

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Morris & Stephanie Engelberg :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law and Chapter 46, Title U of the Administrative :
Code of the City of New York for the Year 1980. :
_____ :

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 14th day of March, 1985, he served the within notice of Decision by certified mail upon Morris & Stephanie Engelberg, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morris & Stephanie Engelberg
3510 North 31st Ave.
Hollywood, FL 33021

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
14th day of March, 1985.

David Parchuck

Amie O. Engelberg
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 14, 1985

Morris & Stephanie Engelberg
3510 North 31st Ave.
Hollywood, FL 33021

Dear Mr. & Mrs. Engelberg:

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

In the Matter of the Petition	:	
	:	
of	:	
	:	
MORRIS AND STEPHANIE ENGELBERG	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law and Chapter 46, Title U of	:	
the Administrative Code of the City of New	:	
York for the Year 1980.	:	

Petitioners, Morris and Stephanie Engelberg, 3510 North 31st Avenue, Hollywood, Florida 33021, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York for the year 1980 (File No. 41944).

On May 21, 1984, petitioners waived their right to a hearing and requested that a decision be rendered by the State Tax Commission based upon the Department of Taxation and Finance file, and briefs to be submitted by August 3, 1984. Upon review of the record, the State Tax Commission renders the following decision.

ISSUES

I. Whether income of \$41,760.00 received from a New York partnership by petitioner Morris Engelberg, a resident of Florida, is subject to New York State income tax and New York City nonresident earnings tax.

II. If so, whether certain expenses incurred with respect to said income are deductible by petitioner Morris Engelberg.

FINDINGS OF FACT

1. Petitioners, Morris and Stephanie Engelberg, filed a 1980 New York State Income Tax Nonresident Return wherein they reported, as the sole item of income subject to New York income tax, income from partnerships, estates and trusts, etc. of \$13,111.00. Petitioners' Federal schedule E indicated that the income reported represented a partnership distribution from Kaye, Scholer, Fierman, Hayes & Handler (hereinafter "Kaye"). Said schedule reported a second distribution from Kaye in the amount of \$41,760.00 which petitioners did not include in their New York income. According to a statement attached to the return, the second distribution was not considered taxable to New York as the "income [was] derived from Florida sources." Petitioners also filed a 1980 New York City nonresident earnings tax return which reported net earnings from self-employment from Kaye of \$11,018.00.¹

2. On April 12, 1982, the Audit Division issued to petitioners a Statement of Audit Changes wherein it included the two distributions from the partnership (\$13,111.00 and \$41,760.00), subject to the partnership's New York allocation percentage (97.3%), as taxable to New York State and the City of New York. The Statement of Audit Changes provided the following explanation:

"A nonresident must report New York income from a partnership as determined by the partnership. Any allocation is determined in accordance with regulations and is reported on the partnership return. The partnership of Kaye, Scholer, Fierman, Hays & Handler has determined your New York allocation percentage to be 97.3%.

Further, pursuant to the provisions of Internal Revenue Regulations Section 1.707-1(c), guaranteed payments are regarded as a partners distribution of ordinary income and as such are allocated to New York on the same basis as the partnership allocation percentage.

Accordingly, the guaranteed payment in the amount of \$41,760.00 may not be excluded in arriving at your New York adjusted gross income."

¹ The record does not show how this amount was determined.

On January 12, 1983, a Notice of Deficiency reflecting the above adjustments was issued against petitioners asserting additional New York State income tax and New York City nonresident earnings tax due of \$3,818.59, plus interest of \$837.96, for a total due of \$4,656.55.

3. Petitioners, Morris and Stephanie Engelberg, were residents of the State of Florida prior to and during the entire year in issue.

4. Prior to and during the year in issue, petitioner Morris Engelberg was a member of the Florida Bar practicing law exclusively in the State of Florida. During 1980, he was president of the law firm of Engelberg & Cotler, P.A. (hereinafter "Engelberg & Cotler"). Engelberg & Cotler was a professional association corporation with offices at 4000 Sheridan Street, Hollywood, Florida and at 125 Worth Avenue, Palm Beach, Florida. Mr. Engelberg owned 80 percent of the outstanding stock of Engelberg & Cotler during the year in issue.

5. In addition to his association with Engelberg & Cotler, Mr. Engelberg was a partner in the law partnership of Kaye during the year in issue. Kaye had offices in New York City, Washington D.C. and Palm Beach, Florida. Engelberg & Cotler and Kaye shared the same Palm Beach office.

6. Petitioner Morris Engelberg, pursuant to an agreement with Kaye,² was in charge of operating Kaye's Palm Beach office during 1980. Mr. Engelberg was to receive an amount equal to 40 percent of the net income generated by Kaye's Palm Beach office. The expenses of its Palm Beach office for rent, telephone, stationery and other miscellaneous items were paid for by Kaye. Such expenses were deducted from fees earned by Kaye's Palm Beach office to determine the net income for the purpose of calculating Mr. Engelberg's share.

² A copy of said agreement is not a part of the record.

7. Expenses incurred on behalf of Kaye's Palm Beach office which were not reimbursed, such as secretarial, professional and accounting expenses, were paid by Engelberg & Cotler. Such expenses were included with other expenses of Engelberg & Cotler and deducted on its U.S. Corporation Income Tax Return for the fiscal year ending January 31, 1981. The corporation income tax return also showed that Mr. Engelberg received total compensation from Engelberg & Cotler during the period February 1, 1980 through January 31, 1981 of \$121,998.00.

8. Kaye issued to petitioner Morris Engelberg a Federal schedule K-1 (Partner's Share of Income, Credits, Deduction, etc.) which indicated that his distributive share of the partnership's ordinary income for 1980 was \$13,111.00. Said schedule also showed that he received guaranteed payments in the amount of \$41,760.00. The \$13,111.00 distribution represented Mr. Engelberg's interest in the partnership's ordinary income of approximately one-tenth of one percent and the \$41,760.00 represented his share of the partnership's earnings from its Palm Beach office. Both distributions were characterized on the schedule K-1 as net earnings from self-employment pursuant to Internal Revenue Code section 1402(a).

9. Kaye determined that for 1980, 97.3 percent of its income was from New York State and New York City sources.

10. Mr. Engelberg maintains that the \$41,760.00 received from Kaye was in payment for services performed for the partnership in Florida and therefore not from or connected with New York sources. He also maintains that his salary from Engelberg & Cotler was reduced by the amount of the nonreimbursed expenses Engelberg & Cotler paid on behalf of Kaye. Therefore, he argues, that if the \$41,760.00 is includible in his New York income, he is entitled to offset that amount by such expenses paid by Engelberg & Cotler. According to Mr. Engelberg's

letter dated October 18, 1983, in 1980 such expenses amounted to \$34,418.00. Engelberg & Cotler deducted such expenses on its U.S. corporate income tax return. There is nothing in the record to substantiate that Mr. Engelberg's salary would have been higher if Engelberg & Cotler had not incurred such expenses.

11. The record indicates that Mr. Engelberg did not deduct any expenses for the operation of Kaye's Palm Beach office on his 1980 Federal and New York income tax returns.

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 sources [20 NYCRR 134.1(a)].

B. That in determining the sources (as either within or without New York State) of a nonresident partner's share of partnership income, no effect shall be given to a provision in the partnership agreement which characterizes payments to the partner as salary or other consideration or distributable for services rendered to the partnership by the partner [section 637(b) of the Tax Law; 20 NYCRR 134.2(a)].

C. That the income received by petitioner Morris Engelberg from Kaye during 1980 in the amount of \$41,760.00 constituted a distributive share of partnership income and was therefore allocable to New York State based on Kaye's New York allocation percentage (See Jablin et al. v. State Tax Commission, 65 A.D.2d 891). Accordingly, the Audit Division properly determined that

\$53,389.00 of Mr. Engelberg's total partnership distribution from Kaye for 1980 was subject to New York tax (\$41,760.00 + \$13,111.00 X 97.3%).

D. That net earnings from self-employment for New York City nonresident earnings tax purposes means the same as net earnings from self-employment as defined in section 1402(a) of the Internal Revenue Code, with certain exceptions not relevant herein (section U46-1.0(f) of the Administrative Code of the City of New York). Accordingly, since the partnership distribution in question constituted net earnings from self-employment and since 97.3 percent was from New York City sources, the Audit Division properly determined the amount of said distribution subject to New York City nonresident earning tax.


E. That the record clearly shows that Engelberg & Cotler paid the expenses in question and deducted them on its U.S. corporate income tax return (see Finding of Fact "10"). There is nothing in the record to substantiate petitioners' claim that Mr. Engelberg paid the corporation for said expenses by reducing his corporate salary as he alleges. Moreover, Mr. Engelberg did not deduct any of the expenses in question on his 1980 U.S. individual or New York State income tax returns. Therefore, since such expenses were not paid by Mr. Engelberg, they are not deductible on his 1980 New York income tax return.

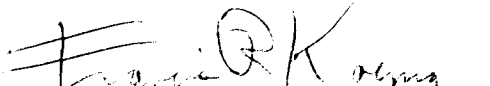
F. That the petition of Morris and Stephanie Engelberg is denied and the Notice of Deficiency dated January 12, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1985


PRESIDENT


COMMISSIONER


COMMISSIONER