

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
FRED S. DUBIN AND SARAH K. DUBIN : DECISION
 : DTA NO. 802868
for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under :
Article 22 of the Tax Law and New York City :
Nonresident Earnings Tax under Chapter 46, Title U :
of the Administrative Code of the City of New York :
for the Year 1983. :
_____ :

Petitioners, Fred S. Dubin and Sarah K. Dubin, 1 Seaside Place, East Norwalk, Connecticut 06855, filed an exception to the determination of the Administrative Law Judge issued on October 16, 1987 with respect to their petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1983 (File No. 802868). Petitioner, Fred S. Dubin, appeared *pro se* and for his wife, Sarah K. Dubin. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of Counsel).

Neither party submitted a brief on the exception. Oral argument was held at petitioners' request on January 19, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

What was the total number of days petitioner Fred S. Dubin worked in New York State and New York City in 1983 for purposes of allocating wage and other income to sources within and without the State and City.

FINDINGS OF FACT

We find the facts of this matter as stated in the Administrative Law Judge determination and such facts are incorporated herein by this reference.

To summarize these facts, petitioners, Fred S. Dubin and Sarah K. Dubin¹, timely filed a joint New York State Income Tax Nonresident Return for the year 1983, together with a City of New York Nonresident Earnings Tax Return. During 1983, Mr. Dubin was president and chief financial officer of Dubin-Bloome Associates, P.C. (hereinafter referred to as “Dubin-Bloome”), a professional corporation engaged in the business of consulting engineering. Mr. Dubin maintained an office in his personal residence in East Norwalk, Connecticut. Dubin-Bloome at all times maintained its corporate headquarters in West Hartford, Connecticut and all its administrative, financial, legal and banking transactions were conducted from that office. Dubin-Bloome’s New York City office was primarily an engineering design office and no administrative functions were performed at the office. The office was run by petitioner’s associate, Mr. Bloome.

Petitioner allocated \$25,773.00 of his total wage income of \$250,000.00 received from Dubin-Bloome to New York State and City sources based on a percentage determined by placing the total number of days worked within the State and City (30) over the total number of

¹Sarah K. Dubin is involved in this proceeding solely as the result of having filed a joint income tax return with her spouse. Accordingly, all references to petitioner shall hereinafter refer solely to Fred S. Dubin.

days worked (291).

In January 1985, petitioner was requested by the Division of Taxation to substantiate the allocation of personal service compensation earned within and without New York State. Petitioner filed a "Questionnaire - Allocation of Personal Service Compensation" with the Division on February 14, 1985. On it petitioner listed the specific days worked outside of New York, the location where he worked and the nature of the duties performed. The list of days worked outside of New York was handwritten, was, in some instances, illegible, the list of days was not prepared in sequential order and a significant number of days were listed more than once.

On March 22, 1985, the Division issued a statement of audit changes to petitioner which increased from 30 to 124 the number of days worked in New York and from 291 to 298 the total number of days worked. The rationale for the changes was lack of substantiation of days worked out of State, and normal nonworking days spent at home. The Division considered certain of petitioner's days at home as days worked in New York and days at home which are not normal working days to be nonworking days.

On November 22, 1985, the Division issued a Notice of Deficiency for 1983 which asserted a tax due of \$10,255.42 plus interest of \$1,782.44 for a total due of \$12,037.86.

Subsequently, the additional tax due was reduced to \$9,405.00 by increasing the number of nonworking days from 53 to 59 and decreasing the total number of days worked from 298 to 292.

At hearing the petitioner submitted in evidence a summary totaling the days he allegedly worked within and without the State of New York. This summary did not list specific dates and

petitioner's whereabouts on such dates.

OPINION

Former section 632(c) of the Tax Law (the law in effect during the year at issue)

provided:

“If a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.”

The regulations of the Tax Commission in effect during the year at issue provided:

“131.18 Earnings of nonresident employees and officers. (a) If a nonresident employee (including corporate officers, but excluding employees provided for in section 131.17 of this Part) performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. The items of gain, loss and deduction (other than deductions entering into the New York itemized deduction) of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer. In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation or leave with or without pay.” (20 NYCRR 131.18[a], emphasis added.)

The issue in this case is one of fact and turns on the ability of the petitioner to substantiate the allocation contained in his return, in particular total number of days worked and conversely the number of nonworking days which under the regulation generally includes Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation or leave with or without pay.

The Administrative Law Judge determined that petitioner was entitled to include days at

home as days worked outside of New York because of factual circumstances of petitioner's business operation. Further, he determined that the "Questionnaire" was the only evidence petitioner submitted which lists specific days worked outside New York. As noted, this "Questionnaire" was illegible in part, confusing and redundant.

The Administrative Law Judge allowed petitioner 63 nonworking days -- 54 Saturdays and Sundays, 4 holidays and 5 other days (petitioner had claimed 74 nonworking days -- 65 Saturdays and Sundays and 9 holidays); 302 total days worked (petitioner claimed 291); 203 days worked outside New York (petitioner claimed 261); 99 days worked in New York (petitioner claimed 30).

On exception petitioner asserts that the determination of the Administrative Law Judge concerning the total number of days worked and the total number of days worked outside of New York is contrary to the facts. Petitioner also asserts that at hearing he was deprived of the opportunity to submit documentation in the form of vouchers, memos, etc. to substantiate his return. We find nothing in the hearing record to substantiate petitioner's assertion. Given such a record, we find absolutely no basis to permit the petitioner to submit additional evidence.

We find no basis in the record to modify the Administrative Law Judge's determination on the law and facts.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioners, Fred S. Dubin and Sarah K. Dubin, is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Fred S. Dubin and Sarah K. Dubin is granted to the extent indicated in conclusions of Law "D", "E" and "G" of the Administrative Law Judge's determination; the Division of Taxation is directed to recompute the Notice of Deficiency dated November 22, 1985 consistent with the determination reached therein; and except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
Apr 21, 1988

John P. Dugan
President

Francis R. Koenig
Commissioner