

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

JAMES J. and MARION L. HOULAHAN

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Personal Income :  
Taxes under Article (s) 22 of the :  
Tax Law for the Year(s) ~~or Period(s)~~ :  
1970, 1971 and 1972.

State of New York  
County of Albany

John Huhn , 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 13th day of September, 1978, ~~she~~ served the within  
Notice of Decision by (certified) mail upon James J. & Marion L.  
Houlahan (~~representative of~~) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Mr. & Mrs. James J. Houlahan  
680 Steamboat Road  
Greenwich, Connecticut 06830  
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 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 September , 1978

J. P. Walker  
ms

John Huhn

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

JAMES J. and MARION L. HOULAHAN

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Personal Income :  
Taxes under Article (x) 22 of the :  
Tax Law for the Year(s) ~~or Period(s)~~ :  
1970, 1971 and 1972.

State of New York  
County of Albany

John Huhn , being duly sworn, deposes and says that  
he is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 13th day of September , 1978, he served the within  
Notice of Decision by (certified) mail upon Harold N. Pappas

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Harold N. Pappas, Esq.  
Zimet, Haines, Moss & Goodkind  
460 Park Avenue  
New York, New York 10022

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 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 September , 1978.

V. P. Walker  
md

John Huhn



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

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

**September 13, 1978**

**Mr. & Mrs. James J. Houlahan  
680 Steamboat Road  
Greenwich, Connecticut 06830**

**Dear Mr. & Mrs. Houlahan:**

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 **(a) 690** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

**Michael Alexander  
Supervising Tax  
Hearing Officer**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JAMES J. and MARION L. HOULAHAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1970, 1971	:	
and 1972.	:	
	:	

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James J. and Marion L. Houlahan, 680 Steamboat Road, Greenwich, Connecticut, 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 1970 through 1972 (File No. 13494).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1977 at 1:15 P.M. Petitioners appeared by Zimet, Haines, Moss & Goodkind, Esqs. (Harold N. Pappas, Esq., of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether certain payments received by petitioner James J. Houlahan from his former employer during the years in issue constituted an annuity excludible from New York taxable income by a nonresident, in accordance with the provisions of the Income Tax Regulations (20 NYCRR 131.4(d)(1) and (2)).

II. Whether the aforementioned payments constituted taxable income attributable to New York sources in consideration for a restrictive agreement not to compete with the employer.

FINDINGS OF FACT

1. Petitioners, James J. and Marion L. Houlahan, filed New York State income tax nonresident returns for 1970, 1971 and 1972, on which they reported losses attributable to New York sources for each of the aforementioned years. Petitioners reported no New York State tax due on each of the aforesaid returns.

2. On February 25, 1974, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, imposing personal income taxes of \$6,379.21, \$5,990.71 and \$4,304.91 for the years 1970, 1971 and 1972, respectively, plus \$2,043.25 in interest for a total due of \$18,718.08. Accordingly, it issued a Notice of Deficiency therefore. Petitioners timely filed a petition for redetermination of said deficiency.

3. During the years in issue, petitioners were and still are nonresidents of the State of New York, residing in Greenwich, Connecticut.

4. Prior to January 1, 1970, petitioner James J. Houlahan was employed by William Esty Company, Inc. (hereinafter "The Company"), a domestic corporation organized under the laws of the State of New York, having its principal place of business in the City and State of New York.

5. On December 19, 1961, petitioner James J. Houlahan entered into an employment agreement with William Esty Company, Inc. for a 5 year period commencing on January 1, 1962 and terminating on December 31, 1967, at a salary of \$125,000.00 annually. Simultaneously with the execution of the aforementioned agreement, the parties thereto entered into a deferred compensation agreement whereby the petitioner James J. Houlahan agreed that during the period commencing January 1, 1968 and terminating on December 31, 1974, he would not compete with The Company in the advertising business, or in any other business engaged in by The Company in any State of the United States (other than the States of Alaska and Hawaii) either as a sole proprietor, member of a partnership or otherwise. He further agreed not to become associated

with any corporation which so competes with The Company, either as a director, officer, employee, stockholder, consultant or otherwise. The Company agreed to pay the petitioner James J. Houlahan \$10,416.66  $\frac{2}{3}$  on the 15th day of each and every month, commencing with the date of the termination of the employment agreement.

6. The agreements referred to in Finding of Fact "4", supra, were extended to December 31, 1968 by instruments in writing dated January 2, 1968 which provided that commencing January 1, 1969, the period of employment shall be extended automatically for annual periods of one year each. The restrictive agreement provided that it shall commence on the first of that month in which James J. Houlahan shall cease to be an employee of The Company. The term of the agreement was for the same number of months he was an employee, between January 1, 1961 and December 31, 1969, namely, 108 months or 9 years.

7. The petitioner James J. Houlahan testified that he was not required to nor did he render any services of any kind to the Company after he ceased to become an employee thereof on December 31, 1969. There was no provision in the restrictive agreement requiring Mr. Houlahan to render any service to The Company either within or without the State of New York.

8. During the period 1942 to 1956, Mr. Houlahan was a stockholder and officer of The Company. In 1956 he sold his stock interest for \$2,500,000.00, pursuant to an installment arrangement. However, he remained with The Company as president, chairman of the board and then honorary chairman until his retirement in December of 1969.

9. The Company had a pension plan for all of its employees, including Mr. Houlahan. Neither petitioner nor his representative submitted a copy of The Company pension plan at the hearing.

10. At the time Mr. Houlahan entered into the restrictive agreement with The Company, he was 62 years of age. According to the annuity tables "Table I - One Life - Expected Return Multiples" pursuant to I. R. S. Regulation 1.72-9, the multiples for a 62 year old male is 16.9.

11. Petitioners contend that the payments received from The Company during the years in issue constituted an annuity excludable from New York income tax by a nonresident. It is further contended that the restrictive agreement not to compete was merely for the purpose of defeating any possible argument that Mr. Houlahan would be in constructive receipt of all the payments under the aforesaid agreement at their commencement.

#### CONCLUSIONS OF LAW

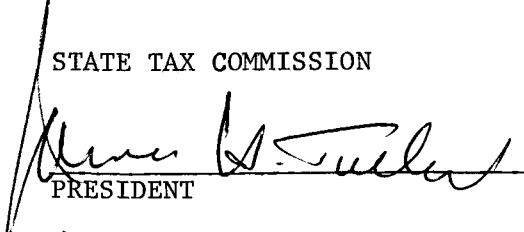
A. That the payments received by petitioner James J. Houlahan from The Company during the years in issue were in consideration for the agreement not to compete and, therefore, constituted additional income attributable to New York sources within the intent and meaning of section 632(a)(1) of the Tax Law. (See The Korfund Co. v. Commr., 1 T.C. 1180; Sabatini v. Commr. 98 F. 2d 753; Ingram v. Bowers, 47 F. 2d 925, aff'd 57 F. 2d 65.)

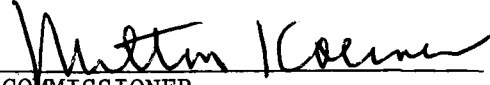
B. That the aforementioned payments did not constitute a pension or retirement benefit, excludible from New York State income tax by a nonresident individual formerly employed in New York who retires from service and, thereafter, receives a pension or retirement benefit attributable to his former services, in accordance with New York State Personal Income Tax Regulations (20 NYCRR 131.4(d)(1)).

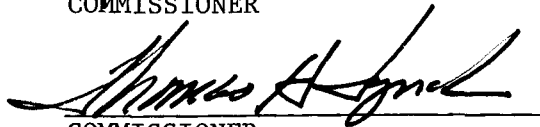
C. That the Statement of Audit Changes and Notice of Deficiency be and the same are correct, and that the petition of James J. and Marion L. Houlahan be and the same is hereby denied.

DATED: Albany, New York  
September 13, 1978

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER