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## BUREAU OF LAW

MEMORANDUM

*Income Tax Determinations*  
*Connell, David D.* <sup>A-2</sup>

TO: **Commissioners Murphy, Palastin & Macduff**

FROM: **Solomon Sies, Hearing Officer**

SUBJECT: **DAVID D. CONNELL**

**Application for Revision or Refund of Personal Income Taxes under Article 16 of the Tax Law for the years 1959 and 1961.**

A hearing with reference to the above matter was held before me at 60 Centre Street, New York, N.Y. on October 13, 1964. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issue involved herein is whether the taxpayer, a non-resident, is entitled to an allocation of earnings without the State of New York for 78 days work performed at home in New Jersey during each of the years 1959 and 1961.

The taxpayer has been employed since 1956 by Robert Keeshan Associates, Inc., a domestic corporation having its sole offices in the city of New York. In 1956 his duties were that of associate producer. In the middle of 1957 his duties were that of a producer. On January 1, 1958, the taxpayer entered into a written agreement of employment with the aforementioned employer whereby he was employed as "producer, associate producer, writer and/or otherwise" in connection with "television and/or radio programs". In accordance with the written agreement of employment, the taxpayer performed services as a producer, director and writer for the employer in connection with a television program called "Captain Kangaroo". He was required to write one or more scripts for this show each week. The taxpayer was assigned a separate office in the offices of the employer in New York City (Minutes of Hearing, page 15). During the year 1958 his script writing was confined exclusively to the offices of the employer (Minutes of Hearing, page 12). The taxpayer did not have any set hours nor did he have any scheduled work hours with respect to the writing of scripts. He testified as follows:

"If I could do it in two hours, I was free to go home the rest of the week". (Minutes of Hearing, page 22).

In 1961 the taxpayer became a Vice-President of the employer corporation.

The taxpayer on his 1959 and 1961 non-resident income tax returns claimed an allocation of 78 days during each of said years

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attributable to work claimed to have been performed outside of the state of New York. It is claimed that this work consisting of writing scripts for the aforementioned television program was performed at his home in New Jersey. The seventy-eight days worked at home during each of the years 1959 and 1961 is estimated. It is based upon the statement contained in the taxpayer's letter dated July 20, 1960 (Tax Commission Exhibit E) which states in part as follows:

"Since I spend, on the average, six to eight hours weekday evenings and six to eight hours on the weekend, an estimate of one and one half days per week throughout the year ( $52 + 26 = 78$ ) seemed reasonably fair to me. In a further effort to be absolutely fair, I calculated the tax on the basis of a six-day work week even though I am required at my New York office only five days."

There is no provision in the written contract of employment requiring the taxpayer to perform work at home.

Although the taxpayer originally contended that he was required to work at home because of the distractions prevalent at the office of the employer and the volume of work required by him to be performed in connection with his duties as producer, he subsequently claimed that he was directed by the employer to work at home. He submitted a letter from the employer dated August 30, 1962, signed by Marvin Josephson, Vice-President and Secretary, to the effect that "after a series of difficulties with scripts prepared by Mr. Connell, it was discovered that the major problem was that he could not properly organize and create a script with the distractions that were constantly present in the office and that if we were to get useable scripts from Mr. Connell, it would be necessary to totally separate the function of writer from the function of producer and executive." The writer concluded from this that, "thus, it might be said that he was directed to work at home." The letter further stated that taxpayer is paid \$575.00 a week for his executive functions and \$225.00 a week by separate check for his functions as a writer. The conferee at the preliminary hearing indicated that since the letter was written in 1962, this condition did not exist during the years in issue. At the hearing, the taxpayer submitted a similar letter from the employer dated October 9, 1964 again signed by Marvin Josephson with the following modifications: 1) that the difficulties with the script writing commenced "beginning in 1958"; and that "The situation that has existed since 1958 still exists at this time and has existed continuously since 1958." (Taxpayer's Exhibit #2). Both letters were unsworn.

I am of the opinion that the inferences or conclusions of the taxpayer that he was required or directed by his employer to perform script writing at home, is not supported by the credible

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evidence adduced at the hearing; that the employer did not allocate such earnings on the withholding tax statements of the taxpayer (Minutes of Hearing, pages 24, 25 & 26); that if it was the intention of the taxpayer and the employer to have the script writing performed at home, the employment agreement could have been modified to so provide; that no part of the taxpayer's work was required to be performed at home either pursuant to any contract or other direction of his employer but was performed by him at home for his greater convenience; that the taxpayer is not entitled to an allocation of income for work performed at home since such work did not constitute services rendered outside the State of New York, but was primarily for the taxpayer's greater convenience in accordance with the decisions of Burke v. Bragalini, 10 A.D. 2d 674, 197 N.Y.S. 2d 524 and Merchouse v. Murphy, et al., 10 A.D. 2d 761.

For the reasons stated above, I recommend that the determination of the Tax Commission in this matter be substantially in the form submitted herewith.

JAN 31 1966

SOLOMON SIES

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Hearing Officer

/s/ MARTIN SCHAPIRO

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Approved

/s/ SAUL HECKELMAN

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Approved.

SS/te (June 29, 1966)

**STATE OF NEW YORK  
STATE TAX COMMISSION**

**IN THE MATTER OF THE APPLICATION**

**OF**

**DAVID D. CONNELL**

**FOR REVISION OR REFUND OF PERSONAL  
INCOME TAXES UNDER ARTICLE 16 OF THE  
TAX LAW FOR THE YEARS 1959 AND 1961.**

David D. Connell, the taxpayer herein, having filed applications for revision or refund of personal income taxes under Article 16 of the Tax Law for the years 1959 and 1961 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, N.Y. on the 13th day of October, 1964 before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and was represented by Alson & Brown, CPA's, 99 Park Avenue, New York, N.Y. by Bernard Cooper, Esq., testimony having been taken and the matter having been duly examined and considered,

**The State Tax Commission hereby finds:**

(1) That the taxpayer, a non-resident, has been employed since 1956 by Robert Keeshan Associates, Inc., a domestic corporation having its sole offices in the City of New York; that in 1956 his duties were that of associate producer; that in 1957, his duties were that of associate producer; that on January 1, 1958, the taxpayer entered into a written agreement of employment with the aforementioned employer whereby he was employed as "producer, associate producer, writer and/or otherwise" in connection with television and/or radio programs; that in accordance with the written agreement of employment, the taxpayer performed services as a producer, director and writer for the employer in connection with a television program called "Captain Kangaroo"; that the taxpayer was assigned a separate office in the offices of the employer in New York City (Minutes of Hearing, page 15); that during the year 1958 his script writing was confined exclusively

to the offices of the employer in New York City (Minutes of Hearing, page 12); that the taxpayer did not have any set hours nor did he have any scheduled work hours with respect to the writing of scripts; that he testified as follows:

"If I could do it in two hours, I was free to go home the rest of the week". (Minutes of Hearing, page 22);

that the written agreement of employment contains no provision requiring or directing the taxpayer to perform any services on behalf of the employer at his home in New Jersey; that in 1961 the taxpayer became a Vice-President of the employer corporation.

(2) That the taxpayer on his 1959 and 1961 New York State non-resident income tax returns claimed an allocation of 78 days for each of said years for work alleged to have been performed at home as a writer consisting of writing at least one or more scripts each week for the aforementioned television program; that the 78 days alleged to have constituted work performed at home during each of the years involved herein is estimated and is based upon the statement contained in a letter written by the taxpayer to the Department of Taxation and Finance dated July 26, 1960 (Tax Commission Exhibit V) which provided, in part, as follows:

"Since I spend, on the average, six to eight hours weekday evenings and six to eight hours in the weekend, an estimate of one and one half days per week throughout the year ( $52 \times 26 = 78$ ) seemed reasonably fair to me. In a further effort to be absolutely fair, I calculated the tax on the basis of a six-day work week even though I am required at my New York office only five days."

(3) That on August 29, 1960 the Department of Taxation and Finance recomputed the tax due from the taxpayer for the year 1959 disallowing the 78 days for work alleged to have been performed at home as not constituting work performed outside the State of New York, disallowed five (5) Sundays for travel outside this State on behalf of the employer but allowed an allocation of 21 days for work actually performed by taxpayer for his employer outside the State of New York and issued a refund to the taxpayer in the sum of \$106.60 for the year 1959; that on February 10, 1961 the Department of Taxation and Finance again recomputed the tax due from the taxpayer for the

year 1959 giving him additional credit for five Sundays spent in traveling outside the State of New York in the performance of his work on behalf of the employer and issued an additional refund to the taxpayer in the sum of \$18.82; that on July 19, 1962 the Department of Taxation and Finance recomputed the tax due from the taxpayer for the year 1961 disallowing 78 days for work alleged to have been performed at home as not constituting days worked outside the State of New York; that on form IT-111.25 for the year 1961 (voucher #0953326) a refund was issued to the taxpayer in the sum of \$914.71; that the Department of Taxation and Finance found that in the year 1959 the total number of working days of the taxpayer both within and without the State of New York was 299; that the number of working days employed within the State of New York in said year was 273; that the number of working days employed outside the State of New York in said year was 26; that the total number of working days of the taxpayer within and without the State of New York in the year 1961 was 218; that the number of working days employed within the State of New York in said year was 173; that the number of days worked outside the State of New York in said year was 45.

(4) That although the taxpayer originally contended that his script writing could not have been performed at the office of the employer because of distractions and the noise level prevalent there and volume of work in connection with his duties as producer, he subsequently claimed that he was directed by his employer to perform such work at home; that in support of such contention the taxpayer submitted a letter by the employer dated August 30, 1962 to the effect that "after a series of difficulties with scripts prepared by Mr. Connell, it was discovered that the major problem was that he could not properly organize and create a script with the distractions that were constantly present in the office and that if we were to get useable scripts from Mr. Connell, it would be necessary to totally separate the function of writer from the function of producer and executive"; that the taxpayer submitted at the hearing similar letter from his employer dated October 9, 1964 with the following notifications,

1) That the difficulties with the script writing commenced "beginning in 1958"; 2) That "the situation that has existed since 1958 and still exists at this time and has existed continuously since 1958" (Taxpayer's Exhibit #1); that both of the aforesaid letters stated, "Thus, it might be said that he was directed to work at home"; that both of said letters were unsworn; that such contentions are not supported by the evidence adduced at the hearing; that no part of the taxpayer's work was required to be performed at home either pursuant to any contract or other direction of his employer but was performed by the taxpayer at his home because of greater convenience.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

**DETERMINES:**

That the income derived from work performed by the taxpayer in his home in New Jersey during the years 1959 and 1961 was attributable to services rendered within the State of New York; that the recomputations of taxes due from the taxpayer for the years 1959 and 1961 are correct; that no further recomputation, resettlement or revision of the taxes due can be made herein and that the taxpayer's applications for revision or refund filed with respect to the years 1959 and 1961 be and the same are hereby denied.

**DATED:** Albany, New York, on the 8th day of July, 1966.

**STATE TAX COMMISSION**

/s/

**JOSEPH H. MURPHY**

**President**

/s/

**IRA J. PALESTIN**

**Commissioner**

/s/

**JAMES R. MACDUFF**

**Commissioner**