

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SAUL N. BRODY AND FROHMA E. BRODY

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 1980 and 1981.

Petitioners, Saul N. Brody and Frohma E. Brody, 20 Glenwood Avenue,
Demarest, New Jersey 07627, 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 1980 and 1981 (File
No. 49103).

A hearing was held before James Hoefer, Hearing Officer, at the offices of
the State Tax Commission, Two World Trade Center, New York, New York, on
January 15, 1986 at 10:45 A.M., with all briefs to be submitted by April 1,
1986. Petitioners appeared by Jerome Feinstein. The Audit Division appeared
by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether days worked at home by petitioner Saul N. Brody can be considered
as days worked outside New York State and New York City for purposes of allocating
wage income to sources within and without the State and City.

FINDINGS OF FACT

1. Petitioners, Saul N. Brody and Frohma E. Brody¹, timely filed joint New York State income tax nonresident returns for the years 1980 and 1981. Together with the State returns, petitioner also filed City of New York nonresident earnings tax returns. On all four returns in question petitioner reported wage income received from the City College of the City University of New York (hereinafter "CUNY").

2. For 1980 and 1981, petitioner allocated wage income received from CUNY to New York State and City sources based on a percentage determined by placing the total number of days worked within the State and City over the total number of days worked. The following table details the allocation of wage income as shown on petitioner's 1980 and 1981 returns:

	<u>1980</u>	<u>1981</u>
Days worked in year	171	174
Less days worked outside the State and City	<u>84</u>	<u>89</u>
Days worked in State and City	<u>87</u>	<u>85</u>

1980 allocation - $87/171 \times \$36,182.73 = \$18,408.60$ (State and City wages)

1981 allocation - $85/174 \times \$40,582.32 = \$19,824.70$ (State and City wages)

All days claimed as days worked outside the State and City in 1980 and 1981 represent days worked by petitioner at his personal residence in Demarest, New Jersey.

3. On July 8, 1983, the Audit Division issued a Statement of Audit Changes to petitioner for 1980 and 1981 which contained the following explanation:

"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

1 Frohma E. Brody is involved in this proceeding solely as a co-petitioner.

which, because of the necessity of the employer, obligates 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 State.

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 State and days spent at home which are not normal work days, are considered to be nonworking days."

Inasmuch as all days claimed by petitioner as having been worked outside the State and City were days worked at home, the Audit Division deemed total wage income received from CUNY as derived entirely from New York State and City sources. The Statement of Audit Changes proposed a tax due of \$1,423.01 for 1980 and a refund² of \$1,439.25 for 1981, producing a net overpayment of \$16.24. Said statement also asserted that interest³ of \$170.35 was due on the tax owed for 1980, leaving a balance due of \$154.11 (\$170.35 less \$16.24). Based on the aforementioned statement, the Audit Division, on October 5, 1983, issued a Notice of Deficiency to petitioner for 1980 asserting that interest of \$154.11 was due.

4. During the years at issue, petitioner was employed by CUNY as a professor in its Department of English. Petitioner, as a professor specializing in medieval literature, was required to reach and prepare for classes, meet with students, grade submissions and examinations and perform certain administrative

2 Petitioner's 1981 return claimed that a refund of \$3,140.52 was due. The Audit Division did not grant the refund as requested, electing to first examine said return. As the result of its examination, the Audit Division, in its Statement of Audit Changes, allowed petitioner a refund for 1981 of \$1,439.25. In this proceeding petitioner seeks to have the tax due for 1980 cancelled and also to be granted the refund of \$3,140.52 as requested on his 1981 return.

3 Interest was computed on the \$1,423.01 of tax due for 1980 from April 15

duties. Petitioner was also required to maintain an established reputation in his discipline by undertaking continual original research, scholarly writing and publication.

5. In 1980 and 1981 petitioner spent between two and three days each week at CUNY's facilities in New York City teaching classes and meeting with students. The remainder of the week petitioner worked out of an office maintained **in** his personal residence.

6. CUNY provided petitioner with an office at its facilities in New York City which he used only on those days when he was teaching classes and meeting with students. Said office was shared with two other full time faculty members and, from time to time, with a varying number of part-time faculty members. Furthermore, the office was situated in a long corridor that was frequently populated by students, generally creating a rather noisy atmosphere. For these reasons, said office lacked the privacy necessary for petitioner to conduct research and produce scholarly writing. In petitioner's own words "It was simply impossible for me to do anything there apart from see students". Other factors, such as insufficient book shelf space, lack **of** a typewriter, lack of a telephone for long distance calls and lack of adequate security for valuable books and papers, all served **to** limit petitioner's use of his CUNY office.

7. On those days when petitioner was not teaching classes at CUNY he worked at home. Petitioner set aside one room in his residence which he used exclusively for the purpose of preparing for classes, doing research and scholarly writing. Over the last twenty-five years petitioner has collected an extensive personal library which was stored on bookshelves lining three walls of his home office. Petitioner's home office also had a typewriter and a

telephone for long distance calls. The home office, however, primarily afforded petitioner the privacy needed to conduct research and write scholarly papers.

CONCLUSIONS OF LAW

A. That for New York State income tax purposes Commission regulation 20 NYCRR 131.16 (since renumbered 20 NYCRR 131.18) provides 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."

For New York City tax purposes, 20 NYCRR Appendix 20 § 4-4(b) contains a similar provision.

B. That the services rendered by petitioner at his home in New Jersey for CUNY during 1980 and 1981 were performed there by reason of his own convenience and not for the employer's necessity. Accordingly, the days worked at home by petitioner cannot be considered **as** days worked outside New York State and New York City for income allocation purposes within the meaning and intent of section 632(c) of the Tax Law and 20 NYCRR 131.16 and section U46-2.0(a)(2) of Title U and 20 NYCRR 295.2 and 20 NYCRR Appendix 20 § 4-4(a) and (b). See Page v. State Tax Commission, 46 A.D.2d 341; Wheeler v. State Tax Commission, 72 A.D.2d 878; Kitman v. State Tax Commission, 92 A.D.2d 1018, mot. for lv. to app. den. 59 N.Y. 2d 603.

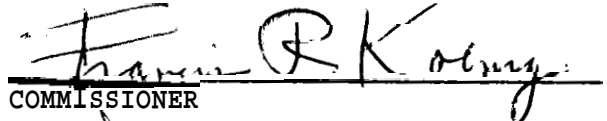
C. That the petition of Saul N. Brody and Frohma E. Brody *is* denied and the Notice of Deficiency dated October 5, 1983 *is* sustained, together with such additional interest as may be lawfully due and owing.

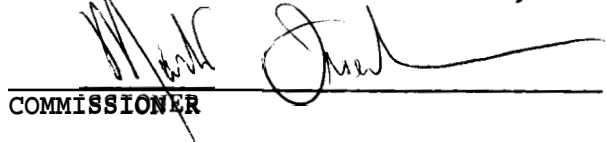
DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER