

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Richard F. & Diane L. Horowitz :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :  
of New York State Personal Income Tax under Article :  
22 of the Tax Law and New York City Nonresident :  
Earnings Tax under Chapter 46, Title U of the :  
Administrative Code of the City of New York for :  
the Year 1976. :

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 18th day of July, 1984, he served the within notice of Decision by certified mail upon Richard F. & Diane L. Horowitz, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

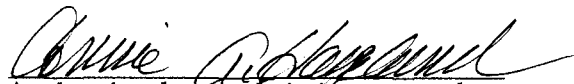
Richard F. & Diane L. Horowitz  
15 Emerson Terrace  
Bloomfield, NJ 07003

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  
18th day of July, 1984.





Authorized to administer oaths  
pursuant to Tax Law section 174

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

July 18, 1984

Richard F. & Diane L. Horowitz  
15 Emerson Terrace  
Bloomfield, NJ 07003

Dear Mr. & Mrs. Horowitz:

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 & 1312 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York, 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

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In the Matter of the Petition	:	
	:	
of	:	
	:	
RICHARD F. HOROWITZ AND DIANE L. HOROWITZ	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Year 1976.	:	

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Petitioners, Richard F. Horowitz and Diane L. Horowitz, 15 Emerson Terrace, Bloomfield, New Jersey 07003, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1976 (File No. 37982).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 11, 1984 at 2:45 P.M. Petitioner Richard F. Horowitz appeared pro se and for his wife. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

#### ISSUES

I. Whether petitioner Richard F. Horowitz can allocate his distributive share of partnership income to sources within and without New York State and New York City based on a percentage determined by placing days worked within the State and City over total days worked.

II. Whether the Audit Division's denial of petitioners' claimed allocation of partnership income is a violation of their rights under the equal protection

and due process clauses of the United States Constitution and Constitution of the State of New York.

FINDINGS OF FACT

1. Petitioners herein, Richard F. Horowitz and Diane L. Horowitz<sup>1</sup>, filed a New York State Income Tax Nonresident Return for the year 1976 and also a New York City Nonresident Earnings Tax Return for the same year.

2. During the year at issue, petitioner was a general partner in the law firm of Weiss, Rosenthal, Heller, Schwartz and Lazar (hereinafter "the partnership"). Petitioner received a distributive share of income from the partnership in the amount of \$69,609.00.

3. On his New York State and New York City income tax returns, petitioner allocated his distributive share of partnership income to New York State and New York City sources based on a percentage determined by placing days worked within the State and City over total days worked. For State purposes, petitioner allocated \$52,502.00 ( $178/236 \times \$69,609.00$ ) of partnership income to New York State and for City purposes, \$47,782.00 ( $162/236 \times \$69,609.00$ ) of partnership income was allocated to New York City.

4. On August 21, 1980, the Audit Division issued a Notice of Deficiency to petitioners for the year 1976, assessing additional New York State and New York City tax due of \$2,513.86, plus interest of \$711.72, for an alleged total due of \$3,225.58. The aforementioned Notice of Deficiency was premised on a Statement of Audit Changes dated May 29, 1980, wherein the basis for the deficiency was explained in the following manner:

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<sup>1</sup> Diane L. Horowitz is involved in this proceeding due solely to the fact that she filed joint income tax returns with Richard F. Horowitz. Accordingly, the term petitioner shall hereinafter refer solely to Richard F. Horowitz.

"Schedules A-1 and A, allocation of wage and salary income to New York State and City, respectively, may not be used to allocate a distribution of partnership income.

A distribution of partnership income may be allocated only on the basis of the partnership allocation percentage.

Since the partnership of Weiss, Rosenthal, Heller, Schwartz and Lazar, of which you are a member partner, does not allocate its income, your full distributive share is reportable for New York State and New York City tax purposes.

Your share of the New York City unincorporated business tax deduction taken on the 1976 partnership return of the above cited partnership is shown below as a modification."<sup>2</sup>

5. The partnership's office was located within the City of New York and no office was maintained by said partnership outside of New York State. The 1976 New York State and New York City partnership returns did not allocate partnership income to sources outside the State or City.

6. The days worked outside New York State and New York City by petitioner were done so of necessity and not for his convenience. The services performed by petitioner on those days worked outside New York State and New York City were services which could only have been performed outside the State and City.

7. Petitioner maintains that regulation 20 NYCRR 134.1 creates an inconsistent and unequal distinction between nonresident partners and nonresident employees and that said regulation is therefore an incorrect, unauthorized and unconstitutional implementation of sections 632 and 637 of the Tax Law. Furthermore, petitioner asserts that if regulation 20 NYCRR 134.1 is determined to be correct, authorized and constitutional, that sections 632 and 637 of the Tax Law, as applied herein, should be deemed unconstitutional.

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<sup>2</sup> Petitioner did not argue nor was any evidence presented with respect to the adjustment increasing taxable income by \$2,346.00 for his share of the New York City unincorporated business tax deduction.

CONCLUSIONS OF LAW

A. That 20 NYCRR 131.16 provides, in pertinent part, that:

"If a nonresident employee...performs services for his employer both within and without the State, his income derived from New York sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within the State bears to the total number of working days employed both within and without the State." (emphasis added)

B. That petitioner herein was a partner and not an employee and therefore he cannot allocate his distributive share of partnership income to sources within and without New York State and New York City based on days worked within and without the State and City. Tax Law Article 22 sections 637(a)(1); 632(a)(1)(A); 632(b)(1); 632(c); 20 NYCRR 134.1; Title U of the Administrative Code of the City of New York sections U46-1.0(f); U46-4.0; 20 NYCRR 295.2; 20 NYCRR Appendix 20 sections 1-7, 4-1 and 4-2.

C. That the partnership, of which petitioner was a member partner, did not maintain an office outside the State and City of New York and, therefore, said partnership was not entitled to allocate its income to sources outside the State or City. Since the partnership could not and did not allocate its income to sources outside New York State and New York City, petitioner may not allocate his distributive share of partnership income to sources outside the State and City.


D. That the constitutionality of the laws and regulations of the State and City of New York are presumed at the administrative level. There is no jurisdiction at the administrative level to declare such laws and/or regulations unconstitutional.

E. That the petition of Richard F. Horowitz and Diane L. Horowitz is denied and the Notice of Deficiency dated August 21, 1980 is sustained in its entirety, together with such additional interest as may be lawfully due and owing.

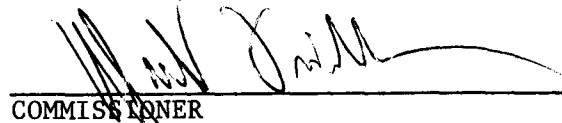
DATED: Albany, New York

STATE TAX COMMISSION

JUL 18 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER