

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Albert DeNeve :
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 :
1980. :

AFFIDAVIT OF MAILING

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

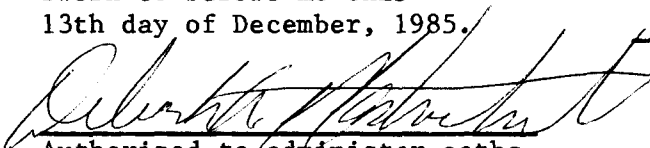
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon Charles R. McArdell, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles R. McArdell
6443 Ridings Rd.
Syracuse, NY 13206

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
13th day of December, 1985.


Authorized to administer oaths
pursuant to Tax Law section 174



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

December 13, 1985

Albert DeNeve
803 Liverpool Rd.
Liverpool, NY 13088

Dear Mr. DeNeve:

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
Charles R. McArdell
6443 Ridings Rd.
Syracuse, NY 13206
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ALBERT DeNEVE	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1980.	:	

Petitioner, Albert DeNeve, 803 Liverpool Road, Liverpool, New York 13088, 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 1980 (File No. 47971).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on July 10, 1985 at 1:20 P.M. Petitioner appeared by Charles R. McArdell, P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined that petitioner had additional unreported income in the amount of \$13,250.00.

II. Whether the Audit Division properly determined that thirty percent of petitioner's income from the partnership of Duerr & DeNeve was personal service income.

III. Whether petitioner is entitled to an additional deduction for sales tax.

FINDINGS OF FACT

1. Petitioner and his wife filed separately, on one return, a New York State Income Tax Resident Return for the year 1980. On this return, petitioner

reported, on a cash basis system of accounting, partnership income of \$35,204.00. Petitioner treated all of this income as personal service income subject to the maximum tax on personal service income. Lastly, petitioner reported a deduction for medical and dental expenses of \$373.00.

2. On October 31, 1980, the Audit Division issued a Notice of Deficiency to petitioner, Albert DeNeve, asserting a deficiency of personal income tax in the amount of \$1,319.90, plus penalty of \$130.70 and interest of \$377.80, for a total amount due of \$1,828.40. To the extent at issue herein, the Notice of Deficiency was premised upon attributing to petitioner additional income in 1980 arising from petitioner's installment sale of his interest in the partnership of Duerr & DeNeve. The Audit Division also deemed thirty percent, rather than one hundred percent, of petitioner's income from the partnership as personal service income. As a result, petitioner was disallowed the use of the maximum tax computation on personal service income. The Audit Division also disallowed \$239.00 of the medical expense deduction claimed by petitioner. The penalty was asserted pursuant to section 685(c) of the Tax Law for failure to pay estimated tax.

3. Prior to the year in issue, petitioner and Mr. James C. Duerr operated a partnership under the firm name of Duerr & DeNeve. The partnership engaged in excavating and grading.

4. On April 25, 1980, petitioner and Mr. Duerr executed an agreement to dissolve the partnership. The agreement provided that Mr. Duerr would pay petitioner \$66,250.00, representing his interest in the partnership, as follows:

"...THIRTEEN THOUSAND TWO HUNDRED FIFTY and no/100 DOLLARS (\$13,250.00) on the 30th day of December, 1980, and a like additional payment of THIRTEEN THOUSAND TWO HUNDRED FIFTY and no/100 DOLLARS (\$13,250.00) on the 30th day of December in each successive year, including 1984, when, on the 30th day of December, 1984, the entire unpaid balance shall be due and payable; and each payment herein shall include interest at the rate of six per centum (6%) per annum."

5. In accordance with the partnership agreement, Mr. Duerr drafted a check payable to the order of petitioner in the amount of \$13,250.00. The check was dated December 31, 1980 and drawn on the account of Duerr & DeNeve at The Bank of New York. However, since the checking account of Duerr & DeNeve only had a balance of \$5,965.58, Mr. Duerr decided not to remit the check until there were sufficient funds for the check to be honored.

6. On January 2, 1981, Mr. Duerr was able to obtain and deposit sufficient funds for the bank to honor the check. Accordingly, on January 2, 1981, Mr. Duerr hand-delivered the check to petitioner.

7. Mr. Duerr believed that by personally delivering the check on January 2, 1981, he complied with the terms of the contract since Mr. DeNeve received the check at the same time he would have received it if it were mailed on December 31, 1980.

8. Petitioner did not perform any personal services for the partnership during 1980.

9. At the hearing, petitioner averred that he was entitled to an additional sales tax deduction because a portion of the medical expense deduction was disallowed.

CONCLUSIONS OF LAW

A. That during 1980, Treas. Reg. §1.451-1(a) provided, in part, that:

"[u]nder the cash receipts and disbursements method of accounting, such an amount is includible in gross income when actually or constructively received."

B. That during the period in issue, Treas. Reg. §1.451-2(a) provided, in part:

"Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given."

C. That under the facts presented herein, it is clear that petitioner did not have actual receipt of the income described in Finding of Fact "5". Further, petitioner did not have constructive receipt of the income since there were no funds available to him during 1980 that he could have drawn upon (Treas. Reg. §1.451-2[a]). Accordingly, the Audit Division erred in attributing the check in the amount of \$13,250.00 as income to petitioner in the year 1980.

D. That since petitioner did not provide any personal services for Duerr & DeNeve in 1980, the Audit Division properly concluded that petitioner was not entitled to utilize the maximum tax computation on personal service income (Tax Law §603-A[b][1]).


E. That the disallowance of a portion of petitioner's medical and dental expense deduction does not entitle petitioner to a greater deduction for sales tax since the deduction for medical and dental expenses has no bearing on adjusted gross income (I.R.C. §§211, 213).


F. That the petition of Albert DeNeve is granted to the extent of Conclusion of Law "C" and the Audit Division is directed to modify the Notice of Deficiency accordingly; the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER