

STATE TAX COMMISSION

In the Matter of the Petition
of
William A. & Anne V. Sheehan
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 Year
1974.

AFFIDAVIT OF MAILING

State of New York }
County of Albany } ss.:

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 9th day of July, 1984, he served the within notice of Decision by certified mail upon William A. & Anne V. Sheehan, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William A. & Anne V. Sheehan
c/o Kirlin, Campbell & Keating
120 Broadway
New York, NY 10005

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
9th day of July, 1984.

David Paruch

Gunnar C. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition :
of :
William A. & Anne V. Sheehan :
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 Year :
1974. :
:

State of New York }
County of Albany } ss.:

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 9th day of July, 1984, he served the within notice of Decision by certified mail upon Kathleen M. Daniels, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kathleen M. Daniels
Kirlin, Campbell & Keating
120 Broadway
New York, NY 10005

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
9th day of July, 1984.

David Paruch

Conrad A. Hawkins
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 9, 1984

William A. & Anne V. Sheehan
c/o Kirlin, Campbell & Keating
120 Broadway
New York, NY 10005

Dear Mr. & Mrs. Sheehan:

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
Kathleen M. Daniels
Kirlin, Campbell & Keating
120 Broadway
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WILLIAM A. and ANNE V. SHEEHAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1974.	:	

Petitioners, William A. and Anne V. Sheehan, 43 Windermere Road, Upper Montclair, New Jersey 07043, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1974 (File No 22505).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1981 at 10:45 A.M. Petitioners appeared by Kirlin, Campbell & Keating, Esqs., (Kathleen M. Daniels, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq., (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether petitioners are precluded from allocating income from the partnership of Kirlin, Campbell & Keating.

II. Whether petitioners' claim for refund is barred by the statute of limitations.

FINDINGS OF FACT

1. Petitioners, William and Anne Sheehan, filed a New York State Income Tax Nonresident Return for 1974 on which they reported \$131,455.83 which amount represented petitioner William Sheehan's federal distributive share of partnership income from the law partnership of Kirlin, Campbell and Keating. Said amount

was reported in both the Federal and New York State columns. Petitioners subtracted from this amount, William Sheehan's share of interest received on U.S. Government obligations as shown on the New York City partnership return for 1974.

2. On February 1, 1978, the Audit Division issued a Statement of Audit Changes against petitioners, William A. Sheehan and his wife, Anne V. Sheehan.

The Statement of Audit Changes contained the following explanation:

"As a result of a field audit of March 24, 1977 by the New York District office for the partnership of Kirlin, Campbell & Keating, your distributive share of the partnership adjustment is \$2,215.09. Unincorporated business taxes imposed by New York City are not deductible in determining personal income tax. On your personal income tax return you failed to increase your Federal income by the amount of \$3,882.33 which represents your share of the New York City unincorporate (sic) business tax deduction taken on the partnership return of Kirlin, Campbell & Keating. Your tax is therefore recomputed as follows:

Total income reported	\$130,146.07
Audit adjustment	2,215.09
Unincorporated business tax adjustment	3,882.33
Corrected total income	<u>\$136,243.49</u>
Less: itemized deductions	12,007.49
Balance	<u>\$124,236.00</u>
Less: exemptions	1,300.00
Taxable income	<u>\$122,936.00</u>
Tax per tax rate schedule	\$ 16,750.00
Tax previously corrected	<u>15,893.68</u>

ADDITIONAL PERSONAL INCOME TAX DUE \$856.32"

3. On April 4, 1978 the Audit Division issued a timely Notice of Deficiency and on July 3, 1978 the petitioners filed a timely petition.

4. The issues raised in the petition relating to a partnership audit adjustment and an unincorporated business tax adjustment were settled at a pre-hearing conference on February 26, 1979 and counsel for the Audit Division has so agreed (See: pages 3 and 4 of transcript of hearing).

5. During the taxable year 1974 petitioners were residents of New Jersey, residing at 43 Windermere Road, Upper Montclair, New Jersey 07043. Petitioner William A. Sheehan is a lawyer and a partner in the law firm of Kirlin, Campbell & Keating which has offices both in New York City and in Washington, D.C. The Washington Office was at The Faragut Building, 900 17th Street, N.W. and consisted of both employees and partners.

6. It is asserted the firm of Kirlin, Campbell & Keating kept its records in such a way that its income and expenses could be allocated between its Washington Office and its New York Office and that such an allocation was prepared by its accountants, Haskins & Sells (now known as Deloitte Haskins & Sells), in connection with the New York City income and unincorporated business tax for the year 1974. A copy of the New York City partnership return of Kirlin, Campbell & Keating was introduced in evidence in this proceeding as petitioners' Exhibit 1. On the last page of that Exhibit there is an allocation schedule which shows an allocation of income and expenses between New York State and outside New York State. Petitioners contend that the allocation percentage for New York State should be determined by dividing New York ordinary income by total ordinary income resulting in an allocation percentage of 79.6793%. It is based upon this allocation that petitioners contend that they should be entitled to allocate income between New York State and Washington, D.C. under Section 637 of the Tax Law, thus entitling them to a refund of New York State income taxes. Petitioners did not file a claim for refund for 1974.

7. The 1974 New York State Partnership Return for Kirlin, Campbell & Keating was not put in evidence.

CONCLUSIONS OF LAW

A. That the New York adjusted gross income of a nonresident partner shall include 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 petitioners William and Anne Sheehan are entitled to allocate petitioner William Sheehan's federal distributive share of partnership income. The New York City unincorporated business tax return for 1974 and the allocation schedule attached thereto (Finding of Fact "6" supra) contain sufficient information so as to compute a business allocation percentage (see Matter of McCauley v. State Tax Commission, 67 A.D.2d 51).

C. That the allocation percentage computed by petitioners of 79.6793% is without merit because it only considers ordinary income and not other items of partnership income and deduction. Therefore, petitioner William Sheehan must allocate his federal distributive share of partnership income 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. The partnership allocation percentage is to be computed as follows:

	<u>FEDERAL</u>	<u>NEW YORK STATE</u>
Ordinary Income	\$1,325,458.21	\$1,056,115.78
Payments to Partners ¹	762,700.00	721,950.00
Additional First - Year Depreciation	(1,991.58)	(1,991.58)
Dividends	500.00	500.00
N.Y.C. Unincorporated Business Tax	34,411.55	34,411.55
Interest on U.S. Government Bonds	(9,561.56)	(9,561.56)
	<u>\$2,111,516.62</u>	<u>\$1,801,424.19</u>

¹ It should be noted that pursuant to section 706(3) of Article 23 of the Tax Law no deduction is allowed for amounts paid or incurred to a partner for services or for use of capital.

New York Source Income	<u>1801424.19</u>	=
Total Source Income	<u>2111516.62</u>	85.3142%

D. That the Audit Division is directed to recompute petitioner William Sheehan's distributive share of New York income by multiplying his federal distributive share of partnership income from Kirlin, Campbell & Keating by the allocation percentage of 85.3% as mentioned in Conclusion of Law "C" supra, resulting in an overpayment of tax.

E. That section 687, subdivision (f) of the Tax Law empowers the State Tax Commission to determine that an individual taxpayer has made an overpayment of income taxes, as follows:

"Effect of petition to tax commission. -- If a notice of deficiency for a taxable year has been mailed to the taxpayer under section six hundred eighty-one and if the taxpayer files a timely petition with the tax commission under section six hundred eighty-nine, it may determine that the taxpayer has made an overpayment for such year (whether or not it also determines a deficiency for such year). No separate claim for credit or refund for such year shall be filed, and no credit or refund for such year shall be allowed or made, except --

(1) as to overpayments determined by a decision of the tax commission which has become final;..."

Subdivision (g) of said section provides, in relevant part:

"Limit on amount of credit or refund. -- The amount of overpayment determined under subsection (f) shall, when the decision of the tax commission has become final, be credited or refunded in accordance with subsection (a) of section six hundred eighty-six and shall not exceed the amount of tax which the tax commission determines as part of its decision was paid --

* * *

(2) within the period which would be applicable under subsections (a), (b) or (c), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the tax commission finds that there is an overpayment."

F. That in response to the Notice of Deficiency, petitioners timely filed a petition, thereby suspending their right to file a claim for refund. This Commission, however, may determine that petitioners have made an overpayment

for the year at issue, whether or not it also determines a deficiency for such year. Tax Law section 687(f).

That had petitioners filed a claim for credit or refund on the date of the mailing of the Notice of Deficiency, the claim would have been timely. See Matter of Peter W. Liu and Lydia W. Liu, State Tax Commission, November 27, 1981; Matter of Lamonte Kennedy and Valerie Kennedy, State Tax Commission, January 9, 1981 [TSB-H-81(53)I]. See also Manuel M. Koufman and Charlotte Koufman, 36 T.C.M. 936, which discusses Internal Revenue Code section 6512(b), from which Tax Law section 687(f) and (g) are derived.

G. That petitioners' overpayment for the year at issue is not in excess of the amount of taxes they paid for such year and therefore is within the limitations set forth in section 687, subdivision (g) of the Tax Law.

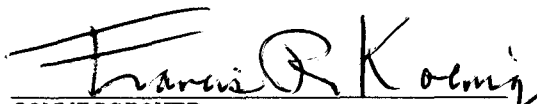
H. That petitioners are entitled to a refund for 1974 based on the decision rendered herein.

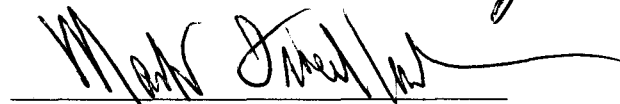
DATED: Albany, New York

JUL 09 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER