

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SEVERINO R. NICO, JR. AND TERESITA V. NICO

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, Severino R. Nico, Jr. and Teresita V. Nico, 9 Saddlewood
Court, Jersey City, New Jersey 07302 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. 53914).

A hearing was held before Allen Caplowaith, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on January 27, 1986 at 2:45 P.M., with all briefs to be submitted by
February 27, 1986. Petitioner Severino R. Nico, Jr. appeared pro se. The
Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of
counsel).

ISSUE

Whether petitioner Severino R. Nico, Jr. was engaged in the practice of
law within the State of New York, thereby entitling him to claim the losses
derived from such practice on his New York return.

FINDINGS OF FACT

1. Petitioners, Severino R. Nico, Jr. and Teresita V. Nico, timely filed a New York State Income Tax Nonresident Return (with City of New York Nonresident Earnings Tax) for each of the years 1980 and 1981 whereon Severino R. Nico, Jr. (hereinafter "petitioner") reported net losses from his law practice of \$10,474.00 (1980) and \$10,393.00 (1981). According to petitioner's Federal schedules C annexed thereto, his gross receipts derived from such law practice were \$700.00 in 1980 and \$150.00 in 1981. Deductions claimed which were purportedly attributable to such gross receipts were \$11,174.00 in 1980 and \$10,543.00 in 1981.

2. On April 13, 1984, the Audit Division issued a Statement of Audit Changes to petitioner and his wife wherein the aforestated net losses were disallowed based on the following explanation:

"Based on the information received it appears that you are not maintaining a business office in New York. As such, your business loss is not considered derived from New **York** State sources and therefore it is disallowed in computing New York income."

Additionally, said statement disallowed a 1980 adjustment to income of \$4,450.00 on the basis that such adjustment was not explained in detail. Further, said statement reported various other technical adjustments which were not contested by petitioner. Accordingly, the Audit Division issued a Notice of Deficiency to petitioner and his wife under the same date asserting a deficiency as follows:

	<u>"Deficiency</u>	<u>Interest</u>	<u>Total</u>
80	\$1,701.86	\$603.08	\$2,304.94
Overpayment on 1981 return			48.00
Amount Due			<u>\$2,256.94"</u>

3. Petitioner alleged that he was practicing law in New York State during the years at issue and, accordingly, he is properly entitled to the net losses

4. Petitioner was admitted to the New York State Bar in October, 1974. From July, 1975 through December, 1977, he used his New York apartment as his office and place of business.

5. In January, 1978, petitioner moved to a house which he purchased at 9 Saddlewood Court, Jersey City, New Jersey. He alleged that at the time of such move, he transferred his office to 114 Liberty Street, New York City, where he maintained a telephone answering machine and mailing service and had the occasional use of office space.

6. The first floor of petitioner's home was used as an office during the years at issue. He stated that he worked and received clients at such office.

7. During the years at issue, petitioner was employed full time by the New York State Department of Labor as a Hearing Officer. He alleged that his private legal practice was conducted during evenings and on weekends.

8. Many of the deductions claimed each year on petitioner's schedules C were attributable to the business use of his New Jersey residence.

9. On petitioner's 1980 Federal Schedule C he reported his business address as "114 Liberty St., Suite 204, N.Y., N.Y.". On his 1981 Federal Schedule C he reported his business address as "80 Centre Street, NYC 10007". The Centre Street address was petitioner's employer's address, not that of his personal law office.

10. Petitioner's 1980 gross receipts of \$700.00 were derived from services rendered to two clients with respect to real estate transactions. His 1981 gross receipts of \$150.00 were derived from two clients for the preparation of tax returns and the preparation of two last will and testament documents.

11. Petitioner failed to explain the 1980 adjustment to income of \$4,450.00.

CONCLUSIONS OF LAW

A. That 20 NYCRR 131.4 provides 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."

B. That 20 NYCRR 131.4(a) provides that:

"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... 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" (emphasis supplied).

C. That petitioner did not carry on a profession within the State of New York during the years 1980 and 1981 within the meaning and intent of 20 NYCRR 131.4(a). Accordingly, the losses purportedly sustained from petitioner's law practice during said years are not deductible on his New York State returns.

D. That the petition of Severino R. Nico, Jr. and Teresita V. Nico is denied and the Notice of Deficiency issued April 13, 1984 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER