STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition of George B. Pidot | 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 1981. | |

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 January, 1985, he served the within notice of Decision by certified mail upon George B. Pidot, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George B. Pidot
25 Gomez Road
Hobe Sound, FL 33455

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 January, 1985.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition of George B. Pidot | 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 1981. | |

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 January, 1985, he served the within notice of Decision by certified mail upon Stanley I. Rubenfeld, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley I. Rubenfeld
Shearman & Sterling
53 Wall Street
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
18th day of January, 1985.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

January 18, 1985

George B. Pidot
25 Gomez Road
Hobe Sound, FL 33455

Dear Mr. Pidot:

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
Stanley I. Rubenfeld
Shearman & Sterling
53 Wall Street
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|---|---|
| In the Matter of the Petition<br>of<br>GEORGE B. PIDOT<br>for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1981. | DECISION |

Petitioner, George B. Pidot, 25 Gomez Road, Hobe Sound, Florida 33455, 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 1981 (File No. 39803).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 15, 1984 at 1:15 P.M., with all briefs submitted by April 30, 1984. Petitioner appeared by Stanley I. Rubenfeld, Esq. and Andrew W. Regan, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

## ISSUE

Whether the money received by the nonresident petitioner from Shearman & Sterling was a pension qualifying as income from an annuity and thereby not taxable to New York State.

## FINDINGS OF FACT

1. Petitioner filed a 1981 New York State Nonresident Income Tax Return and reported New York income tax due of $14,003.00 on New York taxable income of $146,429.00. Petitioner attached a Form IT-250, New York State Maximum Tax

on Personal Service Income, to his tax return on which he reported total personal service income of $158,070.00[1] consisting of partnership income allocated to New York of $121,151.00, retirement benefits of $31,871.00 and $5,048.00 which he designated as New York City unincorporated business tax.

2. On or about April 21, 1982, petitioner filed a refund claim for 1981 income tax paid of $14,003.00. According to petitioner, he received an annual retirement benefit for 1981 from the law firm of Shearman & Sterling, in the amount of $172,186.70[2] which was incorrectly reported on his 1981 New York State Income Tax Nonresident Return. Petitioner claims that he is entitled to a refund of 1981 income tax paid because the $172,186.70 was income from an annuity not taxable to New York State and he had no other New York source income for 1981.

3. Petitioner has been a nonresident of New York State since January, 1978.

4. Petitioner was an active partner of Shearman & Sterling from 1948 until his retirement from the law firm in December 31, 1977. At such time, petitioner's share in the law firm's capital was paid to him in full. Petitioner had relinquished his office at the law firm prior to his retirement on December 31, 1977.

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[1] Petitioner also reported this amount, $158,070.00, as his "total New York income."

[2] Petitioner reported, as "federal amounts" in Schedule A of the tax return, $136,324.00 as partnership income and $35,862.00 as "other income". These amounts total $172,186.00, which petitioner now alleges is a retirement benefit constituting income from an annuity. On his 1981 tax return, petitioner allocated 91.8 percent of the partnership income (or $121,151.00) and 88.8 percent of the "other income" (or $31,871.00) to New York State. The record is unclear how these allocation percentages were calculated.

5. The partnership agreement[3] of Shearman & Sterling provides, in part, the following:

(i) A partner automatically becomes a Class A partner on December 31 in the calendar year he reaches age seventy[4];

(ii) A Class A partner is entitled to receive for each annual period during the remainder of his life payments aggregating 40% of his basic average[5] up to $100,000, and 33-1/3% of his basic average, if any, in excess of $100,000;

(iii) A Class A partner is entitled to office space and secretarial service and is subject to call for services. He may receive additional compensation as is agreeable to the law firm and to the partner;

(iv) A Class A partner may retire from the firm at any time and cease to be a partner. Upon such retirement, he is no longer entitled to office space and secretarial services but is entitled to receive as a pension the payments noted in subparagraph ii above;

(v) A retired partner's pension will be reduced if all annual retirement payments made by the law firm to partners and former partners would exceed an amount equal to 20% of the law firm's net income. The 20% of net income limitation, however, will be reduced in any year where 20% of the law firm's net income is less than 8% of its gross income. If such limitation is applicable, there will be a pro rata reduction of annual retirement payments, subject to a $12,000 annual minimum per person. (A limitation on retirement payments has never been applied by the law firm because such payments have always been far below any of the limitations noted supra.)

6. Petitioner chose to retire from Shearman & Sterling rather than remain a Class A partner.

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[3] Petitioner introduced into evidence what he described in his reply brief as "all of the relevant portions of the Firm's Partnership Agreement." According to petitioner, "The taxpayer did not submit the entire Agreement because there was no reason to burden the Commission with irrelevant and immaterial information. Furthermore, the Firm considers the Agreement to be highly confidential..."

[4] Petitioner reached age seventy during 1977.

[5] "Basic average" is defined in the partnership agreement as the average of the five highest annual fiscal year distributions received by a partner from the law firm prior to his retiring or becoming a Class A partner. The basic average is also subject to annual adjustment in accordance with changes in the Consumer Price Index.

7. According to petitioner's Schedule K-1, "Partner's Share of Income, Credits, Deductions, etc.", for the law partnership of Shearman & Sterling for the fiscal year ending September 30, 1981, petitioner received $136,324.45 from the partnership which the partnership designated as "guaranteed payments" deductible by the partnership. Such schedule also noted that petitioner did not share in the firm's profits and losses. His capital account was zero. He devoted no time to firm business and he had no share in the firm's liabilities. In addition, it is noted on the schedule that petitioner is a "(r)etired partner who has withdrawn all of his capital."

8. Petitioner submitted proposed findings of fact, numbered one through six and proposed conclusions of law, lettered A through D, at the hearing held herein. Proposed finding of fact one, subparagraph b of proposed finding of fact two, proposed finding of fact three, subparagraph a and subparagraph b (to the extent that it says that the annual retirement benefit paid to the petitioner for 1981 was subject to adjustment in accordance with a recognized cost of living index) of proposed finding of fact four, subparagraph b of proposed finding of fact five (to the extent that it says that petitioner paid New York State income tax in the amount of $14,003.00) and proposed finding of fact six are incorporated into and made a part of this decision. However, subparagraph a of proposed finding of fact two and subparagraph c of proposed finding of fact two are not incorporated into this decision because they are more in the nature of conclusions of law. The part of subparagraph b of proposed finding of fact four which says that petitioner's annual retirement benefit was determined without regard to the income of the partnership is not adopted herein because, as noted in Conclusion of Law "G", infra, there is the potential for the pension of a retired Shearman & Sterling partner to be reduced if the partnership's

income falls below a certain level. Therefore, petitioner's annual retirement benefit was determined with some regard to the income of the partnership. Subparagraph a of proposed finding of fact five is not adopted herein because, as noted in Conclusion of Law "B", infra, petitioner failed to adequately establish that $35,862.00 of the $172,186.70 was also received by petitioner from Shearman & Sterling as an annual retirement benefit in light of the contradictory information noted in petitioner's Schedule K-1. Subparagraph b of proposed finding of fact five [to the extent that it says that the taxpayer reported such amount ($172,186.70) on his 1981 New York State income tax return] is not incorporated herein because, in fact, petitioner reported $136,324.00 as partnership income and $35,862.00 as "other income" on his tax return as noted in footnote "2" of Finding of Fact "2", supra. Subparagraph c of proposed finding of fact five is not adopted herein because, as noted in Conclusion of Law "B", infra, petitioner failed to sustain his burden of proving the source of $35,862.00, of which he reported $31,871.00 as New York source income on his tax return.

No ruling is made concerning petitioner's proposed conclusions of law (although they were carefully considered in rendering the Conclusions of Law, infra) because the State Administrative Procedure Act §307 requires a ruling upon each proposed finding of fact only.

CONCLUSIONS OF LAW

A. That pursuant to Tax Law §689(e), the burden of proof is upon the petitioner to show that he is entitled to a refund of the 1981 personal income taxes that he now claims he incorrectly paid. Therefore, he must show that no part of the $136,324.00, which he reported as partnership income, and no part

of the $35,862.00, which he reported as "other income" (as noted in footnote "2" of Finding of Fact "2") constituted income from New York State sources.

B. That as noted in Finding of Fact "7", supra, petitioner's Schedule K-1 shows that he received only $136,324.45 (and not $172,186.70) from Shearman & Sterling during the tax year at issue. Petitioner failed to adequately prove the source of the $35,862.00. Therefore, it cannot be concluded that he incorrectly reported $31,871.00 of such amount as New York source income on his tax return.

C. That Tax Law §632(b)(2) provides, in part, as follows:

> "Income from intangible personal property, including annuities ...shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this State."

D. That if a pension or a retirement benefit of an individual formerly employed in New York State constitutes an annuity, income from such annuity is not taxable to New York State if he is a nonresident. 20 NYCRR 131.4(d)(1).

E. That to qualify as an annuity, a pension or other retirement benefit must meet the following requirements:

> (A) It must be paid in money only, not in securities of the employer or other property;
>
> (B) It must be payable at regular intervals at least annually, for the life of the individual receiving it, or over a period not less than half his life expectancy, as of the date payments begin;
>
> (C) It must be payable at a rate which remains uniform during such life or period or at a rate which varies only with the fluctuation in the market value of the assets from which the benefits are payable or a specified cost-of-living index; and
>
> (D) The individual's right to receive it must be evidenced by a written instrument executed by his employer, or by a plan established and maintained by the employer in the form of a definite written program communicated to his employees. 20 NYCRR 131.4(d)(2).

F. That , however, the annuity rule of 20 NYCRR 131.4(d) applies to former employees only. Matter of David Kestenbaum, State Tax Commission, December 20, 1983 and Matter of Louis Lacher (deceased) and Bessie Lacker, State Tax Commission, October 30, 1974. Petitioner, George B. Pidot, was a former partner and not a former employee. Furthermore, the payment of $136,324.00 made by Shearman & Sterling to petitioner is properly considered a guaranteed payment for tax purposes under I.R.C. §736(a) and under the applicable Treasury regulation, petitioner continues to be viewed as a "partner" for tax purposes (although he is a retired partner). See Treasury Reg. §1.736-1(a)(1)(ii). Therefore, the income he received from Shearman & Sterling was taxable to New York State in accordance with Tax Law §§632(a)(1)(A) and 637.

G. That, in addition, even if the annuity rule of 20 NYCRR 131.4(d) was held applicable to retired partners, petitioner's retirement benefit does not meet the requirement that the rate of payment may vary only with the fluctuation in the market value of the assets from which the benefits are payable or a specified cost-of-living index. As noted in subparagraph "v" of Finding of Fact "5", supra, there is the potential for the pension of a retired Shearman & Sterling partner to be reduced if the partnership's income falls below a certain level. Therefore, there is no guarantee that petitioner's retirement benefit will always be paid at a uniform rate.

H. That the Audit Division did not act improperly in failing to approve petitioner's refund claim.

I. That the petition of George B. Pidot is denied.

DATED: Albany, New York

JAN 18 1985

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER