STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

J. STANFORD SMITH (DECEASED) AND ELAINE S. SMITH

DECISION

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 1977.

Petitioners, J. Stanford Smith (deceased) and Elaine S. Smith, 90 Round Hill Road, Greenwich, Connecticut 06830, 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 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 1977 (File No. 31912).

On September 4, 1986, petitioners advised the State Tax Commission, in writing, that they desired to waive a hearing and submit the case to the State Tax Commission based upon the entire record contained in the file, with submission of additional evidence and documents by January 12, 1987. After due consideration of said record, the Commission renders the followingdecision.

ISSUES

I. Whether petitioner J. Stanford Smith properly allocated his income to sources within and without New York State and City.

II. Whether the portion of petitioner J. Stanford Smith's director's fees, characterized as retainer or service fees, was properly allocable to sources

III. Whether petitioner **J.** Stanford Smith's partnership loss derived from Twist Associates may properly be claimed as a New York State loss.

FINDINGS OF FACT

1. **J.** Stanford Smith (hereinafter "petitioner") and his wife, Elaine **S.** Smith, filed a joint New York State Income Tax Nonresident Return (with New York City Nonresident Earnings Tax) for the year 1977 whereon petitioner allocated his New York salary income **of** $762,786.00 to sources within and without New York. On Schedule A-1 of said return, petitioner computed his allocation wherein he claimed to have worked without New York State for 99 days during 1977. On his 1977 New York City Nonresident Earnings Tax Return he computed his allocation on the basis of 102 days worked without New York City.

2. Annexed to petitioner's returns was a Federal Schedule C (Profit or **[Loss]** From Business or Profession), whereon he reported director's fees of $33,150.00. **Of** said amount, petitioner reported $10,100.00 as the amount taxable for New York State and City purposes.

3. On February 13, 1979, the Audit Division issued a Statement of Audit Changes to petitioner and his wife whereon adjustments were made which were explained as follows:

> "Review of information submitted has resulted in the following adjustments to your 1977 New York State nonresident tax return:
>
> 1. Days worked at home do not form a proper basis for allocation of income by a nonresident. Any allowance claimed for days worked outside New York State must be based upon the performance of services which, because of the necessity of the employer, obligate the employee to out-of-state duties in the service of his employer. Such duties are those which. by their very nature, cannot be performed in New York.
>
> Giving effect to the above principles for purposes of the allocation formula, normal work days spent at home are considered to be days worked in New York, and days spent at home which are not normal work days are considered to be non-working days. Therefore, the 15 d-

that you worked at home have been disallowed as days worked outside New York State for 1977.

2. Since your Director's Meetings were held in New York City, they are taxable to New York State and New York City as shown below.

3. A modification for your New York City non-resident tax deduction has been increased from $959.00 to $1,102.00 in computing your itemized deductions.

NEW YORK STATE ALLOCATION:

Total days worked in year	262	
Deduct days worked outside New York	84	
Days worked in New York adjusted	178	
$\frac{178}{262}$ x $762,786.00 =		$518,229.00

NEW YORK CITY ALLOCATION:

Total days worked in year	262	
Deduct days worked outside New York City	87	
Days worked in New York City adjusted	175	
$\frac{175}{262}$ x $762,786.00 =		$509.494.00

DIRECTOR'S FEES:

	STATE	CITY
Total fees	$ 33,150.00	$ 33,150.00
Less: Fees in Detroit	3,000.00	3,000.00
Taxable fees	$ 30,150.00	$ 30,150.00"

4. On February 26, 1980, petitioner and his wife filed an amended 1977 New York State nonresident return whereon petitioner increased his partnership losses attributable to New York State from $117,837.00, which was claimed on his original return, to $175,404.00. The additional loss of $57,567.00 was claimed with respect to Twist Associates. On petitioner's original return, such loss was reported for Federal purposes but was not attributed to New York State.

5. Based on the aforesaid Statement of Audit Changes, a Notice of Deficienc was issued against petitioner and his wife on June 13, 1980, asserting additional

New York State and City personal income taxes of *$4,749.22,* plus interest of *$864.37,* for a total due of *$5,613.59.*

6. The issue respecting the partnership **loss** derived from Twist Associates was not considered in computing the Notice of Deficiency.

7. Prior to the waiver of hearing, it was discovered that the Audit Division erred in computing petitioner's salary allocation. The *15* days that petitioner worked at home were weekend days. The auditor, in recomputing petitioner's allocation, reduced the number of days claimed to have been worked without New York State and City by *15* days. However, he failed to concurrently reduce the claimed number of total days worked in the year by *15* days.

8. The issue respecting the allocation of petitioner's salary income was resolved by the parties solely on the basis of correcting the aforestated error. The effect of said correction resulted in the reduction of the tax deficiency from *$4,749.22* to *$2,703.38.*

9. According to correspondence submitted, the total *1977* director's fees of **$33,150.00** were derived by petitioner, as a non-officer director, from the following sources:

The Chase Manhattan Bank, N.A.	
Annual Retainer	$ 3,000.00,
Attendance Fee - *11* Board meetings	3,600.00[1]
Attendance Fee - *6* Executive Committee meetings	600.00[1]
Attendance Fee - 1 Trust Committee meeting	200.00
Attendance Fee - *2* Employee Benefits Review Committee meetings	*400.00*
Total	*$ 7,800.00*

1 When joint meetings of the bank and corporation were held, one attendance fee was paid and divided between the bank and the corporation.

The Chase Manhattan Corporation	
Annual Retainer	$ 3,000.00,
Attendance Fee - 10 Board meetings	3,000.00[2]
Attendance Fee - 6 Executive Committee meetings	600.00
Total	$ 6,600.00
General Motors Corporation	
Service Fees	$15,000.00
Attendance Fees	3.750.00
Total	$18,750.00

10. The General Motors Corporation ("GM") board meetings in 1977 were held in New York City with the exception of the meetings in May and August, which were held in Michigan. Petitioner received a service fee of $1,250.00 and an attendance fee of $250.00 for each of said months.

11. All of the Chase Manhattan Bank, N.A. and Chase Manhattan Corporation (collectively "Chase") meetings were held in New York.

12. During the year at issue, petitioner was Chairman of the International Paper Corporation ("IPC"), headquartered in New York. He received a Wage and Tax Statement with respect to his earnings from IPC. The director's fees petitioner received from Chase were reported on information returns as fees to a nonemployee. The record does not indicate how GM reported petitioner's director's fees.

13. Petitioner's position with respect to the director's fees at issue is that only the fees actually attributable to meetings held in New York constitute New York source income. The fees designated as retainer or service fees, he alleged, were paid for work done without New York State since neither of the aforesaid companies provided him with office space in Mew York.

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2 When joint meetings of the bank and corporation were held, one attendance fee was paid and divided between the bank and the corporation.

14. Petitioner submitted an affidavit from an officer of Chase stating, inter alia, that:

> "The retainer fee is neither related to nor dependent upon the attendance of directors at board or committee meetings. This fee is paid as compensation to the directors for director's service outside of meetings such as consultation, and review of advance meeting material, reports, memorandums, etc., throughout the year. It is not a requirement of the retainer fee that that work be performed at Chase offices in New York, and quite the contrary no Chase facilities are provided to perform these roles, while such facilities are provided for board and committee meetings."

15. Petitioner submitted an affidavit from an officer of GM. The content of such affidavit is essentially the same as that submitted with respect to Chase. An affidavit was also submitted by Elaine S. Smith wherein she stated, inter alia, that:

> "I am familiar with the work which he [petitioner] performed in the office at our residence. He reviewed materials for outside directorships, prepared for board and committee meetings, and conducted telephone consultations from his office at our residence. He performed his work mostly at nights and on weekends."

16. The record provides no information with respect to how petitioner determined that $10,100.00 of the total director's fees of $33,150.00 was allocable to New York (see Finding of Fact "2", supra).

17. The file contains a letter from APS Holding Two, Inc., the general partner of Twist Associates, dated March 18, 1982, wherein it is stated that:

> "Twist Associates is a Connecticut limited partnership engaged in the business of purchasing and leasing various kinds of equipment, primarily office equipment, fixtures, medical and dental equipment.
>
> The General Partner, APS Holding Two, Inc. is a Delaware corporation, originally located at 1345 Avenue of the Americas in New York City through May 31, 1979 and then moved to 350 Fifth Avenue in New York City. The General Partner has the sole and exclusive right and responsibility to manage the Partnership's business. It engaged such agents as attorneys and accountants as it deemed necessary. It borrowed money in connection with the purchase of equipment. It executed, acknowledged and delivered any and all instruments necessary or useful with any legal or accounting matters It maintained the

records. It opened and maintained a bank account for the partnership in which receipts were deposited and disbursement withdrawn as was necessary. It communicated with limited partners from time to time on certain partnership matters. All books and records were maintained and stored at its New York City locations and all partnership transactions were conducted from there as well.

The partnership does not now have any employees nor did it ever have any in the past. The General Partner performs all clerical and administrative functions as is necessary and devotes approximately 5% of its time to it. From time to time the partnership has utilized the services of accounting firms and law firms for specific matters but never on a contractual basis. New York State was the only state in which partnership tax returns were ever filed."

18. The Certificate of Amendment of Certificate of Limited Partnership of Twist Associates, dated December 30, 1974, provides, in pertinent part, that:

"111. The principal place of business of the Limited Partnership is 666 Steamboat Road, Greenwich, Connecticut 06830."

19. An affidavit was submitted by one Michael Shore, the content of which is identical to the statement made by APS Holding Two, Inc. in its letter of March 18, 1982 (see Finding of Fact "17" supra).

20. Other than the statement from the general partner and the affidavit of Michael Shore (who is purported to be a principal of the general partner), no evidence was submitted to establish that Twist Associates conducted business in New York.

CONCLUSIONS OF LAW

A. That the resolution of the issue respecting the allocation of petitioner's salary income reduced the initial New York State and City tax deficiency from $4,749.22 to $2,703.38 (see Finding of Fact "8", supra).

B. That section 632 of the Tax Law provides, in pertinent part, that:

"(a) General. The New York adjusted gross income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined

* * *

(b) Income and deductions from New York sources. (1) Items of income, gain, **loss** and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this state; or

(B) a business, trade, profession or occupation carried on in this state. **...”**

C. That former *20* NYCRR 131.4 provides, in pertinent part, that:

"The New York adjusted gross income of a nonresident individual includes items **of** income, gain, **loss** and deduction entering into his Federal adjusted gross income which are attributable to a business, trade, profession or occupation carried on in this State.

(a) A business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within the State by a nonresident when he occupies, has, maintains or operates desk room, an office, a shop, a store, a warehouse, a factory, an agency or other place where his affairs are systematically and regularly carried **on,** notwithstanding the occasional consummation of isolated transactions without the State. This definition ***is*** not exclusive. Business ***is*** carried on within the State **if** activities within the State in connection with the business are conducted **in** this State with a fair measure of permanency and continuity.“

D. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law and section U46-39.0(e) of the Administrative Code **of** the City of New York, to show that his retainer and service fees from GM and Chase were not derived from or connected with New York sources. The affidavits submitted by GM and Chase establish that at least portions of such fees were paid with respect to his preparation for future New York meetings and thus were connected with New York sources. Accordingly, petitioner's director's fees are taxable to New York State and City to the extent of $30,150.00, as stated in the Statement of Audit Changes.

E. That petitioner has failed to sustain his burden of proof to show that Twist Associates conducted business in New York. Accordingly, the loss claimed with respect thereto is not allowable.

F. That the petition of **J.** Stanford Smith and Elaine **S.** Smith is granted to the extent provided in Conclusion of Law "A", supra; that the Audit Division is directed to modify the Notice **of** Deficiency issued June 13, **1980** accordingly; and that, except as so granted, said petition is in all other respects denied.

DATED: Albany, New York

MAY 29 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER