

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ERNEST NORRIS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1982 and 1983.	:	

Petitioner, Ernest Norris, 491 Indian Harbor Road, Vero Beach, Florida 32960, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1982 and 1983 (File No. 64905).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 11, 1986 at 9:15 A.M., with all briefs to be submitted by December 22, 1986. Petitioner appeared by Samuel W. Sansone, Esq. and Charles V. O'Neill, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether retirement benefit payments received by petitioner during the years 1982 and 1983 constituted an annuity as defined in 20 NYCRR 131.4.

FINDINGS OF FACT

1. Ernest Norris (hereinafter "petitioner") filed a New York State Nonresident Income Tax Return for the year 1982 whereon he excluded from New York State income the sum of \$160,000.00 received from his former New York employer, Batten, Barton, Durstine & Osborn, Inc. ("BBDO") on the basis that

said sum constituted a nontaxable annuity. The return as filed showed an overpayment of \$12,610.00 to be refunded to petitioner.

2. On November 3, 1983, the Audit Division issued a Statement of Income Tax Adjustment to petitioner wherein it was indicated that he was not entitled to a refund for 1982.

3. On June 1, 1984, petitioner filed a Claim for Credit or Refund of Personal Income Tax for the year 1982. The amount of refund claimed thereon was \$12,537.00. Petitioner's basis for said claim was that "[t]he payment of \$160,000 is excludable from the Taxpayer's New York State income as an annuity under Regulations Section 131.4(d)...."

4. On October 15, 1984, petitioner filed a New York State Nonresident Income Tax Return for the year 1983 whereon, as in 1982, he excluded from New York State income the sum of \$160,000.00 received from his former employer.

5. On May 6, 1985, the Audit Division issued a Statement of Audit Changes to petitioner wherein the retirement benefit payments of \$160,000.00 for each of the years 1982 and 1983 were held to be fully taxable for New York State purposes. Accordingly, a Notice of Deficiency was issued against petitioner on August 8, 1985 asserting additional personal income tax for 1982 and 1983 of \$20,589.00, plus interest of \$3,082.61, for a total due of \$23,671.61.

6. Petitioner, who was born July 6, 1923, alleged that even if it is determined that the aforesaid retirement benefit payments do not qualify as an annuity, the Audit Division failed to exclude from his 1982 and 1983 New York State income, the first \$20,000.00 of such payments for each of said years pursuant to section 612(c)(3-a) of the Tax Law, made applicable to nonresidents by section 632(a)(2) of the Tax Law.

7. Petitioner received the aforesaid payments in accordance with Article III of an agreement with his employer dated September 5, 1975. Such payments, which were for a period of calendar years fixed by a predetermined schedule, were determined as follows:

"in each of such years a sum equal to the lesser of (i) one year's salary or (ii) the Participation in respect of the net profits of the Company for the calendar year immediately preceding the scheduled date of payment...."

8. The Audit Division's position is that:

"[U]se in the aforesaid agreement of the term 'net profits of the Company' as an alternative determinant makes the total amount to be paid unpredictable, nor is it one of the standards enumerated in 20 NYCRR 131.4(d)(iii). Therefore, the petitioner's retirement payments do not qualify as an annuity under said Regulation. The fact that the payments may actually turn out to be uniform over the payout term is irrelevant."

9. Petitioner's profit participation is .8 percent. Petitioner would receive less than \$160,000.00 per year only in the event BBDO's net profits fall below \$20,000,000.00. BBDO's profit base upon which annual severance payments were made was as follows:

1981	\$27,655,897.06
1982	\$30,006,617.12
1983	\$35,448,043.93
1984	\$43,442,190.58
1985	\$40,910,209.47

10. Petitioner argued that the likelihood of a profit base reduction to an amount below \$20,000,000.00 is so remote that it should not be considered.

11. Petitioner argued that the potential of his receiving reduced payments does not disqualify his payments from meeting the requirements necessary for same to be considered annuity payments under 20 NYCRR 131.4.

CONCLUSIONS OF LAW

A. That 20 NYCRR 131.4(d)(2) provides that:

"(2) Definition. To qualify as an annuity, a pension or other retirement benefit must meet the following requirements:

* * *

(iii) It must be payable:

- (a) at a rate which remains uniform during such life or period; or
- (b) at a rate which varies only with:
 - (1) the fluctuation in the market value of the assets from which such benefits are payable;
 - (2) the fluctuation in a specified and generally recognized cost-of-living index; or
 - (3) the commencement of social security benefits; or
- (c) in such a manner that the total of the amounts payable is determinable at the annuity starting date either directly from the terms of the contract or indirectly by the use of either mortality tables or compound interest computations, or both, in conjunction with such terms and in accordance with sound actuarial theory."

B. That petitioner's retirement benefit payments received in 1982 and 1983 do not qualify as an annuity since said benefits failed to meet the requirements set forth in 20 NYCRR 131.4(d)(2)(iii). Petitioner's reliance on Pidot v. State Tax Commission (118 AD2d 915, affd ___NY2d___ [March 17, 1987]) is misplaced in that in Pidot the taxpayer was a retired partner of a partnership and "[a]lthough the agreement provided that all payments to retired partners would be reduced in any year in which the partnership's net income failed to exceed certain criteria, the unpaid amounts remained due and owing, to be paid in subsequent years when the limitation did not apply." (Id at 916; emphasis supplied.) There is no such deferral of income in the instant case and, therefore, the rate is variable and not within the criteria of 20 NYCRR 131.4(d)(2)(iii).

C. That NYCRR 131.4(d)(1) provides, in pertinent part, that:

"Where a pension or other retirement benefit does not constitute an annuity, it is compensation for personal services and, if the individual receiving it is a nonresident, it is taxable for New York State personal income tax purposes to the extent that the services were performed in New York State."

D. That section 612 of the Tax Law provides, in pertinent part, that:

"(a) General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.

* * *

(c) Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:

* * *

(3-a) Pensions and annuities received by an individual who has attained the age of fifty-nine and one-half, not otherwise excluded pursuant to paragraph three of this subsection, to the extent includible in gross income for federal income tax purposes, but not in excess of twenty thousand dollars, which are periodic payments attributable to personal services performed by such individual prior to his retirement from employment...."

E. That section 612(c)(3-a) of the Tax Law is made applicable to nonresidents by section 632(a)(2) of the Tax Law.

F. That the modification provided in section 612(c)(3-a) of the Tax Law is not applicable to petitioner for the year 1982 because he did not attain the age of fifty-nine and one-half in such year as required by said section.

G. That for taxable year 1983 petitioner is properly entitled to the modification provided in section 612(c)(3-a) of the Tax Law. Accordingly, \$20,000.00 of his 1983 retirement benefit payments are to be subtracted from his Federal adjusted gross income in arriving at his New York adjusted gross income.

H. That the petition of Ernest Norris is granted to the extent provided in Conclusion of Law "G", supra; that the Audit Division is directed to modify the Notice of Deficiency issued August 8, 1985 accordingly; and that, except as so granted, said petition is in all other respects denied.

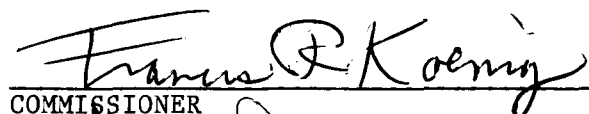
DATED: Albany, New York

STATE TAX COMMISSION

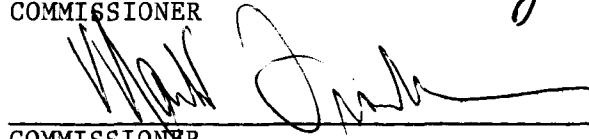
APR 23 1987



PRESIDENT



COMMISSIONER



COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Ernest Norris :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article(s) 22 of the Tax Law for the :
Years 1982 & 1983. :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 23rd day of April, 1987, he/she served the within notice of Decision by certified mail upon Ernest Norris the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ernest Norris
491 Indian Harbor Rd.
Vero Beach, FL 32960

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
23rd day of April, 1987.

Janet M. Snay

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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Ernest Norris

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Tax under Article(s) 22 of the Tax Law for the :
Years 1982 & 1983.

:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 23rd day of April, 1987, he served the within notice of Decision by certified mail upon Samuel W. Sansone, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel W. Sansone
O'Neill, DeManno & Kelly
15 Beekman St.
New York, NY 10038

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
23rd day of April, 1987.

Janet M. Snay

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

April 23, 1987

Ernest Norris
491 Indian Harbor Rd.
Vero Beach, FL 32960

Dear Mr. Norris:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Samuel W. Sansone
O'Neill, DeManno & Kelly
15 Beekman St.
New York, NY 10038