

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

RICHARD F. & DIANE L. HOROWITZ

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 1980.

Petitioners, Richard F. & Diane L. Horowitz, 15 Emerson Terrace, Bloomfield,
New Jersey 07003, 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 1980 (File No. 47237).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices
of the State Tax Commission, Two World Trade Center, New York, New York, **on**
November 18, 1985 at 2:45 P.M., with all briefs to be submitted by December 31,
1985. Petitioners appeared pro se. The Audit Division appeared by John P.
Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether days worked at home by Richard F. Horowitz during the year 1980
are properly considered days worked outside New York State for income allocation
purposes.

FINDINGS OF FACT

1. Petitioners, Richard F. and Diane L. Horowitz, residents of New Jersey timely filed a New York State Income Tax Nonresident Return with City **of** New York Nonresident Earnings Tax for 1980.

2. During the year in issue, Mr. Horowitz was **an** attorney working in a New York City professional law corporation. Petitioners reported income in the amount of \$71,250.00 from Mr. Horowitz's employment. Mr. Horowitz's salary was allocated to New York sources based **on** a percentage which was determined by placing the number of days worked within New York (150) over the total number of days worked in the year (237). This resulted **in an** allocation of \$45,095.00 to New York State.

3. **On** July 28, 1983, the Audit Division issued to petitioners a Notice of Deficiency asserting that for the year 1980 additional personal income tax was due in the amount of \$2,773.07 plus interest. A previously issued Statement of Audit Changes explained that petitioners' total allocation of wages had been disallowed **as** unsubstantiated.

4. **In** accordance with information submitted by petitioners after the Notice of Deficiency was issued, the Audit Division adjusted the allocation of income to New York State by allowing an allocation for twenty days worked outside of New York and away from home; however, sixty-seven days which Mr. Horowitz claimed to have worked at his New Jersey home on weekends were excluded.

5. **In** 1980, Mr. Horowitz's employer was a commercial law firm with clients throughout the country and abroad. Attorneys in the firm were expected to be available to receive business calls and to respond to matters presented to them by phone at odd hours in the evening. The firm was not a law firm.

routinely worked at home on weekends. Although Mr. Horowitz had a key to the New York office and could have worked there on weekends if he desired, his employer did not expect him to do so.

CONCLUSIONS OF LAW

A. That the sixty-seven days worked during 1980 at petitioner's home in New Jersey were worked there by reason of his own convenience and not for the necessity of his New York employer. Accordingly, those days are considered as day worked within New York State for income allocation purposes in accordance with the meaning and intent of section 632(c) of the Tax Law [see 20 NYCRR 131.18(a)].

B. That the services performed by petitioner at his out-of-state home could have easily been performed at his employer's office. As the Appellate Division stated in Burke v. Bragalini, 10 A.D.2d 654:

"It is understandable that many people -- living within and out of the State -- may on occasions find it more advantageous to work at home, either during the regular working hours or extra 'home work' after hours. Such a person living in the State is not entitled to special tax benefits, and...the commuter from outside the State is entitled to no such special benefits."

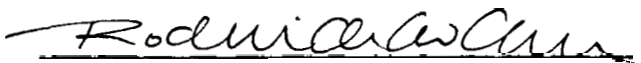
C. That the allocation of income to New York State should be adjusted to allow for twenty days worked outside of New York State in accordance with Finding of Fact "4", supra.

D. That the petition of Richard F. and Diane L. Horowitz is granted to the extent indicated in Conclusion of Law "C"; the Notice of Deficiency issued on July 28, 1983 shall be modified accordingly; and, in all other respects, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986


PRESIDENT
