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STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

JOHN J. & BEVERLY O'KEEFE

For a Redetermination of a Deficiency or
a Refund of Personal Income :
Taxes under Article(s) 22 of the :
Tax Law for the (Year(s) 1961 & 1963 :

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

Martha Funaro , being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of December , 1972 , she served the within Notice of Decision (or Determination) by (certified) mail upon John J. & Beverly O'Keefe (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: John J. & Beverly O'Keefe
Hickok Road
New Canaan, Connecticut
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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

11th. day of December , 1972.

Lynn Wilson

Martha Funaro

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
JOHN J. & BEVERLY O'KEEFE

For a Redetermination of a Deficiency or
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Tax Law for the (Year(s) 1961 & 1963 :

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OF NOTICE OF DECISION
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State of New York
County of Albany

Martha Funaro , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 11th day of December , 1972 , she served the within
Notice of Decision (or Determination) by (certified) mail upon Harvey Kitay, Esq.

(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Harvey Kitay, Esq.
Kolleeny, Kitay & Hort
1180 Avenue of the Americas
New York, New York 10036
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) 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

11th day of December , 1972.

Lynn Wilson

Martha Funaro



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A
STATE CAMPUS

ALBANY, N. Y. 12227

AREA CODE 518

457-2655, 6, 7

STATE TAX COMMISSION

NORMAN F. GALLMAN, PRESIDENT

A. BRUCE MANLEY

MILTON KOERNER

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

Dated: Albany, New York

December 11, 1972

John J. & Beverly O'Keefe
Nickok Road
New Canaan, Connecticut

Dear Mr. & Mrs. O'Keefe:

Please take notice of the **DECISION** of
the State Tax Commission enclosed herewith.

Please take further notice that pursuant to **section 690 of**
the Tax Law any proceeding in court to review an adverse decision
must be commenced within **4 Months** after
the date of this notice.

Any inquiries concerning the computation of tax due or refund allowed
in accordance with this decision or concerning any other matter relat-
ing hereto may be addressed to the undersigned. These will be referred
to the proper party for reply.

Very truly yours,

Nigel G. Wright

HEARING OFFICER

cc Petitioner's Representative
Law Bureau

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
JOHN J. AND BEVERLY O'KEEFE : DECISION
for a Redetermination of a Deficiency or :
for Refund of Personal Income Taxes under :
Article 22 of the Tax Law for the Years :
1961 and 1963. :

John J. and Beverly O'Keefe filed petitions under section 689 of the Tax Law for the redetermination of deficiencies in personal income taxes for the years 1961 and 1963. A hearing was duly held on September 17, 1970, before Nigel G. Wright, Hearing Officer, with Harvey Kitay, Esq. appearing for the petitioners and Francis X. Boylan on behalf of Edward H. Best, Esq. appearing for the Income Tax Bureau. The record of the hearing has been duly examined and considered.

FINDINGS OF FACT

1. The issues in the hearing are (A) for 1961 and 1963, whether receipts from a business carried on in New York should be allocated and whether they should be allocated on the basis of business done in and out of the State (Regulation 20 NYCRR 131.15) or on the basis of time spent in and out of the State (Regulation 20 NYCRR 131.16); (B) for 1963, whether a loss on stock of a Connecticut corporation should be allowed as a partial deduction because of its alleged relationship to the business of taxpayer; and (C) for 1963, whether the Commission should abate a 25% penalty under section 685(a) of the Tax Law for failure to file a timely tax return. The taxpayer has not placed in issue a credit for New York tax withheld which was claimed on the return but which was denied in the deficiency notice because of a failure to produce a

withholding statement (IT-2102).

2. The deficiencies amount to: \$1,745.08 with \$313.70 interest to April 13, 1965, for 1961; and \$4,134.44 with a 25% penalty of \$1,033.61 and interest of \$876.63 to September 25, 1967, for 1963.

3. It is conceded that for 1961, the taxpayer is entitled to deductions of \$10,048.00 as shown on his Federal return instead of \$5,106.00 as incorrectly shown on his New York return as filed.

4. Petitioners are residents of Connecticut. They filed non-resident New York income tax returns. The 1961 return was filed on time. The 1963 return was filed on July 20, 1966, over 2 years and 3 months after it was due.

5. Mr. O'Keefe is an employee of Cupples Products Corporation whose main office is in St. Louis, Missouri and which has a New York City office. Cupples produces "curtain walls" which are prefabricated metal parts used to form the outer walls of large buildings. It also, in the years in question, produced aluminum window frames. It contracts for the installation of the curtain walls in place at the job site. The terms of Mr. O'Keefe's compensation are \$4,200.00 a year plus 1% of all shipments made to the customers which he has solicited. Although the company has representatives in many major cities in the country, none of them have exclusive territories. The contracts are solicited largely through personal contact.

6. Upon receiving notice of a job either directly in New York or through Cupples in St. Louis, Mr. O'Keefe would interview the architect, the general contractor and the owner, both at their respective places of business, typically in major cities in different states of the United States, and also in St. Louis, where Cupples stations its estimators, designers and engineers. The

interviews were necessary to settle on designs and specifications for the job and involved much interstate travel. These contracts would be finally closed at the offices of Cupples in St. Louis. In addition, Mr. O'Keefe would contract in the name of Cupples with subcontractors located near the job site to perform the labor of installing the curtain walls at the job site. After a contract is signed, Mr. O'Keefe has duties to help resolve conflicts between the owner, the contractors and Cupples.

7. Mr. O'Keefe's time spent in and out of New York State, as estimated from expense vouchers was: for 1961, 158 days in New York and 88 days out of New York; and for 1963, 170 days in New York and 64 days out of New York. To show the volume of business transacted in and out of New York petitioner submitted figures showing shipments from Cupples to job sites in and out of the State. These figures are: for 1961; \$2,090,491.00 in New York and \$1,232,265.00 out of New York. For 1963; \$3,050,074.00 in New York and \$2,497,050.00 out of New York

8. In 1959, Mr. O'Keefe had organized the Fox Steel Company, a Connecticut Corporation, and contributed \$16,000.00 to its capital. In 1963, the corporation became bankrupt and Mr. O'Keefe sustained a complete loss of his investment in the stock. This was allowed on his Federal return as an ordinary loss of a small business corporation as provided in section 1244(a) of the Internal Revenue Code. The Fox Steel Corporation produced parts for use in or with "curtain walls" and it sold these either to Cupples or to the customers of Cupples. Mr. O'Keefe testified that the sole purpose of the company was to supplement and aid him in the sale of curtain walls for Cupples by supplying valuable parts for such walls, but no other evidence was offered to show how such stock was employed in Mr. O'Keefe's business as an employee of Cupples.

9. The late filing of the 1963 return was due to the fact that Mr. O'Keefe thought that the loss from the Fox Steel stock could be deducted from his income and that amounts for New York State taxes were being withheld from his salary in sufficient amounts to cover any further tax liability. He offered no explanation for his failure to prove the amount of taxes withheld.

CONCLUSIONS OF LAW

A. The petitioners are entitled to an allocation of the compensation received by Mr. O'Keefe. Such allocation is most appropriately made on the basis of time spent in and out of New York under Regulation 20 NYCRR 131.16. An allocation on the basis of business done in and out of New York under Regulation 20 NYCRR 131.15 is not appropriate. The only figures submitted with respect to such business done by Mr. O'Keefe relate to shipments to job sites in New York. Although the compensation of Mr. O'Keefe is measured in part by such shipments, it is clear that such shipments are not personally handled by Mr. O'Keefe and that his business as an employee involves many duties and much activity at locations other than the job sites to which the shipments are made. The size of each shipment does not necessarily reflect the amount and extent of Mr. O'Keefe's efforts to secure the contract for such shipment. His compensation, therefore, does not directly depend upon the amount of such activity or of such shipments.

B. The loss on the stock of the Fox Steel Company is not deductible, in whole or in part, from New York income. The loss is derived from the ownership of stock which is not from New York sources unless employed in a business or occupation carried on in New York (Tax Law, section 632(b)(2)). The petitioner has not sustained the burden of proof that the stock ownership was employed in a New York business.

C. The penalty for failure to file a timely 1963 return is fully justified in this case. The petitioner has not shown that his belief that taxes were withheld had a reasonable foundation. Ignorance of the law relating to deductions is itself not an excuse especially when, as here, it relates to ultimate tax liability and not the duty to file a return.

DECISION

The petitions are granted and the deficiencies are recomputed to be: \$370.65 plus \$61.32 interest to April 13, 1965, for the year 1961; and \$2,180.55 plus penalty of \$545.14 and interest of \$712.17 to September 25, 1967, for the year 1963; each with such further interest, if any, as may be due pursuant to section 684 of the Tax Law.

DATED: Albany, New York
December 11, 1972

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER