therefore, petitioner was a nonresident partner of Simpson, Thacher & Bartlett during the years 1965 and 1966 and, as such, was required to report his distributive share of 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's New York source income was properly determined by a ratio, the numerator of which represents partnership income from New York State sources and the denominator of which represents partnership income from sources within and without New York State.

C. That petitioner is entitled to file on a joint basis for 1965 and 1966 and claim itemized deductions, less state and local income taxes, two exemptions and a statutory credit of $25.00.

D. That the constitutionality of the laws of the State of New York are 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.

E. That petitioner's failure to file New York State income tax returns was due to reasonable cause; therefore, the penalty imposed pursuant to section 685(a) of the Tax Law is cancelled.

F. That the petition of Harry Heller is granted to the extend shown in Conclusions of Law "C" and "E", supra, and in all other respects denied. The Audit Division is directed to modify the Notice of Deficiency dated May 3, 1968, to be consistent with the decision rendered herein.

DATED: Albany, New York

APR 06 1984

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER