

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JUSTIN and JUDITH LEWAND

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 New York City Administrative :
Code for the Years 1980 and 1981.

Petitioners, Justin and Judith LeWand, 417 St. Marks Avenue, Westfield,
New Jersey 07090, 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 New York
City Administrative Code for the years 1980 and 1981 (File No. 54266).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New York
on February 11, 1986 at 2:00 P.M. Petitioners appeared by Seymour I. Hurwitz,
Esq. (Lester Yudenfriend, Esq., of counsel). The Audit Division appeared by
John P. Dugan, Esq., (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether days worked at home by petitioner Justin LeWand, a New Jersey
resident, may be considered as days worked without New York State and New York
City for income allocation purposes.

FINDINGS OF FACT

1. Petitioners, Justin and Judith LeWand, filed New York State income tax
nonresident returns with City of New York nonresident earnings tax for the

years 1980 and 1981. On the returns petitioners allocated petitioner Justin LeWand's salary income based on days worked outside of New York State and New York City.

2. Analysis of schedules completed by Mr. LeWand in response to Audit Division questionnaires shows that with respect to 1980, 56 days were claimed to have been worked at home and 20 days were claimed to have been worked at other locations outside New York State. With respect to 1981, 69 days were claimed to have been worked at home and 35 days were claimed to have been worked at other locations outside New York State.

3. On March 26, 1984, a Notice of Deficiency was issued to petitioners in the amount of \$2,874.94 in tax, plus interest, for the years 1980 and 1981. Aside from a subtraction modification for state and local income tax refunds, which is not at issue, the deficiency was based on the disallowance of an allocation for days worked at home.

4. During the years at issue, petitioner Justin LeWand worked for National Expositions Company, Inc. ("NEC"). NEC was engaged in the business of creating and organizing industrial trade shows. Mr. LeWand's primary job function was the sale of exhibit space to exhibitors at the trade shows.

5. Mr. LeWand had a private office in NEC's offices at 14 West 40th Street, New York, New York. The office had a telephone, dictating machine and file cabinets.

6. Mr. LeWand was told by NEC to work at home if he believed that he could get more done at home than in the New York office. Mr. LeWand felt there were many distractions in his New York office and he found that he could make fifty telephone calls a day when he was working at home rather than the twenty calls which he could normally make in the New York City office.

to the elimination of the distractions which took place in the New York office and the gain of time which otherwise would have been spent commuting.

7. Mr. LeWand worked in his "den" at his home in Westfield, New Jersey; the room contained a desk, file cabinets and two telephones. One of the telephones was his personal telephone and the other was a telephone installed on behalf of NEC and paid for by NEC. He would generally use the company phone to make the outgoing phone calls and if he had to leave a message for someone he would give the number on his personal phone for incoming responses. The phone calls were generally in the nature of selling space to prospective exhibitors at future trade shows. He also had a dictating machine at the office in his home with which he dictated letters to follow up on the phone calls.

8. NEC had a listing in the New Jersey Bell Yellow Pages. The address shown was petitioners' home address.

CONCLUSIONS OF LAW

A. That under section 632(a) of the Tax Law, the New **York** adjusted gross income of a nonresident individual includes income derived from or connected with New York sources. Section 632(c) of the Tax Law provides as follows:

"(c) Income and deductions partly from New York sources.
If a business, trade, profession or occupation **is** carried **on** partly within and partly without this state, as determined under regulations of the tax commission, the items **of** income, gain, **loss** and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations."

(The New York City Nonresident Earnings Tax is similarly allocated on Schedule A of Form NYC-203).

C. That 20 NYCRR 131.16, as in effect for the years at issue, provided in Dart. as follows:

"If a nonresident employee ... performs services for his employer both within and without the State, his income derived from New York sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within the State bears to the total number of working days employed both within and without the State. The items of gain, loss and deduction (other than deductions entering into the New York itemized deduction) of the employee attributable to his employment, derived from or connected with New York sources, are similarly determined. However, 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. In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay...."

This section has been retained in the current regulations and renumbered 20 NYCRR 131.18(a).


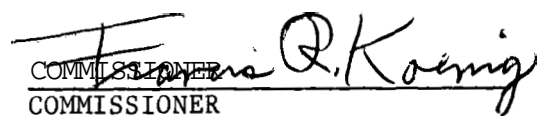
D. That despite the fact that petitioner Justin LeWand found it more efficient to work at home for the days at issue, the fact remains that the work could have been performed in his employer's New York City office. The work was not performed at the petitioners' New Jersey home for the employers' necessity. See Kitman v. State Tax Commission, 92 AD2d 1018, Motion for lv. to appeal denied, 59 NY2d 603.

E. That the petition of Justin and Judith LeWand is denied and the Notice of Deficiency issued March 26, 1984 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 30 1986


PRESIDENT

COMMISSIONER
COMMISSIONER

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