

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Richard H. & Dorothy E. Sommer :  
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 }

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 9th day of July, 1984, he served the within notice of Decision by certified mail upon Richard H. & Dorothy E. Sommer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard H. & Dorothy E. Sommer  
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 Parchuck

James A. Haskins  
Authorized to administer oaths  
pursuant to Tax Law section 174

## STATE TAX COMMISSION

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

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

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.

David Penhuch

Carrie Aubrey Cook  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

July 9, 1984

Richard H. & Dorothy E. Sommer  
c/o Kirlin, Campbell & Keating  
120 Broadway  
New York, NY 10005

Dear Mr. & Mrs. Sommer:

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

In the Matter of the Petition  
of  
RICHARD H. and DOROTHY E. SOMMER  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1974.

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 11:20 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).

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

1. On February 1, 1978, the Audit Division issued a Statement of Audit Changes against petitioners, Richard H. and Dorothy E. Sommer. 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 and Keating your distributive share of the partnership adjustment is \$588.08.

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 \$1,058.82 which represents your share of New York City unincorporated business tax deduction taken on the partnership return of Kirlin, Campbell and Keating.

Audit Adjustment	\$ 588.08
UBT Adjustment	<u>1,058.82</u>
Total additional income	\$1,646.90

PERSONAL INCOME TAX DUE AT 15% \$247.04"

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

3. The only remaining issue in this petition is whether income of \$3,660.95, considered by petitioners to be their Washington, D.C. source income, is properly taxable by New York State. The other issues relating to a partnership audit adjustment and an unincorporated business tax adjustment were settled at a pre-hearing conference on February 26, 1979.

4. The \$3,660.95 represents the sum by which petitioner Richard H. Sommer asserts he overstated his distributive share of New York partnership income from his law firm on his 1974 New York State IT-203 tax return.

5. During the taxable year 1974 petitioners were residents of New Jersey, residing at 183 Cooper Avenue, Upper Montclair, New Jersey 07043. Petitioner Richard H. Sommer 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 located 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. The allocation percentage for New York State income applicable to petitioners was derived 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. Petitioners did not file a claim for refund for 1974.

7. Counsel for the Audit Division maintained that in order for petitioners to allocate, the partnership had to allocate each item of income and expense to each partner and without such allocation being made petitioners have no right to allocate.

8. 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 Richard and Dorothy Sommer are entitled to allocate petitioner Richard Sommer'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 Richard Sommer 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:

	FEDERAL	NEW YORK STATE
Ordinary Income	\$1,325,458.21	\$1,056,115.78
Payments to Partners <sup>1</sup>	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>
New York Source Income	1801424.19	=
Total Source Income	2111516.62	85.3142%

D. That the Audit Division is directed to recompute petitioner Richard Sommer's distributive share of New York income by multiplying his federal

---

<sup>1</sup> 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.

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.

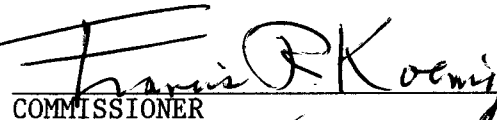
H. That petitioners are entitled to a refund for 1974 based on the decision rendered herein.

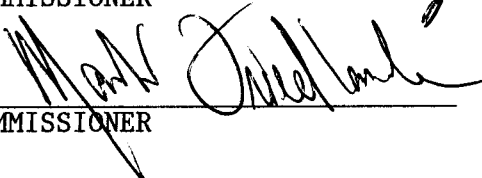
DATED: Albany, New York

STATE TAX COMMISSION

JUL 09 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER