

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

FERNANDO L. KINDLER AND IDA N. KINDLER

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1979.

Petitioners, Fernando L. Kindler and Ida N. Kindler, 1 Kenneth Terraces
Flanders, New Jersey 07836, 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 1979 (File No. 46541).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on October 30, 1986 at 2:45 P.M. Petitioner Fernando L. Kindler appeared
pro se and in behalf of his wife, Ida N. Kindler. The Audit Division appeared
by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether petitioner Fernando L. Kindler, an employee of a New York corporation
during the period **in** issue, properly allocated his income for New York State
personal income tax purposes.

FINDINGS OF FACT

1. On January 17, 1983, the Audit Division issued a Statement of Personal
Income Tax Audit Changes to petitioners, Fernando L. Kindler and Ida N. Kindler,
asserting liability for additional personal income tax due for the year 1979.
An attachment to the Statement of Personal Income Tax Audit Changes explained
the pertinent reason for the adjustment as follows:

"Since you failed to present any proof that you performed services out of New York for your New York employer, your salary income has been deemed to be fully taxable to New York."

Said statement set forth additional tax due **of** \$2,380.19, interest of \$735.19, for a total liability of \$3,115.37.

2. On May 12, 1983, the Audit Division issued a Notice of Deficiency to Fernando L. Kindler and Ida N. Kindler asserting liability for additional personal income tax due for the year 1979 **in** the **sum** of \$2,380.19, together with interest of \$811.31, for a total amount due and owing of \$3,191.49.

3. During the tax year 1979, petitioners were residents of the State of New Jersey and Mr. Kindler was an employee of Merrill Lynch, Pierce, Fenner and Smith, Inc., 1 Liberty Plaza, 165 Broadway, New York, New York 10080, where he served as **an** account executive.

4. Petitioners filed a joint New York State Income Tax Nonresident Return for the year 1979. On said return, petitioners allocated Fernando L. Kindler's wages, computed **on** schedule A-1, based **on** days worked within and without the State of New York. Petitioners claimed 120 days worked outside of New York **State, yielding an allocation of wages to New York State of \$29,477.45.**

5. At conference, the Audit Division conceded that the petitioner worked **outside the State of New York for 70 days during the year 1979 and reduced the additional tax due to \$1,123.59.**

6. Petitioner Fernando L. Kindler contends that he was out of the country **on** business during four separate periods during the year 1979:

- (a) Panama City, January 3, 1979 through February 17, 1979;
- (b) Mexico City, April 7, 1979 through May 13, 1979;
- (c) Columbia, South America, July 8, 1979 through August 15, 1979; and
- (d) Panama, October 9, 1979 through November 25, 1979.

Petitioner had "salesman's practical notes," a handwritten log which documented his business activities in each of these four locations.

7. Petitioners submitted **no** further substantiation or documentation of these trips like airline ticket receipts, credit card receipts or hotel bills, even though said substantiation was requested by the Audit Division.

CONCLUSIONS OF LAW

A. That petitioners were nonresident individuals required to file a New York State Income Tax Nonresident Return for the tax year 1979 **in** accordance with Tax Law §§ 605(b); 632(b)(1)(B); 632(c) and the regulation at 20 NYCRR § 131.4(c).

B. That the regulations promulgated pursuant to Tax Law § 632(c) at 20 NYCRR § 131.18 state, in pertinent part, as follows:

"(a) If a nonresident employee... performs services for his employer both within and without New York State, his income derived from New **York** State 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."

C. That Tax Law § 689(e) provides that, in any case before the Tax Commission, the burden of proof **is** upon the petitioner, except **in** specifically enumerated circumstances which are not present herein.

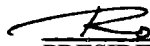
D. That the documentation submitted by the petitioners to substantiate total days worked outside of New York State, consisting of only the "salesman's practical notes," was not sufficient for the purpose of substantiating that petitioner Fernando **L.** Kindler worked more than 70 days outside the State of New York in the year 1979.

E. That the petition of Fernando L. Kindler and Ida N. Kindler is granted to the extent indicated in Finding of Fact "5"; that the Audit Division is directed to modify the Notice of Deficiency dated May 12, 1983; and that, except so as granted. the petition is in all other respects denied.

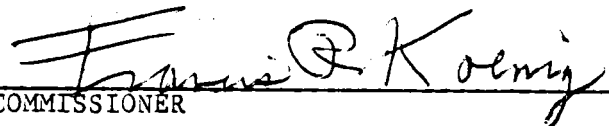
DATED: Albany, New York

STATE TAX COMMISSION


FEB 20 1987



PRESIDENT



COMMISSIONER



COMMISSIONER