

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JACK AND THELMA RAIMEN : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 817648
York State Personal Income Tax under Article 22 of the :
Tax Law for the Years 1996, 1997 and 1998. :

Petitioners, Jack and Thelma Raimen, 49 Steeplechase Drive, Marlboro, New Jersey 07746, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law the years 1996, 1997 and 1998.

A small claims hearing was held before Allen Caplowaith, Presiding Officer, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on June 21, 2001 at 1:15 P.M. Petitioners appeared by David J. Weiss, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Bola M. Lawal).

Additional documentation in this matter was due by September 10, 2001 and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether, and if so to what extent, petitioner Jack Raimen is properly entitled to allocate a portion of his 1996, 1997 and 1998 income derived from his employer, Intimate Fabrics Inc., to sources without the State of New York.

FINDINGS OF FACT

1. Jack and Thelma Raimen filed joint New York State nonresident income tax returns for each of the years 1996, 1997 and 1998 wherein Jack Raimen (hereinafter “petitioner”) allocated his salary income from his New York employer, Intimate Fabrics Inc. (“Intimate”), to sources within the State of New York as follows:

1996

$\frac{167}{237}$ (days worked in NYS) x \$125,365.00 (salary) = \$88,332.00 (allocated to New York State)
237 (total days worked)

1997

$\frac{167}{237}$ (days worked in NYS) x \$75,500.00 (salary) = \$53,197.00 (allocated to New York State)
237 (total days worked)

1998

$\frac{167}{237}$ (days worked in NYS) x \$78,000.00 (salary) = \$54,959.00 (allocated to New York State)
237 (total days worked)

2. In 1996 petitioner reported commission income of \$162,000.00 in addition to the above stated salary income. Subsequent to 1996, Intimate became an S corporation and in 1997 and 1998, petitioner reported total S corporation income from Intimate of \$210,843.00 and \$83,252.00, respectively. No commissions were earned or reported for these two years.

3. As the result of an audit, on October 29, 1999, the Division of Taxation (“Division”) issued a Statement of Personal Income Tax Audit Changes to petitioner for each of the years at issue. For 1996, petitioner’s entire salary and commission income was held taxable for New York State purposes. For 1997 and 1998, his entire salary income was held taxable for New York State purposes. The Division’s basis for these adjustments was detailed in the auditor’s December 16, 1999 report of audit wherein he stated as follows:

Taxpayer is a non-resident who lives in NJ and works in NY. The issues in this case were allocation. Taxpayer for 1996 had received W-2 as well as 1099. Taxpayer is a major shareholder in a company selling apparel. For 1996 taxpayer had received a commission on certain sales. Taxpayer was asked to substantiate days out of NY as well as the commission that had been received. Taxpayer submitted schedule of days in and out but no substantiation was provided. Taxpayer could not also explain satisfactorily the basis of commission none of which was allocated to NY. Taxpayer's rep said that there was no provision in the law which asked for specific documentation for days in and out and therefore refused to submit any additional documentation. After protracted correspondence, bill was finally sent to taxpayer disallowing any days out and considering commission received to be NY's share. Rep said he is refusing to accept the bill and would rather go to appeal. Case is closed for assessments.

4. Based on the above statements, the Division issued a Notice of Deficiency against petitioner on January 18, 2000 wherein it asserted the following amounts:

Tax Year	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Assessment Payments/ Credits	Current Balance Due
1996	\$13,569.13	\$3,008.00	\$2,182.46	\$0.00	\$18,759.59
1997	1,461.78	187.44	166.80	0.00	1,816.02
1998	2,128.37	116.12	164.48	0.00	2,408.97
TOTALS	\$17,159.28	\$3,311.56	\$2,513.74	\$0.00	\$22,984.58

The penalty asserted, although not characterized in the Notice of Deficiency, was issued for negligence pursuant to Tax Law § 685(b). The Division's representative explained that such penalty was issued solely because insufficient substantiation was provided.

5. In March 2000, petitioner paid the 1996 tax deficiency of \$13,569.13. In a letter submitted with the payment petitioner's representative stated that "[T]his payment is submitted with reservation of all rights including, but not limited to, the taxpayers' statutory right to file a

petition with the New York State Tax Commission for refund of the amounts set forth in the above Notice of Deficiency and amounts paid hereunder.”

6. On April 12, 2000, petitioner filed a petition for a hearing with the Division of Tax Appeals wherein he requested cancellation of the deficiencies asserted and refund of the \$13,569.13 paid. Essentially, it was alleged in the petition that on his returns, petitioner properly allocated his income during the years at issue in accordance with the applicable sections of the Tax Law.

7. During the years at issue Intimate was a distributor of textile fabrics. Petitioner was an employee, officer and stockholder of Intimate. His primary duties were those of an outside salesman. As such, he personally visited his clients to secure textile orders and resolve any quality control problems which might exist. He then purchased yarn for the orders from manufacturers located in the southeast United States. The yarn was then sent directly to production facilities, and ultimately, the finished textile order was shipped directly from the processor to the customer.

8. During the years at issue petitioner had three customers. His largest was Warnaco Inc., located in Milford, Connecticut. The other two were Biflex International and Inner Secrets, both of which were located in New Jersey. According to the forms 1099 submitted, petitioner's 1996 commissions of \$162,000.00 were comprised of \$148,000.00 derived from Intimate and \$14,000.00 derived from East Cost Molders Inc., which was located at the same New York address and was affiliated with Intimate. These commissions were relative solely to sales made to the above-stated three out-of-state customers. All commissions were earned at the rate of 10% of sales and based solely on the volume of business transacted.

9. In support of his reported salary allocations for the years at issue, petitioner submitted, what was characterized as a “diary recap” for each of the years 1996, 1997 and 1998. Each recap, which was handwritten and listed the date, person met with, company, and order number created for those days claimed to have been worked by petitioner outside New York State, was purportedly created from petitioner’s diary. Petitioner’s diaries for the years at issue were not submitted into the hearing record. It was explained that they were unavailable. To illustrate the manner in which such diaries were kept, petitioner submitted a photocopy of what he characterized as his diary being kept for the year 2001. This “diary” consisted of one page which contained a small monthly calendar for each of the twelve months. The dates that were purportedly spent outside New York at petitioner’s customer’s facilities were encased in either a circle, square or triangle. Petitioner explained that the circled dates indicated those days spent at Warnaco Inc’s facility, while those dates encased in the squares and triangles indicated those days spent at the facilities of Biflex and Inner Secrets, respectively. The only markings, other than the geometric figures described, were numbers and arrows. No explanation was provided for these markings. Although petitioner’s “diary recap” for each year at issue provided certain definitive information, the example “diary,” which was kept in an identical manner to those kept during the years at issue from which each submitted “diary recap” was prepared, contained no information other than that as described above. No documentary evidence, such as bills, receipts or vouchers, was offered into evidence to establish that petitioner was physically at the out-of-state locations claimed on the stated dates.

10. Respecting petitioner’s 1996 commission income, the record shows that the entire amount was earned for sales transacted at the facilities of petitioner’s three out-of-state customers.

CONCLUSIONS OF LAW

A. The New York source income of a nonresident individual includes the net amount of income, gain, loss and deductions reported in the Federal adjusted gross income that are “derived from or connected with New York sources” (Tax Law § 631[a]). Included among the above is income attributable to a business, trade, profession or occupation carried on in this State (Tax Law § 631[b][1]).

If a business, trade, profession or occupation is carried on partly within and partly outside this State, the items of income, gain, loss and deduction “derived from or connected with New York sources” shall be determined by apportionment and allocation under regulations promulgated by the Commissioner of Taxation and Finance (“Commissioner”) (Tax Law § 631[c]).

B. The regulations of the Commissioner in effect during the years at issue provided:

[i]f 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 . . . 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 (20 NYCRR former 131.17).

[i]f the nonresident employee (including corporate officers, but excluding employees provided for in [former] 131.7 of this Part) performs service for his employer both within and without New York State, his income derived from New York 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 (20 NYCRR former 131.18).

C. The question that must be answered with respect to the allocation of petitioner’s 1996 commission income and his 1996, 1997 and 1998 salary income, is whether he has satisfied his

burden of proof. Review of the entire hearing record shows that petitioner has met such burden in showing that his 1996 commission income was derived from sales transactions consummated totally without the State of New York. Accordingly, since no sales leading to commission income were transacted within New York State, no portion of his 1996 commission income is taxable for New York State purposes.

D. With respect to allocation of petitioner's salary income for the years 1996, 1997 and 1998, the record shows that petitioner failed to provide diaries or original source documents for the years at issue to substantiate that he spent any days performing services for his employer without New York State. Therefore, it must be held that pursuant to Tax Law § 689(e), petitioner failed to prove through clear and convincing evidence, the extent, if any, to which he is properly entitled to allocate his salary income for the years stated. Accordingly, petitioner's salary income for each of the years 1996, 1997 and 1998 is taxable in full for New York State purposes.

E. The penalties asserted against petitioner for negligence, pursuant to Tax Law § 685(b) are hereby canceled based on the Division's failure to provide a reasonable basis for asserting same.

F. The Division of Taxation is hereby directed to modify the Notice of Deficiency issued January 18, 2000 so as to be consistent with the determination rendered herein. Such modified notice must allow credit for the \$13,569.13 payment made by petitioner in March 2000.

G. The petition of Jack and Thelma Raimen is granted to the extent provided in

Conclusions of Law “C”, “E” and “F”, and except as so granted, said petition is in all other respects, denied.

DATED: Troy, New York
December 6, 2001

/s/ Allen Caplowaith
PRESIDING OFFICER