

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

James A. & Marjorie Russell :

AFFIDAVIT OF MAILING

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 Years 1960 - 1969. :

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 14th day of November, 1980, he served the within notice of Decision by certified mail upon James A. & Marjorie Russell, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

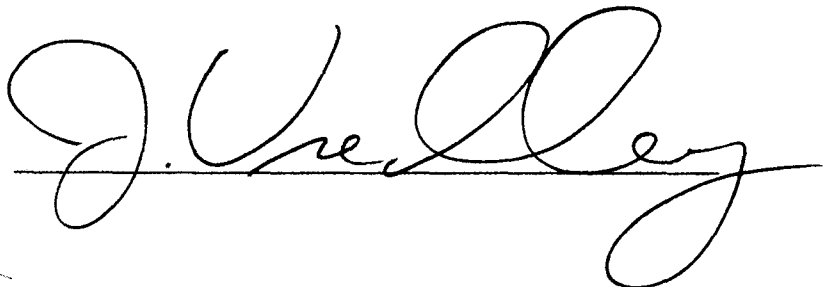
James A. & Marjorie Russell  
254 E. 68th St., Apt. 23B  
New York, NY 10021

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  
14th day of November, 1980.





STATE OF NEW YORK  
STATE TAX COMMISSION

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for Redetermination of a Deficiency or a Revision :

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Personal Income Tax :

under Article 22 of the Tax Law

for the Years 1960 - 1969. :

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 14th day of November, 1980, he served the within notice of Decision by certified mail upon E. E. Finucan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. E. E. Finucan  
Finucan & Greenwood  
10 E. 40th St.  
New York, NY 10016

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  
14th day of November, 1980.

Deborah A. Bank

J. Vredenburg

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

November 14, 1980

James A. & Marjorie Russell  
254 E. 68th St., Apt. 23B  
New York, NY 10021

Dear Mr. & Mrs. Russell:

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:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
E. E. Finucan  
Finucan & Greenwood  
10 E. 40th St.  
New York, NY 10016  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JAMES A. RUSSELL	:	
and	:	DECISION
MARJORIE RUSSELL	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1960 through 1969.	:	

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Petitioners, James A. Russell and Marjorie Russell, 254 East 68th Street, Apt. #23B, New York, New York 10021, 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 1960 through 1969 (File No. 01767).

A formal hearing was held before Nigel Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 17, 1975 at 1:20 P.M. and continued on August 5, 1976 at 9:15 A.M. The hearing was continued to conclusion before Edward L. Johnson, Hearing Officer, on June 24, 1977 at 12:40 P.M. Petitioners appeared by E. E. Finucan, CPA. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner James A. Russell, a member partner of Van Alstyne, Noel & Co., properly allocated his distributive share of partnership income.

II. Whether petitioner James A. Russell was required to add to total income his share of the New York City unincorporated business tax deduction taken on the partnership return of Van Alstyne, Noel & Co. for 1966 through 1969.

III. Whether petitioner James A. Russell was required to report his distributive share of partnership income/loss from Mawdsley, Sellas & Co., a Missouri partnership.

IV. Whether petitioner James A. Russell was entitled to deduct losses incurred from a joint venture which was engaged in oil and gas explorations during the period he was a nonresident.

V. Whether petitioners were entitled to allocate petitioner James A. Russell's distributive share of partnership ordinary income on the basis of the number of months they were residents and nonresidents during 1969.

VI. Whether petitioners were entitled to allocate partnership salary paid to petitioner James A. Russell on the basis of days worked within and without New York State.

VII. Whether the Notice of Deficiency issued for 1960 was barred by the three-year period of limitation on assessment.

#### FINDINGS OF FACT

1. Petitioners, James A. Russell and Marjorie S. Russell, filed joint New York State income tax nonresident returns for 1960 through 1968, and a part-year nonresident and resident return for 1969.

2. Petitioner James A. Russell was a member partner of Russell, McElnea & Co. and Van Alstyne, Noel & Co. for the years in issue and of Mawdsley, Sellas & Co. for 1968 and 1969; and a member partner of several oil lease joint ventures in 1969. His share of partnership income/loss from Russell, McElnea & Co. is not at issue.

3. Petitioner James A. Russell signed consents fixing period of limitation upon assessment of personal income and unincorporated business taxes, which consents extended the period for assessment of personal income tax for 1961 through 1969, until April 15, 1974. No such consent was obtained for 1960.

4. On November 26, 1973, the Income Tax Bureau issued a Notice of Deficiency against petitioners for the years 1960 through 1969, asserting personal income tax of \$54,540.52, and interest of \$21,767.21, for a total sum of \$76,307.73. The notice was issued, in part, as a result of a New York field audit of the partnership Van Alstyne, Noel & Co. for the fiscal years ending January 31, 1961 and 1962, for the short period February 1, 1962 through December 31, 1962 and for the calendar years 1963, 1964, 1965 and 1968, wherein adjustments were made to the partnership allocation percentage which resulted in personal income taxes due from nonresident partners. Said adjustments also included adjustments made by the Internal Revenue Service for years 1961, 1962, 1963, 1965, 1966 and 1967.

5. Mawdsley, Sellas & Co. was a partnership formed in the State of Missouri. It had two functions: the first was the financing of cattle and included such activities as investing money, borrowing money and making arrangements for various banking relationships in order to get enough money to buy the cattle; the second function was the actual cattle operation which included the purchasing of the animals, the selection of the feed yards in which they were kept, and the checking of the animals until they were ready for sale. Petitioners' representative stated that feed yards were located all over the Southwest and West, including California, Nevada, Louisiana, Texas and Oklahoma. Van Alstyne, Noel & Co. provided the collateral on loans made to Mawdsley, Sellas & Co. Van Alstyne, Noel & Co. was not a member partner in Mawdsley, Sellas & Co., nor did it carry said firm on its books as an investment.

Petitioner James A. Russell and the other partners of Van Alstyne, Noel & Co. became joint venturers with Nyvatex, a joint venture involved in oil and gas exploration. The joint venture had no place of business in New York

State during 1969 and 1970. The partners of Van Alstyne, Noel & Co. and their wives owned a large amount of stock in Nyvatex Oil Co., a public company listed in over-the-counter stocks. The explorations took place in the State of Montana and various other places, but not in New York State. In order to drill for oil, Nyvatex would seek out financing in the Wall Street financial community of New York City, excluding Van Alstyne, Noel & Co., and also from other companies. The partners of Van Alstyne, Noel & Co. became joint venturers as individuals and not as partners. Petitioners contended that Nyvatex also was engaged in a number of financial ventures in New York City, but submitted no evidence to support their contention.

6. The New York adjustments for 1966 through 1969 were based, in part, on petitioners' failure to add to total income, petitioner James A. Russell's share of the New York City unincorporated business tax deduction taken on the partnership return of Van Alstyne, Noel & Co.

The New York adjustments for 1967 and 1968 also included the allowance of a net operating loss deduction resulting from a carryback from 1970 and 1971, respectively. The amount of the net operating loss deduction for each year was the same as that claimed for Federal income tax purposes.

The field audit adjustments for 1968 were also based on the disallowance of petitioner James A. Russell's share of partnership income/loss from Mawdsley, Sellas & Co., and his share of short term capital loss from said partnership.

7. On June 26, 1969, petitioners changed their status from that of non-resident to resident. Petitioners allocated to their resident period fifty percent of petitioner James A. Russell's share of partnership ordinary income/loss and fifty percent of his partnership salary. Petitioners allocated the remainder of partnership ordinary income/loss to the non-resident period and allocated

the remainder of partnership salary on the basis of the ratio that days worked within New York State in the nonresident period bore to total days worked in the nonresident period.

CONCLUSIONS OF LAW

A. That the Audit Division is hereby directed to recompute petitioner James A. Russell's proportionate share of partnership income from Van Alstyne, Noel & Co. in a manner consistent with the State Tax Commission decision in the Matter of the Petition of Van Alstyne, Noel & Co., signed on this date.

B. That the New York City unincorporated business tax is an income tax for which deduction shall be allowed under section 706(4) of Article 23 of the Tax Law, which refers to the computation of New York State unincorporated business income tax. For purposes of personal income tax, Article 22 is applicable, which article requires a modification increasing total income by adding back income taxes imposed by this or any other state or taxing jurisdiction; therefore, New York City unincorporated business tax was not deductible in computing New York State adjusted gross income under section 632(a)(2) of the Tax Law.

C. That although financial arrangements were made on behalf of Mawdsley, Sellas & Co., at the offices of Van Alstyne, Noel & Co. in New York City, such location did not constitute a place of business of the Missouri partnership; that even though the interests of the partners in Mawdsley, Sellas & Co. were in the same percentages as their proportionate interests in Van Alstyne, Noel & Co., the Missouri partnership did not maintain in this State a place of business where its business affairs were systemically and regularly carried on. Therefore, petitioner James A. Russell's share of partnership loss from Mawdsley, Sellas & Co. is not includable in determining New York adjusted gross income under section 637(a)(1) of the Tax Law and 20 NYCRR 134.1.



D. That petitioners are not entitled to deduct losses from oil lease joint ventures, since said losses were incurred as a result of oil drilling operations, which were carried on outside New York State, and which were individually financed by petitioner James A. Russell.

E. That petitioners are not entitled to allocate partnership income based upon the number of days worked within and without New York State since such method is available only to nonresident employees (Matter of the Petition of John J. McGlew, State Tax Commission, March 29, 1972). That petitioners are not entitled to allocate partnership income on the basis of the number of months they were New York State residents since the distributive share of partnership income, gain, loss and deduction is not prorated between separate resident and nonresident returns in accordance with 20 NYCRR 148.6.

F. That the Notice of Deficiency for 1960 was barred by the three-year period of limitation on assessment within the meaning and intent of section 683(a) of the Tax Law.

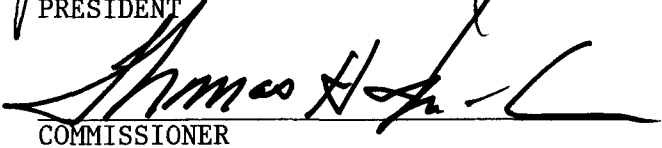
G. That the Audit Division is directed to modify the Notice of Deficiency issued on November 26, 1973, to the extent shown in Conclusions of Law "A" and "F", supra; and that, except as so granted, the petition is in all other respects denied.

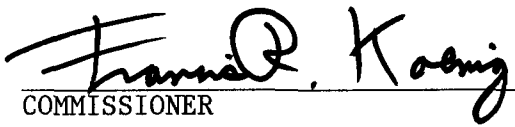
DATED: Albany, New York

NOV 14 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER