

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

ARI KIEV and PHYLLIS KIEV

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 Years 1977, 1978, 1979 and  
1980.

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Petitioners, Ari Kiev and Phyllis Kiev, 65 Woodcliffe Lake Road, Saddle River, New Jersey 07458, 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 years 1977, 1978, 1979 and 1980 (File No. 45341).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 14, 1986 at 1:15 P.M., with all briefs to be submitted by April 15, 1986. Petitioners appeared by Nathan Altman, C.P.A., and Mordecai Barash, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner Ari Kiev is properly entitled to allocate a portion of his salary income to sources without the State and City of New York.

11. Whether petitioner Ari Kiev is properly entitled to claim a partnership loss of \$46,482.00 on his 1980 return.

FINDINGS OF FACT

1. Ari Kiev and his wife, Phyllis Kiev, filed a joint New York State Income Tax Nonresident Return (with City of New York Nonresident Earnings Tax) for each of the years 1977, 1978, 1979 and 1980 wherein Ari Kiev (hereinafter "petitioner") allocated his salary income derived each year from his professional service corporation, Ari Kiev M.D., P.C., 150 East 67th Street, New York, New York 10021, to sources within and without New York State and City. Said allocations were based on days claimed to have been worked without New York State and City for the professional service corporation as follows:

<u>Year</u>	<u>Number of days claimed as having been worked without New York State and City</u>
1977	50 Days
1978	50 Days
1979	52 Days
1980	52 Days

2. On February 17, 1983, the Audit Division issued two (2) statements of personal income tax audit changes to petitioner. One such statement was issued with respect to the years 1977 and 1978. The other statement was issued with respect to the years 1979 and 1980. The adjustments detailed therein were as follows:

<u>ADJUSTMENT</u>	<u>1977</u>	<u>1978</u>
Failure to make P.C. modification 612(b) 8 [sic]	\$ 816.75	\$ 893.80
Days worked out of NY disallowed as unsubstantiated	8,683.00	12,553.00
Additional itemized deductions	(1,635.80)	(3,423.50)
Additional exemptions	(277.60)	(369.90)
Adjustment	<u>\$7,586.35</u>	<u>\$ 9,653.30</u>

<u>ADJUSTMENT</u>	<u>1979</u>	<u>1980</u>
Days worked out of NY disallowed as unsubstantiated	\$10,700.00	\$12,840.00
Income from estate of I.E. Kiev deemed subject to NY tax	13,191.00	
Additional itemized deductions	(5,436.45)	(3,663.60)
Additional exemptions	(693.48)	(374.50)

3. On December 10, 1980, petitioner and his wife executed a consent form fixing the period of limitation upon assessment of personal income taxes for taxable year 1977 to any time on or before April 15, 1982. On November 24, 1981, they executed a consent form fixing the period of limitation upon assessment of personal income taxes for taxable years 1977 and 1978 to any time on or before April 15, 1983.

4. On April 11, 1983, the Audit Division issued two (2) notices of deficiency. One such notice asserted additional New York State and City personal income taxes for the years 1977 and 1978 of \$2,391.89, penalty of \$23.90, plus interest of \$1,100.21, for a total due of \$3,516.00. The other notice asserted additional New York State and City personal income taxes for the years 1979 and 1980 of \$3,377.48, penalty of \$33.76, plus interest of \$1,038.28, for a total due of \$4,449.52.

5. The only adjustments contested by petitioner were those which disallowed his claimed allocation each year for days worked without the State and City of New York.

6. On August 6, 1982, petitioner submitted a letter wherein he explained his claimed allocations for the years at issue. In said letter petitioner stated that:

"I am writing to explain to you the reasons for allocating a portion of my salary from my psychiatric practice to out of state.

I spend on the average two days a week in New Jersey seeing private patients, preparing forensic psychiatric examinations and/or testifying in courts as an expert witness; visiting pharmaceutical firms located in New Jersey regarding drug studies conducted with my patients; and preparing seminars to be given to mental health organizations and universities.

There is no space in my office in New York to conduct the above activities on the days that I spend in New Jersey.

7. Subsequent to the hearing petitioner submitted voluminous documentation evidencing his presence without New York State and City during several days of each year at issue. Although some days were spent by petitioner attending various professional conferences, the vast majority of such days spent without New York State and City were spent in various other states relative to his many appearances on several radio and television broadcasts.

8. On petitioner's 1977 and 1978 returns he reported his occupation as "Psychiatrist - **MD**" On his 1979 and 1980 returns he reported his occupation as "Psychiatrist - MD & Author". In addition to his income derived from the professional service corporation, petitioner reported (for Federal purposes) income derived in the form of royalties, fees and other income.

9. Petitioner alleges that he is properly entitled to a partnership loss of \$46,482.00 for 1980. He argued that said loss was claimed on his Federal return but inadvertently was omitted from his New York return. Said **loss** was purportedly derived from "M & F Co.", which was engaged in business in New York as a trader of government securities. Although petitioner submitted what was purported to be a copy of the New York State partnership return for 1980 wherein such **loss** is reported, a search by the Audit Division failed to produce any record that such return was in fact filed. Furthermore, although petitioner was given sufficient time to submit a copy of the Federal partnership return, he failed to do **so**.

#### CONCLUSIONS OF LAW

A. That 20 NYCRR 131.16, in effect during the period in issue, provides, in pertinent part, that:

"...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."

B. That considering petitioner's explanation of his claimed allocations (see Finding of Fact "6", supra), the days spent by him without New York, attending conferences and appearing on various radio and television broadcasts, appear to be related to his income derived in the nature of royalties, fees and other income, rather than relative to his services for the professional service corporation.

C. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(a) of the Tax Law and section U46-39.0(e) of the Administrative Code of the City of New York, to show that he actually worked in New Jersey during each week as claimed or that such work was done for the necessity of his employer rather than for his own convenience.

D. That petitioner has failed to sustain his burden of proof to show that he is properly entitled to a partnership loss during taxable year 1980.

E. That the petition of Ari Kiev and Phyllis Kiev is denied and the two notices of deficiency issued April 11, 1983 are sustained together with such additional penalty and interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

**OCT 07 1986**

Roderick A. Cline  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Mark J. O'Neil  
COMMISSIONER