

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SAMUEL WYMAN, JR., AND CAROLYN WYMAN	:	DETERMINATION DTA NO. 809078
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1984, 1985 and 1986.	:	

Petitioners, Samuel Wyman, Jr., and Carolyn Wyman, 35 Lamb Avenue, P.O. Box 1060, Quogue, New York 11959, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1984, 1985 and 1986.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 12, 1991 at 1:15 P.M. Petitioners appeared by Murphy, O'Connor & Co. (Thomas Horan, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitioner Samuel Wyman, Jr. properly allocated days worked outside of New York State on his 1984, 1985 and 1986 nonresident income tax returns.

FINDINGS OF FACT

Petitioners, Samuel Wyman, Jr., and Carolyn Wyman, filed a joint New York State Nonresident Income Tax Return for the year 1984. The return included a New York City Nonresident Earnings Tax Return wherein petitioners reported that 52.2% of the wages received by Mr. Wyman were allocable to New York City. The same percentage was used to report the amount of wages and salary allocable to New York State.

Petitioners filed a joint New York State Nonresident Income Tax Return for 1985 and

included a New York City Nonresident Earnings Tax Return. On the latter return, Mr. Wyman reported that of the 236 days worked in the year, 119 days were worked in the City of New York. Petitioners used the ratio of days reported to be worked in and out of New York to calculate the amount of income subject to New York State and New York City income taxes.

Petitioners filed joint New York State and New York City nonresident income tax returns for the year 1986. On the latter return, Mr. Wyman reported that of the 234 days worked in the year, 119 days were worked in the City of New York. The ratio of days reported to be worked in and out of New York was used to calculate the amount of wages and salary allocable to New York State and New York City.

Each of the foregoing returns listed petitioners' address as being in New Jersey.

In the course of an audit inquiry, the Division of Taxation asked petitioners to prepare schedules for the years in issue showing the client's name and the nature of the business conducted outside of New York State. Petitioners responded with schedules for the years 1984, 1985 and 1986 which showed which days were spent at an office in New Jersey meeting with clients and prospective clients and which days were spent calling on clients or prospective clients in New Jersey, Connecticut, Pennsylvania, North Carolina, South Carolina and Colorado.

The Division issued two notices of deficiency to petitioners dated September 23, 1988. One notice asserted a deficiency of personal income tax for the years 1984 and 1985 in the amount of \$17,291.57, plus penalty of \$864.58 and interest of \$4,316.77, for a total amount due of \$22,472.92. The remaining notice asserted a deficiency of personal income tax for the year 1986 in the amount of \$11,042.83, plus penalty of \$552.14 and interest of \$1,012.27, for a total amount due of \$12,607.24.

The notices of deficiency were based on the Division's position that petitioners had not sufficiently substantiated the allocation of days worked out of state.

Donaldson, Lufkin & Jenrette, Inc. ("DLJ") is an international banking and securities firm. According to the firm's brochure, its major businesses include "investment and merchant

banking; public finance; institutional research, sales trading and arbitrage; correspondent services; and brokerage and asset management services." DLJ maintains an office at, among other places, 140 Broadway, New York, New York.

In 1979, petitioner Samuel Wyman, Jr. was elected as vice-president of DLJ's Investment Securities Group. As a vice-president and a registered securities salesman, Mr. Wyman sold various types of financial instruments including stocks, bonds, limited partnerships, tax shelters and various money market instruments. Mr. Wyman served as a financial advisor and performed investment planning on behalf of his clients. He was compensated solely on a commission basis.

Mr. Wyman's territory was primarily New Jersey, Connecticut, New York and North Carolina. However, he could and did have accounts throughout the world.

Mr. Wyman felt that face-to-face contact with his clients was very important in his business in order to introduce his firm and present what could be offered. Direct contact was also necessary to develop client trust.

DLJ also strongly advised its brokers to meet with their individual clients. In furtherance of this approach, DLJ provided some of its more successful salesmen, such as Mr. Wyman, with an automobile. At the end of each year, Mr. Wyman advised DLJ of the number of business and personal miles traveled in the vehicle. DLJ included the value of the benefit from the personal use of the automobile on Mr. Wyman's wage and tax statement.

During the period in issue, Mr. Wyman sought to develop a client base in New Jersey in conjunction with a lawyer. It was thought that Mr. Wyman could attract clients by having an office in New Jersey adjacent to a law office, so that he would be in a position to develop a client base wherein he and the attorney could present a complete financial overview. It was also hoped that the New Jersey office would improve the client base, as well as provide a convenient location for clients to visit. After discussing the possibility of promoting business for DLJ, it was decided that Mr. Wyman should rent space from a law firm that worked closely with DLJ. This led to Mr. Wyman developing a close working relationship with a Mr. Arthur Swenson, III.

Eventually, Mr. Wyman and Mr. Swenson agreed that, since Mr. Wyman was spending so much time at Mr. Swenson's law firm, it would be to their mutual benefit for Mr. Wyman to sublet office space from Mr. Swenson in New Jersey.

On January 15, 1985, Mr. Wyman entered into a lease for the rental of office space in Plainfield, New Jersey. The lease term commenced January 15, 1985 and continued through 1986. A monthly payment of \$225.00 was required by the lease. Mr. Swenson executed the lease on behalf of the landlord.

Mr. Wyman estimated that he used his New Jersey office approximately 20% to 30% of his time. Most of the time he was meeting with clients at the clients' home or office. One reason for not spending time in the New Jersey office was that Mr. Swenson's clients included a number of widows and widowers. Mr. Wyman spent a great deal of time at a location which was convenient to these clients. Further, these clients could not travel to New York City.

The expenses for operating the telephone at the New Jersey office were billed directly to DLJ. Mr. Wyman paid the rent for the office.

At the hearing, Mr. Wyman estimated that he was absent from his office in New York City about 40% of the time.¹ When he was in his New York City office, he made a practice of writing his appointments on a desk-size calendar. Usually, the calendar recorded the name of the client and, if Mr. Wyman was not going to be in the State of New York, it indicated the state he would be in. The calendar did not indicate the exact location of the meeting except when the meeting was scheduled to be held in the New Jersey office. Mr. Wyman used this desk calendar to advise his accountant how many days should be allocated to working in New York on his income tax returns.

According to Mr. Wyman's desk calendar, he spent 58 days at his office in New Jersey in 1985. His desk calendar shows that in 1986 he spent

¹According to petitioners' tax returns, Mr. Wyman spent approximately 50% of his time in New York City.

30 days in his office in New Jersey. Mr. Wyman's calendar shows that when he was in the New Jersey office it was to meet with Mr. Swenson and/or a client.

At one time DLJ considered and then rejected the idea of opening an office which sold securities in New Jersey. DLJ made this decision because it did not wish to create competitive problems for other portions of its business.

During a previous audit of the years 1980 through 1982, an auditor advised petitioners that they were incorrectly allocating their income on the basis of volume of transactions. Petitioners and the auditor agreed that an allocation based on days worked in and out of New York should be used.

SUMMARY OF THE PARTIES' POSITIONS

It is the Division's position that the days spent at the New Jersey office were incurred for Mr. Wyman's convenience and not for the necessity of the employer. Therefore, petitioner should not be permitted to include these days in an allocation of income. The Division also contends that Mr. Wyman's diaries are insufficient to substantiate the number of days allocated to work out of New York.

It is petitioners' position that the days worked out of New York were not incurred for Mr. Wyman's convenience. Petitioners' also argue that, Mr. Wyman's calendars should be considered sufficient substantiation of the days worked out of New York State.

CONCLUSIONS OF LAW

A. During the years in issue, Tax Law former § 631(a) provided that the New York taxable income of a nonresident individual shall be his New York adjusted gross income less his New York deductions and New York personal exemptions. Tax Law former § 632(a)(1) provided that New York adjusted gross income of a nonresident individual includes the sum of the net amount of the items of income, gain, loss and deduction entering into that individual's Federal adjusted gross income which were derived from or connected with New York sources.

B. The Commissioner's regulations, set forth at 20 NYCRR 131.17, provide as follows:

"Earnings of salesmen. If the commissions for sales made or other compensation for services performed by a nonresident traveling salesman, agent or other

employee depend directly upon the volume of business transacted by him, his items of income, gain, loss and deduction (other than deductions entering into the New York itemized deduction) derived from or connected with New York State sources include that proportion of the net amount of such items attributable to such business which the volume of business transacted by him within New York State bears to the total volume of business transacted by him within and without New York State. (See sections 132.11 through 132.14 of this Title with respect to deductions which constitute the New York itemized deduction.)"

Similar treatment of income earned in and out of New York City is provided for in 20 NYCRR Appendix 20 § 4-4(c).

C. The Commissioner's regulations set forth at 20 NYCRR 131.18(a) state, in pertinent part, as follows:

"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...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...."

D. In this case it is undisputed that Mr. Wyman was compensated 100% as a commission salesman. Therefore, the amount of income which is allocable to New York is governed by 20 NYCRR 131.17 which requires an allocation based on a ratio of the volume of business transacted within New York to the total volume of business transacted within and without New York State. Since 20 NYCRR 131.17 is applicable, the succeeding section of the regulations providing for the "convenience of the employee" test is expressly inapplicable. It follows that the notices of deficiency lack a rational basis and should be cancelled because an allocation of days worked in and out of New York has no bearing on petitioners' taxable income.

E. The petition of Samuel Wyman, Jr., and Carolyn Wyman is granted and the notices of deficiency are cancelled.

DATED: Troy, New York
May 7, 1992

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE