

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
James H. Heller	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Years	:	
1970 - 1973.	:	

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

James H. Heller
3317 Rowland Place, N.W.
Washington, DC 20036

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.





Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
James H. 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	:	
1970 - 1973.	:	

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 Arthur K. Mason, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

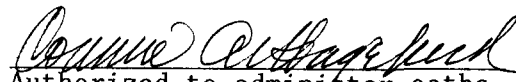
Arthur K. Mason
1220 19th St. N.W.
Washington, DC 20036

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

James H. Heller
3317 Rowland Place, N.W.
Washington, DC 20036

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
Arthur K. Mason
1220 19th St. N.W.
Washington, DC 20036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
JAMES H. HELLER	:	DECISION
for Redetermination of Deficiencies or for	:	
Refunds of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1970, 1971,	:	
1972 and 1973.	:	

Petitioner, James H. Heller, 3317 Rowland Place N.W., Washington, D.C. 20008, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1970, 1971, 1972 and 1973 (File Nos. 14072 and 18772).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 10, 1978 at 2:45 P.M., with all briefs to be submitted by June 30, 1978. Petitioner appeared by Hydeman, Mason & Goodell, Esqs. (Arthur K. Mason, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether petitioner was a nonresident member partner in a New York law firm and subject to New York State income tax on his distributive share of partnership income.

II. Whether petitioner's income tax liability was properly computed.

III. Whether penalties were properly asserted for failure to file New York State income tax returns and pay the tax shown due.

FINDINGS OF FACT

1. On March 6, 1974, and April 22, 1976, the Audit Division issued a Statement of Audit Changes to petitioner on the grounds that he was required to file a New York State income tax nonresident return since he was a nonresident partner in a partnership having offices both within and without New York State. Petitioner was told that his New York income tax for 1970 was computed to be \$3,521.65, plus penalties, pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law of \$1,197.36, and interest of \$609.67, for a total due of \$5,328.68.

On September 15, 1975, a revised Statement of Audit Changes modifying the IT-38 dated March 6, 1974 was sent to petitioner showing a tax due for 1970 of \$2,442.48, plus penalty of \$1,160.18 and interest of \$700.50, for a total due of \$4,303.16. On January 26, 1976, the Audit Division issued a Notice of Deficiency.

On February 28, 1977, petitioner was sent a Notice of Deficiency for the years 1971, 1972 and 1973 claiming the following deficiency:

<u>Year</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
1971	\$ 4,505.76	\$2,140.24	\$1,316.27	\$ 7,962.27
1972	5,579.95	2,566.78	1,621.20	9,767.93
1973	374.72	149.89	80.77	605.38
Total	<u>\$10,460.43</u>	<u>\$4,856.91</u>	<u>\$3,018.24</u>	<u>\$18,335.58</u>

2. Petitioner timely filed petitions for redetermination of deficiencies. The formal hearing treated them as one consolidated petition for the years 1970 through 1973.

3. Petitioner, a lawyer admitted to the District of Columbia (Washington) bar, became associated with the Washington office of Stroock & Stroock & Lavan ("Stroock") in March, 1968. He received an agreed fixed salary in 1968 and 1969 but negotiated a written contract as of January 1, 1970. This agreement authorized petitioner to hold himself out as a member of the firm. The initial

paragraph stated:

"FIRST: HELLER is herewith admitted to partnership in the FIRM under the terms and conditions set forth in this agreement."

4. The agreement thereafter set out that petitioner was not required to contribute to the capital of the firm. He was to have..."no interest in the furniture and fixtures, library, leaseholds, firm name or in any other tangible or intangible property of the firm."

5. The agreement by its terms was to commence as of January 1, 1970 and to continue to and including December 31, 1970. Although petitioner continued to practice as an associate attorney with Stroock in Washington until March, 1973, this 1970 agreement was the only writing delineating the relationship between petitioner and Stroock and was acknowledged by both to have been a purely "cosmetic" arrangement intended to aid petitioner in attracting clients to the firm.

6. Petitioner did not participate in partnership decisions as to management, division of profits or losses, and was not listed as a partner on the business letterhead of Stroock. All bills he rendered were for Stroock, and all fees were payable to Stroock.

7. Petitioner spent all of his time and professional efforts in the Washington office, except for four or five trips per year to the New York main office of Stroock. Then he would spend two or three days each time in the New York office. He was not admitted to the New York bar. The firm had a Paris office also, but petitioner did not work in that location.

8. Petitioner sought to become a partner in Stroock. The New York firm had a two-tiered partnership consisting of nineteen persons designated as "partners" and thirteen others called "Stroock partners". A "management committee" appointed by the Stroock partners and including one or more of the

other partners passed upon and made all decisions with respect to policies, management, and operations of the law firm. The overall partnership agreement dated January 1, 1972 provided that the Washington office was to be operated as an integral part of the firm. The agreement provided that one or two other persons in the Washington office "...even though denoted as members of the firm for certain purposes, nevertheless receive fixed amounts, have no ascribed percentages and are deemed and treated as expenses of the firm for the purpose of determining net fees."

9. Petitioner was paid a fixed compensation of \$35,000.00 in 1970, \$40,000.00 plus a \$5,000.00 bonus in 1971, and \$45,000.00 with no bonus in 1972. He left Stroock in March, 1973. No social security or withholding taxes were deducted from the amounts paid petitioner.

10. Stroock filed its Federal partnership income tax returns for each of the years in question, and listed petitioner as a partner. Although he was not allowed to see the returns, petitioner was aware, although not informed, that he was listed as a partner.

11. Stroock filed New York State partnership returns and listed petitioner as a partner. Petitioner did not know how the partnership allocated its net income. He did not have access to partnership books or income tax returns.

12. Petitioner filed Federal income tax returns as a resident of Washington, D.C. for 1970, 1971, 1972 and 1973, including with each return Schedule 1040 SE (Computation of Social Security Self-Employment Tax) on which he reported compensation from Stroock as partnership income. Petitioner paid his own Social Security Tax. In Schedule E of each Form 1040, petitioner listed Stroock as the source of monies reported as partnership income.

13. At the formal hearing it was stipulated between counsel for the petitioner and the Audit Division that in the event petitioner should be determined to be liable for income taxes for the years at issue, the Notice of Deficiency should be adjusted to reflect the proper amount of itemized deductions and exemptions as stated in petitioner's Federal income tax returns for 1971, 1972 and 1973.

14. Petitioner was a nonresident of New York for the entire period 1970 through 1973. He did not file New York State income tax returns because he did not believe his income from Stroock's Washington law office was derived from a New York source. Petitioner contended that he was an employee and not a partner in Stroock because that was the intent of the parties, and that under Federal tax cases and common law, the arrangement in his case did not constitute a partnership. Petitioner cited many cases and the Uniform Partnership Act to substantiate the basis for his contention.

CONCLUSIONS OF LAW

A. That although petitioner did not share in the profits or losses of Stroock during the years in issue, he was paid fixed monthly compensation which 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 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 Stroock and that his partnership designation served only to aid in his attracting clients to said firm is unpersuasive (see Matter of Weinflash v. Tully, 93 A.D.2d 373). Therefore, petitioner was a nonresident partner of Stroock during the years 1970 through 1973 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 is entitled to an allocation of his distributive share of partnership income received from Stroock for the years 1971, 1972 and 1973 on the basis of 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 and claim itemized deductions, less state and local income taxes, and exemptions for years 1971 through 1973. A statutory credit of \$25.00 is to be allowed for 1971.


D. That petitioner's failure to file New York State income tax returns was due to reasonable cause; therefore, the penalties imposed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are cancelled.


E. That the petition of James H. Heller is granted to the extent shown in Conclusions of Law "B", "C" and "D", supra, and is in all other respects denied. The Audit Division is directed to modify the Notice of Deficiency dated February 28, 1977, to be consistent with the decision rendered herein.

DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1984


PRESIDENT


COMMISSIONER


COMMISSIONER