

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sabino & Brenda Berardino :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax :
under Article 22 of the Tax Law :
for the year 1972. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, 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 8th day of August, 1979, he served the within Notice of Decision by certified mail upon Sabino & Brenda Berardino, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sabino & Brenda Berardino
40 E. 88th St.
New York, NY 10028

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
8th day of August, 1979.

Victor J. [Signature]

Jay Vredenburg

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

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

August 8, 1979

Sabino & Brenda Berardino
40 E. 88th St.
New York, NY 10028

Dear Mr. & Mrs. Berardino:

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, 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,



cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
SABINO BERARDINO and BRENDA BERARDINO : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Year :
1972. :
:

Petitioners, Sabino Berardino and Brenda Berardino, 40 East 88th Street, New York, New York 10028, 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 1972 (File No. 10978).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 20, 1978 at 2:45 P.M. Petitioner appeared pro se and for his wife, petitioner Brenda Berardino. The Income Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioners are required to add Sabino Berardino's proportionate share of the New York City unincorporated business tax of his partnership to their Federal adjusted gross income, in determining their New York State adjusted gross income.

II. Whether sections 617(a) and 612(b)(3) of the New York State Tax Law are constitutional.

III. Whether the Notice of Deficiency issued to petitioners should be dismissed because of the Department of Taxation and Finance's delay in bringing this case to a hearing.

FINDINGS OF FACT

1. Petitioners, Sabino Berardino and Brenda Berardino, timely filed a resident income tax return for 1972, on which they reported Sabino Berardino's distributive share of partnership income for said year. Petitioners failed to increase their Federal adjusted gross income by the proportionate share of the New York City unincorporated business taxes deducted by the partnership of Garbarino, Scher, DeCicco & Berardino, in arriving at petitioner Sabino Berardino's distributive share of partnership income.

2. On July 28, 1975, the Income Tax Bureau issued a Notice of Deficiency to petitioners, asserting additional personal income tax for 1972 of \$374.10, plus interest. This was done on the grounds that they failed to increase their total New York income, so as to include petitioner Sabino Berardino's proportionate share of the New York City unincorporated business tax deducted by the partnership, in arriving at his distributive share of partnership income.

3. The facts herein are not in dispute; however, Sabino Berardino argued that the amounts of New York City unincorporated business tax claimed as deductions by the partnership in 1972 were claimed properly, in determining his distributive share of partnership income

reportable for Federal income tax purposes for said year. Mr. Berardino contended that to require him to add to his Federal adjusted gross income, his shares of the New York City unincorporated business tax of the partnership for the purpose of determining his New York adjusted gross income, constitutes the disallowance of a deduction which was proper for Federal income tax purposes.

4. Petitioner further contended that the New York City unincorporated business tax is a business tax (in accordance with Shapiro v. City of New York, 32 N.Y. 2d 96) rather than an income tax, and that no modification with respect thereto is required by the Tax Law. He argued that to require such modification results in the same money being taxed twice, thereby making the modification unconstitutional.

CONCLUSIONS OF LAW

A. That petitioners, Sabino Berardino and Brenda Berardino, were required to add Mr. Berardino's proportionate share of the New York City unincorporated business tax of his partnership to their Federal adjusted gross income, in determining their New York State adjusted gross income for the year in question, pursuant to sections 617(a) and 612(b) (3) of the Tax Law.

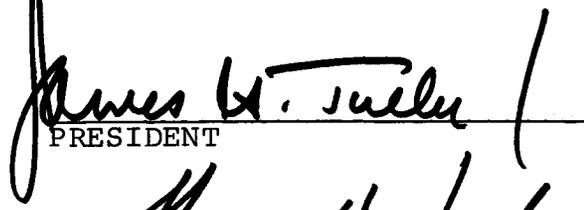
B. That there is no jurisdiction at the administrative level to declare such laws unconstitutional. Therefore, it must be presumed that sections 617(a) and 612(b) (3) of the Tax Law are constitutional to the extent that they relate to the imposition of a personal income tax liability on petitioners.

C. That the State Tax Commission is not estopped from making a claim against petitioner. A state agency or body cannot be estopped from asserting its governmental power regarding acts within its governmental capacity.

D. That the petition of Sabino Berardino and Brenda Berardino is denied and the Notice of Deficiency issued July 28, 1975 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York
August 8, 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER