

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LESTER AND MARTHA WEISS

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law and Nonresident Earnings Tax :
under Chapter 46, Title U of the Administrative :
Code of the City of New York for the Years :
1975 and 1976. :

Petitioners, Lester and Martha Weiss, 1001 Hillcrest Avenue, Hollywood, Florida 33021, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1975 and 1976 (File No. 29544).

On February 28, 1985, petitioners filed a waiver of formal hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record with all briefs to be submitted by May 8, 1985. After due consideration, the State Tax Commission renders the following decision.

ISSUES

I. Whether the State Tax Commission has jurisdiction to determine the income tax liability of petitioners for the years 1975 and 1976.

11. Whether petitioners properly allocated wage income within and without New York for the years 1975 and 1976.

111. Whether petitioners received additional income in the form of fees or discharge of indebtedness from Fingar & Weiss, Inc. in 1976.

IV. Whether petitioners received additional fee income for services rendered to Pat Pride, Inc. **in** 1976.

FINDINGS OF FACT

1. Petitioners, Lester and Martha Weiss, filed New York State nonresident income tax returns for taxable years 1975 and 1976 with New York City nonresident earnings tax for 1976. Petitioners were residents of Hollywood, Florida during the years **in** issue.

2. On January 25, 1980, the Audit Division issued a Notice of Deficiency against petitioners in the amount of \$19,298.50, plus interest of \$5,423.06, for a total due of \$24,721.56 for the years 1975 and 1976.¹

3. A Statement of Personal Income Tax Audit Changes issued November 29, 1979 explained that adjustments to income tax were based, in part, on income received from New York sources for services which could have been performed in New York State. Such income amounted to \$45,862.00 in 1975 and \$7,212.00 in 1976. Adjustments were also made for additional income received as fees or discharge of indebtedness from Fingar & Weiss, Inc., petitioner's employer, amounting to \$75,373.00 for 1976. There were also adjustments made for additional fee income or distributions received from Pat 'Pride, Inc. in the amounts of \$16,880.00 in 1975 and \$7,952.00 in 1976. Pat Pride, Inc. is unrelated to Fingar & Weiss, Inc., although the officers of Pat Pride are relatives of the principals of Fingar & Weiss, Inc. Other adjustments made by the Audit Division were not raised by petitioner and are not in issue.

1 Petitioner Martha Weiss's name appears solely by virtue of having filed a ~~1976~~ return with petitioner Lester Weiss. Accordingly, all references to

4. Petitioner was president and one-third stockholder of Fingar & Weiss, Inc., a clothing manufacturer which specialized in producing low cost copies of more expensive women's wear. Petitioner's duties involved going to stores, talking to the managers and sketching their higher quality fashions. These sketches were then used by Fingar & Weiss, Inc. to produce an inexpensive copy. For many years, petitioner performed this function in New York City. In 1973 or 1974, Fingar & Weiss, Inc. decided to broaden its design line to include lightweight dresses and designs which could be produced in a variety of fabrics and styles, both in lightweight and heavyweight pieces. Coincident with the broadening of the design line, petitioner suffered two heart attacks and his doctors advised him that continuing to work in New York City during the winter could constitute a serious health threat. Fingar & Weiss, Inc. then altered its operation and petitioner moved to Florida where he continued his duties in various Florida stores. In 1975, petitioner spent 96 days working in New York and in 1976 he spent 9 days working in New York. On his 1975 return, petitioner allocated 96 of 233 days worked to New York and on his 1976 return, he allocated 9 of 234 days worked to New York. In early 1976, Fingar & Weiss, Inc. ceased active operations.

5. The Audit Division determined that petitioner received \$75,373.00 in income from Fingar & Weiss, Inc. in 1976 as compensation for services or as a discharge of indebtedness. Petitioner maintains that during his 23 years with Fingar & Weiss, Inc. he received loans from the corporation which are still carried on the corporation's books. Although petitioner alleges that all such loans were evidenced by notes, there is no evidence in the record indicating that any such loans were made or, if made, whether Fingar & Weiss, Inc. continues to carry the loans on its books or has discharged them.

6. Petitioner's children, David Weiss and Joyce Blumeneau, along with other individuals related to the officers of Fingar & Weiss, Inc., owned the rights to the name Pat Pride. Two of the principals of Pat Pride, Inc. were minors. They licensed the use of the name Pat Pride to Fingar & Weiss, Inc. which marketed products utilizing the name. In return for the license, Fingar & Weiss, Inc. paid the owners of the name an agreed upon amount of compensation. The Internal Revenue Service conducted audits of Fingar & Weiss, Inc. and petitioner for 1975 and invalidated the licensing fee arrangement attributing the income from Pat Pride, Inc. equally to each of the officers of Fingar & Weiss, Inc. Petitioner **did** not file either a Report of Federal Changes or an amended return reflecting these changes. David Weiss and Joyce Blumeneau, both adult children of petitioner, each received a \$3,976.00 share of the 1976 payment. The Audit Division adopted the 1975 findings of the Internal Revenue Service, applied them to 1976 and combined the two shares and reallocated \$7,952.00 to petitioner as fee income from Pat Pride, Inc. There does not appear to have been any corporate purpose for Pat Pride, Inc. other than to license its name to Fingar & Weiss, Inc. When Fingar & Weiss, Inc. ceased doing business in 1976, so did Pat Pride, Inc.

7. Petitioner also maintains that the Notice of Deficiency was not sent by registered or certified mail and that, since petitioner is a Florida resident, the State Tax Commission has no jurisdiction to determine petitioner's liability.

CONCLUSIONS OF LAW

A. That the State Tax Commission has jurisdiction to determine the income tax liability of any taxpayers required to file a return under Article 22 of the Tax Law. Tax Law §681(a). Nonresidents of this state are subject to tax on items of income, gain, loss, and deduction under 1.6

York sources. Tax Law §632(a)(1). This Commission, therefore, has jurisdiction to determine petitioner's tax liability on New York source income regardless of his state of residence.

B. That the mere allegation that the Audit Division did not mail the notice by registered or certified **mail** without any additional evidence is insufficient to meet petitioner's burden of proof as provided for in section 689(e) **of** the Tax Law. Whether the notice was received by regular, registered or certified mail was not proven. Petitioner may not shift the burden of proof to the Audit Division by simply claiming that no evidence exists indicating the method of mailing.

C. That section 632(a)(1) of the Tax Law provides, **in** part, that New York adjusted **gross** income **of** a nonresident individual includes the net amount of items **of** income, gain, loss and deduction entered into Federal adjusted gross income which are derived from or connected with New York sources. Items of income, gain, loss and deduction derived from or connected with New York sources include those items attributable to "**a** business, trade, profession or occupation carried **on** in this state...". Tax Law §632(b)(1)(B). Additionally, section U46-2.0 of Chapter 46, Title U of the Administrative Code of the City of New York imposes a tax on the wages earned within New York City of every nonresident individual. Section 632(e) of the Tax Law and section U46-4.0 of Chapter 46 of the Administrative Code allow items of income from an occupation carried on partly within and partly without New York State and City to be apportioned and allocated. With respect to allocation, 20 NYCRR 131.18(a) (formerly 131.16) provides, in part, that any allocation of income within and without this 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. That petitioner has failed to prove that he was obligated to perform work in Florida during the years in issue out of necessity rather than for his own convenience. For many years, petitioner performed his work in New York. There is nothing in the record to indicate that the nature of the business of Fingar & Weiss, Inc. changed during the years in issue so that petitioner would have been required to work in Florida rather than in New York. What did change was the state of petitioner's health which required him to leave New York. This is an indication that petitioner's work in Florida was for his convenience rather than his employer's necessity. Additionally, the fact that the business ceased operations in 1976 coincident with petitioner's retirement indicates that the move to Florida was a convenient means for petitioner to wind down his business affairs prior to retiring. Accordingly, wages received **from** Fingar & Weiss, Inc. in 1975 and 1976 are not subject to allocation, constitute income derived from a New York source and thus are taxable within the meaning and intent of section 63 of the Tax Law.

E. That petitioner has failed to show by any evidence whatsoever that the \$75,373.00 considered income or discharge of indebtedness was received in the form of bona fide loans still carried on the **books** of Fingar & Weiss, Inc., whether interest was charged or whether any repayments have been made. Therefore, such amount was properly considered income for tax year 1976.

F. That the fees paid to Pat Pride, Inc. by Fingar & Weiss, Inc. were properly attributable to petitioner and the other officers of Fingar & Weiss, Inc. Petitioner offered no evidence to show that the audit performed by the


business had changed in 1976. Therefore, it was proper for the Audit Division to apply the Federal findings to 1976. Moreover, petitioner failed to show any reasonable business purpose for the existence of Pat Pride, Inc. Without such purpose, the licensing fee arrangement was no more than a scheme to pass income from Fingar & Weiss, Inc. to petitioner and the other officers through their relatives.

G. That the petition of Lester and Martha Weiss is denied and the Notice of Deficiency issued January 25, 1980 is sustained.

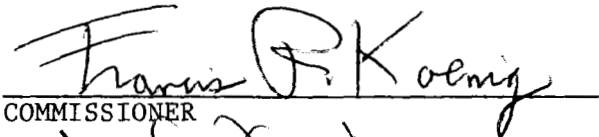
DATED: Albany, New York

STATE TAX COMMISSION

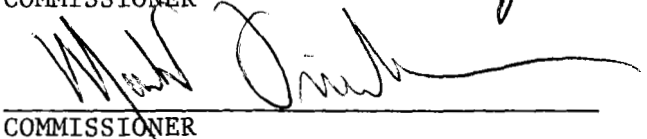
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PRESIDENT



COMMISSIONER



COMMISSIONER