

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

JOSEPH STEIN AND MIRIAM STEIN

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Year 1976.

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**Petitioners, Joseph Stein and Miriam Stein, 50 Belmont Avenue, Apt. #805,**  
Bala Cynwyd, Pennsylvania 19004, 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 1976 (File No. 23469).

A hearing was held before James Hoefer, Hearing Officer, at the offices of  
the State Tax Commission, Two World Trade Center, New York, New York, on  
November 18, 1985 at 1:15 P.M., with all briefs to be submitted by March 13,  
1986. Petitioners appeared by Arthur Gelber, C.P.A. and Laurence J. Karst,  
C.P.A., of the accounting firm Laventhol & Horwath. The Audit Division appeared  
by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

#### ISSUE

Whether petitioners included days worked at home as days worked outside New  
York State in the allocation of wage income to sources within and without the State

#### FINDINGS OF FACT

1. Petitioners, Joseph Stein (hereinafter "petitioner") and Miriam Stein,  
timely filed a joint New York State Income Tax Nonresident Return for 1976.  
On said return, petitioner reported wage income of \$174,200.00 in the Federal  
amount column. For State purposes, petitioner reported wages of \$162,200.00 as

Total days worked in year	294
Less days worked outside New York State	<u>237</u>
Days worked in New York State	57

$$\frac{57}{294} \times \$162,200.00 = \$31,447.00 \text{ New York State wage income}$$

2. During 1976 petitioner received wages from the following corporations in the amount indicated:

<u>CORPORATION</u>	<u>WAGES</u>
Royal Jobbers, Inc.	\$ 92,200.00
Philadelphia Sales of Endicott, Inc.	40,000 .00
Philadelphia Sales of Waverly, Inc.	<u>30,000.00</u>
Total	<u>\$162,200.00</u>

3. In addition to the three aforementioned corporations, petitioner also performed services for a firm known as San Marc Hosiery Corporation. Petitioner performed services simultaneously for all four corporations.

4. In response to an inquiry from the Audit Division, petitioner submitted a completed Form IT-2332, "Questionnaire - Allocation of Personal Service Compensation." On said questionnaire, petitioner indicated that out of the 237 days claimed as worked outside New York State, 78 of those days were worked at home. It was also indicated on the questionnaire that "Taxpayer maintains an office in his home for convenience purposes since the distance to the company headquarters is significant."

5. On February 15, 1978, the Audit Division issued a Statement of Audit Changes to petitioner for the year 1976 disallowing the 78 days worked at home as days worked outside New York State. Other adjustments were proposed which petitioner does not contest and, therefore, said adjustments will not be addressed hereinafter.

6. Based on the aforementioned statement, the Audit Division, on May 5,

tax due of \$6,236.09, plus interest of \$559.11, for a total allegedly due of \$6,795.20.

7. During 1976 petitioner was an officer and fifty percent owner of Royal Jobbers, Inc., Philadelphia Sales of Endicott, Inc., Philadelphia Sales of Waverly, Inc. and San Marc Hosiery Corporation. All four corporations operated retail department stores. San Marc Hosiery Corporation ("San Marc") conducted business at 237 Market Street, Philadelphia, Pennsylvania, while the other three corporations were located in New York State.

8. The four corporations were established as discount or bargain stores. Mr. Stein's principal responsibility consisted of buying off-price merchandise through manufacturers' close-outs, overstock liquidations, irregulars, seconds, bankrupt stores, out-of-season merchandise and distress sales. Petitioner would seek out opportunities to purchase merchandise, evaluate the marketability and value of said merchandise and negotiate the purchase price or determine what bidding strategies were to be used at auctions.

9. Petitioner utilized the facilities maintained by San Marc at 237 Market Street, Philadelphia, Pennsylvania as corporate headquarters and as a distribution center for all four corporations. All of petitioner's buying activities were conducted out of San Marc's offices. Mr. Stein would visit the three stores located in New York State every two to three weeks in order to determine what merchandise was selling.

10. Petitioner has been active in the retail sales and merchandise purchasing fields since approximately 1920. Mr. Stein has a fifth grade education and he relied extensively on his secretary to handle all correspondence. Mr. Stein also had complete faith in his accountants and he would regularly sign documents prepared by his accountants without examining said documents. Mr. Stein was born 1900.

"Questionnaire - Allocation of Personal Service Compensation," was signed by petitioner, but was prepared by Mr. Stein's accountants.

11. Mr. Stein did not maintain an office in his home and did not perform services for any of the four corporations at home. The 237 days worked outside New York State did not include any days worked at home. Petitioner's personal residence is approximately nine miles from San Marc's offices.

#### CONCLUSIONS OF LAW

A. That Commission regulation 20 NYCRR 131.16 (since renumbered 20 NYCRR 131.18) provides that:

"If a nonresident employee...performs services for his employer both within and without the 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 the State bears to the total number of working days employed both within and without the State.. . However, any allowance claimed for days worked outside of the 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." (Emphasis added.)

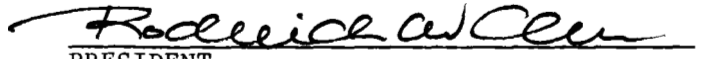
B. That it is well settled that days worked at home by a nonresident employee performing services which could have been performed at the employer's New York office cannot be considered as days worked outside New York State (Matter of Kitman v. State Tax Comm., 92 A.D.2d 1018, mot. for lv. to app. den. 59 N.Y.2d 603). However, in the instant matter, it is clear that petitioner did not work at home and that the 237 days worked outside New York State represent days that Mr. Stein was obligated to out-of-state duties. Accordingly, the allocation of wage income as reported by petitioner on his 1976 return is correct.


C. That the petition of Joseph Stein and Miriam Stein is granted to the extent indicated in Conclusion of Law "B", supra; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER