

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Arkwin Industries, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Fiscal Year Ended 4/30/78. :
:

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 15th day of April, 1985, he served the within notice of Decision by certified mail upon Arkwin Industries, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arkwin Industries, Inc.
686 Main St.
Westbury, NY 11590

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
15th day of April, 1985.

David Parchuck

William A. Hargrave
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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of :
Arkwin Industries, Inc. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
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Franchise Tax under Article 9A of the Tax Law for :
the Fiscal Year Ended 4/30/78. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 15th day of April, 1985, he served the within notice of Decision by certified mail upon David R. Safer, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David R. Safer
Grubin, Safer & Turner
19 Rector Street
New York, NY 10006

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
15th day of April, 1985.

David Parchuck

William C. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

April 15, 1985

Arkwin Industries, Inc.
686 Main St.
Westbury, NY 11590

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
David R. Safer
Grubin, Safer & Turner
19 Rector Street
New York, NY 10006
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

ARKWIN INDUSTRIES, INC. :

DECISION

for Redetermination of a Deficiency or for :
Refund of Corporation Franchise Tax under :
Article 9A of the Tax Law for Fiscal Year Ended :
April 30, 1978.

Petitioner, Arkwin Industries, Inc., 686 Main Street, Westbury, New York 11590, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9A of the Tax Law for the fiscal year ended April 30, 1978 (File No. 35882).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on October 31, 1984 at 10:45 A.M. Petitioner appeared by Grubin, Safer & Turner (David R. Safer, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined that petitioner's business allocation percentage was one hundred percent on the basis that petitioner did not maintain a regular place of business outside of New York State for the fiscal year ended April 30, 1978.

FINDINGS OF FACT

1. Petitioner, Arkwin Industries, Inc. ("Arkwin"), filed a New York Corporation Franchise Tax Report for the fiscal year ended April 30, 1978. On this report, petitioner claimed that it was entitled to a business allocation

percentage of 57.65 percent on the ground that it maintained a regular place of business outside New York.

2. On December 21, 1981 the Audit Division issued a Notice of Deficiency to petitioner asserting a deficiency of corporation franchise tax for the fiscal year ended April 30, 1978 in the amount of \$4,664.50 plus interest of \$1,497.96 for a total of \$6,162.46. The Notice was issued to petitioner on the grounds that petitioner did not maintain a regular place of business outside of New York State and consequently could not allocate its income within and without the State.

3. During the period in issue, petitioner was an engineering firm which created high technology designs for the aerospace and computer industries. It also planned to become active in designing for the nuclear power industry.

4. Petitioner did not have a product line. Rather, petitioner sought out customers in need of a particular item and then designed an item to satisfy that need at its engineering facility in Westbury, New York. In addition, potential customers would learn of petitioner by its reputation and ask petitioner to bid on contracts. There were approximately five firms in the United States which performed similar functions for their customers.

5. During 1976, there were several factors which influenced petitioner's conclusion that establishing an office in Tennessee was warranted. One factor was that petitioner was chosen to perform the design and subsequent manufacturing of a computer activator for Sperry Univac which was located in the Bristol, Tennessee area. A second factor was that Union Carbide, which was located in Oakridge, Tennessee had approached petitioner to start designing special valves which could operate in the environment of a uranium reactor. Third, the Tennessee Valley Authority had been considering developing a nuclear plant and

had started contacting companies with technical expertise in anticipation of hiring them. Another factor was that a company known as AVCO, located in Nashville, Tennessee, had asked petitioner to perform design services for them. In addition, petitioner had begun to develop contacts with a Tennessee firm known as Arnold Engineering and Development Corporation. Lastly, petitioner was performing under a contract with General Dynamics with respect to the F-16 aircraft and Tennessee was readily accessible to General Dynamics' main offices in St. Louis, Missouri.

6. During 1976, petitioner had an employee named Monroe Taylor, a Tennessee resident who owned a home in Bluff City, Tennessee. Mr. Taylor was a sales engineer and handled service, sales and repairs of products for petitioner. Mr. Taylor also was petitioner's representative for Union Carbide.

7. Petitioner's Board of Directors decided that of the available alternatives, Mr. Taylor's home was the best location for establishing an office. Petitioner reached this conclusion because: it needed facilities for storing hardware and test equipment; Mr. Taylor's home was located near Bristol, thereby providing access to potential customers; and Mr. Taylor was willing to make changes in his home so that an office could be constructed with a separate entrance. An additional factor was that a substantial portion of petitioner's work was of a secret nature and therefore petitioner did not seek public exposure. Accordingly, renting an office in an employee's home, which was somewhat remote, was more advantageous than the rental of space in an office building.

8. On November 1, 1976, petitioner entered into a lease with Mr. Taylor to rent an office in his home for the period commencing November 1, 1976 and ending October 31, 1977. The lease provided that it "...shall be renewed

automatically unless cancelled in writing by 30 days written notice....". The lease was not cancelled either prior to or during the period in issue.

9. In conjunction with the establishment of the office in Tennessee, petitioner shipped manuals, gauges, testing equipment, valves and assemblies to Mr. Taylor. Petitioner treated the items sent to Mr. Taylor as an expense in the period they were shipped to Tennessee. Accordingly, upon shipment, they were not included on petitioner's balance sheet.

10. On or about October 14, 1976, petitioner was granted a certificate of authority to conduct business in the State of Tennessee. At or about the same time, the United States Corporation Company was designated by petitioner as registered agent in Tennessee for the receipt of process on behalf of petitioner.

11. On or about January 27, 1977 petitioner filed a Sales and Use Tax Certificate of Registration with the Department of Revenue of the State of Tennessee.

12. Petitioner filed a Tennessee Franchise and Excise Foreign Tax Return for the period November 1, 1976 through October 31, 1977 and for the period November 1, 1977 through April 30, 1978. Petitioner computed its franchise tax liability on the basis of doing business in the State of Tennessee and elsewhere.

13. Although petitioner's letterhead did not disclose a Tennessee office, Mr. Taylor's business card showed both the main office address and telephone number and the Tennessee address and telephone number. It was Mr. Taylor's responsibility to visit customers and inform them that he was available at petitioner's Tennessee office. On occasion, petitioner's customers would visit petitioner's office in Mr. Taylor's home.

14. Petitioner was not listed in a telephone directory in Tennessee. However, petitioner determined that a telephone listing was not needed for the business.

15. Petitioner did not maintain a finished goods inventory because everything was made to order. Therefore, as soon as an item was completed, it was sent to the customer. Petitioner's inventory does contain work-in-process. However, this inventory was not stored in Tennessee.

CONCLUSIONS OF LAW

A. That section 210.3(a)(4) of the Tax Law, prior to its amendment effective for taxable years beginning after January 1, 1978, provided, in part:

"...that if the taxpayer does not have a regular place of business outside the state other than a statutory office, the business allocation percentage shall be one hundred per cent;"

B. That 20 NYCRR 4-2.2(b) provides, in part:

"A regular place of business is any bona fide office (other than a statutory office), factory, warehouse or other space which is regularly used by the taxpayer in carrying on its business..."

C. That the factors usually considered in determining whether a taxpayer has a regular place of business outside of New York State are whether the taxpayer had full-time employees in the other state, whether the taxpayer had an office in the other state, whether the taxpayer paid taxes to the other state, and whether the taxpayer was licensed to do business in the other state (see Matter of Psychological Corp. v. Tax Comm. of the State of N.Y., 99 A.D.2d 905, 906).

D. That in view of the fact that each of the factors set forth above has been satisfied it is found that the office maintained by petitioner in Tennessee constituted a bona fide office which was regularly used by petitioner in


carrying out its business within the meaning of 20 NYCRR 4-2.2(b). Accordingly, the Audit Division erred in concluding that petitioner's New York business allocation percentage was one hundred percent.

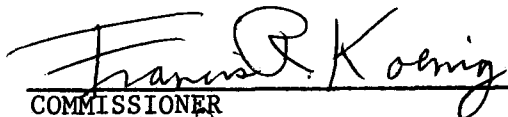
E. That the petition of Arkwin Industries, Inc. is granted and the Notice of Deficiency issued December 21, 1981 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER