

STATE OF NEW YORK

STATE **TAX** COMMISSION

In the Matter of the Petition

of

EMANUEL LEVENTHAL AND MILDRED LEVENTHAL

,

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 1979, 1980 and 1981.

Petitioners, Emanuel Leventhal and Mildred Leventhal, 850 Claridge Drive,
Verona, New Jersey 07044, 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 1979, 1980 and 1981
(File No. 64965).

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 March 9, 1987 at 2:45 P.M. with all briefs to be submitted by March 23,
1987. Petitioners appeared by Martin L. Eisman, CPA. The Audit Division
appeared by **John P.** Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether petitioner Emanuel Leventhal is properly entitled to allocate a
portion of his business income to sources without New York State and City.

FINDINGS OF FACT

1. Emanuel Leventhal (hereinafter "Petitioner") timely filed joint New
York State income tax nonresident returns with his wife, Mildred Leventhal, for

the years 1979, 1980 and 1981. In conjunction therewith, petitioner filed a New York City nonresident earnings tax return for each of said years. For both New York State and New York City purposes, petitioner allocated his business income to sources within and without the State and City of New York.

2. On January 7, 1985, the Audit Division issued a Statement **of** Personal Income Tax Audit Changes to petitioner and his wife wherein adjustments were made which were explained thereon as follows:

"Since you have not established that a bona fide place of business exists outside New York State, your entire business income constitutes income from New York State and New York City sources and [is] therefore taxable as such.

Long-term capital losses on intangible personal property are not deductible on the non-resident return.

Business income is increased by additional deposits as evidenced per audit."

3. Based on the aforesaid statement, two notices of deficiency were issued against petitioner and his wife on August 8, 1985. One notice asserted additional New York State and City personal income taxes for 1979 and 1980 of \$4,490.57, plus penalty of \$224.53 and interest of \$2,716.48, for a total due of \$7,431.58. The other notice asserted additional New York State and City personal income taxes for 1981 **of** \$1,914.50 plus penalty of \$95.73 and interest of \$770.47, for a total due of \$2,780.70. Said penalties were asserted for negligence pursuant to section 685(b) of the Tax Law and section U46-35.0(b) of the Administrative Code of the City of New York.

4. Petitioner and his wife executed three successive consent forms which ultimately extended the period of limitation on assessment of personal income taxes for the years at issue to any time on or before April 15, 1986.

5. The only adjustment raised in the petition and addressed at the hearing was the disallowance of petitioner's claimed allocation of busi-

income within and without the State and City of New York for each of the years at issue. Accordingly, it is presumed that petitioner is not contesting the other adjustments explained in the Statement of Audit Changes (see Finding of Fact "2", supra).

6. In 1979, petitioner reported net income from his "textile broker" business of \$49,993.00. The amounts which he allocated to New York State and City were computed on a schedule annexed to his return as follows:

NEW YORK BUSINESS ALLOCATION FORMULA

	<u>Total</u>	<u>New York</u>	<u>Percentage</u>
Tangible Property (rent)	\$ 25,256	\$ 4,800	19.005%
Gross Receipts	104,174	56,087	53.840
			53.840
Payroll	20,986	19,753	94.125
<u>TOTAL</u>			<u>220.810%</u>
<u>Average of Percentages:</u>			
New York State (divided by 4)			55%
New York City (divided by 3)			56%
<u>Net Income Allocated to:</u>	N.Y.S.	<u>\$27,496</u>	
	N.Y.C.	<u>\$27,996</u>	

7. In 1980, petitioner reported net business income of \$39,601.00. The amounts which he allocated to New York State and City were computed on a schedule annexed to his return as follows:

NEW YORK BUSINESS ALLOCATION FORMULA

	<u>Total</u>	<u>New York</u>	<u>Percentage</u>
Tangible Property (rent)	\$ 20,848	\$ 4,800	23.0%
Gross Receipts	117,508	72,273	61.5
			61.5
Payroll	24,813	23,570	95.0
<u>TOTAL</u>			<u>241.0%</u>

Average of Percentages

New York State (divided by 4)	60%
New York City (divided by 3)	60%
<u>Net Income Allocated to:</u> N.Y.S.	<u>\$23,761</u>
N.Y.C.	<u>\$23,761</u>

8. In 1981 petitioner reported net business income of \$49,799.00 . He allocated 54% of such income, or \$26,891.00 to New York State and 60% of such income or \$29,879.00 to New York City.

9. During the years at issue petitioner was engaged in business as a textile broker. His activities consisted of arranging for the sale of odd lots of piece goods to various buyers. Petitioner never physically received the merchandise. He was compensated on a commission basis.

10. Petitioner did not personally appear for the hearing. His representative testified that petitioner maintained a small office in New York City during the years at issue. It was purported that said office was 12 feet by 8 feet, or 96 square feet.

11. It was alleged that petitioner's office in New York was so small that he had to maintain the books and records at his residence, a condominium located in New Jersey. It was further alleged that petitioner used 25% of his residence as an office. Such office was purportedly used in the evenings and on weekends to make business phone calls, prepare statements to customers and to receive payments.

12. The only documentation submitted relative to the years at issue herein were bank statements whereon petitioner's home address was listed and several 1979 Federal forms 1099 which were issued to petitioner at his home address.

CONCLUSIONS OF LAW

A. That section 632 of the Tax Law provides, in pertinent part that:

"(a) General. The New York adjusted gross income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New **York** sources,...

* * *

(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

* * *

(B) a business, trade, profession or occupation carried on in this state..."

B. That 20 NYCRR 131.12, as was in effect during the years at issue, provided that:

"A business, trade, profession or occupation...is carried on partly within and partly without this State when one or more of the activities described in subdivision (a) of section 131.4 is systematically and regularly carried on within this State and one or more of such activities is systematically and regularly carried on outside of this State, or when one or more of such activities is systematically and regularly carried on both within and without this State."

Such activities consist of occupying, maintaining or operating desk room, an office, a shop, a store, a warehouse, a factory, an agency or other place where petitioner's affairs are systematically and regularly carried on.

C. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law and section U46-39.0(e) of the Administrative Code of the City of New York, to show that he systematically and regularly carried on his business activities without the State of New York. Accordingly, petitioner is not properly entitled to allocate a portion of his business income to sources without the State and City of New York.


D. That even if petitioner had shown that he carried on his business activities partly without the State and City of New York, his claimed New York State and City allocations for each year at issue were not computed in accordance with the methods prescribed in 20 NYCRR 131.13 as was then in effect, or section **U46-4.0** of the Administrative Code of the City of New York. Furthermore, the amounts used in said computation were unsubstantiated.

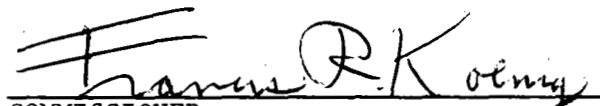
E. That the petition of Emanuel Leventhal and Mildred Leventhal is denied and the two notices of deficiency issued August 8, 1985 are sustained together with such additional penalty and interest as may lawfully be owing.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1987


PRESIDENT


COMMISSIONER


COMMISSIONER