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*Income Tax Determinations*

A-2

BUREAU OF LAW

MEMORANDUM

*Johnson, Robert E.*  
*Marjorie C.*

TO: Commissioners Murphy and Macduff and Conlon

FROM: Solomon Sies, Hearing Officer

SUBJECT: ROBERT E. JOHNSON and MARJORIE C. JOHNSON, his wife

Petition for Redetermination of  
Deficiency of Personal Income Taxes  
Under Article 22 of the Tax Law for  
1963

(File #3-8471659)

EDMUND and MARION MC D. BURKE, JR.

Petition for Redetermination of  
Deficiency of Personal Income Taxes  
Under Article 22 of the Tax Law for  
Year 1964

(File #2-9175451)

Separate hearings with reference to the above matters were held before me at the New York City office. The appearances and evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

Since there are similar questions of fact and law involved, common to both cases, this memorandum is being submitted to cover both. The issue involved is whether the taxpayers, non-residents, are entitled to an allocation of days worked at home.

Both taxpayers are attorneys admitted to practice law in the State of New York but are not admitted to the practice of law in the State of Connecticut where they reside. Both are employed on the legal staffs of large corporations in New York City. They both claim an allocation of income for work performed at home,, mostly on Saturdays and Sundays when the offices of the employers were closed. They claim that the work performed at home was not for their convenience but for the convenience of the employers since it would not be economically feasible to furnish ventilation or heat just for one person.

ROBERT E. JOHNSON:

This taxpayer is employed as Assistant General Counsel in the Law Department of the Railway Express Agency, Inc. at 219 East 42 Street, New York City where he is assigned an office. The taxpayer has no written agreement of employment. The office hours of all

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EDMUND and MARION MC D. BURKE, JR.

employees of the company including taxpayer are from 8:30 A.M. to 5 P.M. Mondays through Fridays. The taxpayer handles various legal matters before the Courts and various State Public Utilities Commissions including the Interstate Commerce Commission and prepares briefs and memoranda of law in connection therewith. The taxpayer performs services both within and without the State of New York whenever it is necessary for him to appear in Court or before State and Federal public utility commissions. The taxpayer on his return claimed an allocation of 42 days worked outside the State, 11 of which were performed at home; and 9 such days were Saturdays and Sundays. The taxpayer testified that he writes his briefs at home in longhand and then submits them to his secretary for a first draft. This is the procedure that he follows either in the office or when he works at home. The taxpayer further claims that work performed at home on the two week days was necessary because one-third of his time in the office was taken up with telephone calls and matters pending to management. (Minutes of Hearing, Page 15).

The work performed at home on Saturdays and Sundays the taxpayer claimed was necessitated by the fact that the office is closed on Saturdays and since the building is completely air-conditioned it would have been impossible to have performed such services at the office. The taxpayer submitted a statement from the Vice-President in charge of the Technical Services and Equipment Department of Railway Express Agency to the effect that it would not be practical nor economically feasible for the Company to make an arrangement to provide ventilation, heat or air-conditioning for the taxpayer on week-ends.

EDMUND BURKE, JR.

This taxpayer is employed on the legal staff of Texaco, Inc. at 135 East 42 Street, New York City. The taxpayer is primarily responsible for the legal problems in connection with his employer's interest in the Middle East. The Income Tax Bureau disallowed 17 days worked at home of which 14 were Saturdays and Sundays and 3 weekdays. In connection with his work, the taxpayer was required, on occasion, to travel outside the State of New York on company business. The taxpayer testified that he is in the category of "exempt employee", that he is required to work 7 days a week. The taxpayer uses the den at home as an office where he has a typewriter. His wife does the typing for him and in addition he has a dictaphone supplied by the company with a travelling case so that he could bring it back and forth from the office to his home. The taxpayer prepares reports and his expense vouchers at home. He testified that it is company practice that upon returning from a trip involving the substantial change in time that the employee of the company may stay at home to write his reports or adjust his expense account. The taxpayer claims that it

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was necessary to perform the work at home in order to catch up with the backload of his work. In addition, he claims that since the building in New York is air-conditioned the employer would have to make special arrangements for the heating or cooling of the building solely for him and that the cost to the employer would be prohibitive.

The taxpayer further contends that the decision in Oxnard v. Murphy, 19 A.D. 2d 138, aff'd. 15 N.Y. 2d 593, applies to the instant case since the criterion is the place where the work was performed. In Oxnard, the sole question was whether a non-resident co-executor of a New York estate was subject to tax upon his commissions where he did not perform any services within the State of New York.

I am of the opinion that the Oxnard case is not applicable to the instant cases; that the Saturdays and Sundays were not, in fact, actual working days (Manual of Policy, Art. 265, page 1 - 8/25/58); that taxpayers are not entitled to an allocation of income for work performed at home since such work does not constitute services rendered without the State of New York in accordance with the provisions of Section 632(c), Art. 22 of the Tax Law; that the same was primarily for the taxpayer's greater convenience in accordance with the decisions of Burke v. Bragalinni, et. al. 10 A.D. 2d 654, and Morehouse v. Murphy, 10 A.D. 2d 764.

For the reasons stated above, I recommend that the decisions of the Tax Commission in these matters be substantially in the forms submitted herewith.

DEC 21 1966 (Jan. 17, 1967)

Solomon Sies  
Hearing Officer

Martin Shapiro  
Approved

A. Hochman  
Approved

ES:HM

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STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE PETITION

OF

ROBERT S. JOHNSON and MAJORIE C. JOHNSON,  
his wife

File #3-2472659

FOR REDETERMINATION OF A DEFICIENCY OR FOR  
REFUND OF PERSONAL INCOME TAXES UNDER  
ARTICLE 22 OF THE TAX LAW FOR THE YEAR  
1963.  
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The taxpayer herein having filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the year 1963 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 20th day of September, 1966 before Solomon Sles, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer, Robert S. Johnson, appeared personally and testified and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That during the year 1962 the taxpayer, Robert S. Johnson, a resident of the State of Connecticut was and still is an attorney-at-law duly admitted to practice law in the State of New York, authorized to practice law in various U.S. District and Federal Appeals Courts and the U.S. Supreme Court and was and still is employed as Assistant General Counsel in the Law Department of Railway Express Agency, Inc. in its national headquarters at 219 East 42 Street, New York City; that the taxpayer was assigned an office therein; that the taxpayer was never admitted to practice law in the State of Connecticut; that the primary responsibility of the taxpayer was to prepare briefs and to appear in the various New York State and Federal courts and Federal and State public utility commissions in connection with litigation involving rates and other matters on behalf of his employer; that his

Justice required him to appear before such Court and agencies both within and without the State of New York; that the taxpayer's regular hours of employment with the employer company are from 8:30 A.M. to 5 P.M. Mondays through Fridays; that the offices of the employer are closed after 5 P.M. and are also closed on Saturdays and Sundays; that the Law Department of Railway Express Agency where taxpayer is employed is located on the 8th floor, has no windows and is entirely dependent on the blower system for ventilation, heating and air conditioning; that the taxpayer submitted a statement from the Vice-President in charge of the Technical Services and Equipment Department of Railway Express Agency to the effect that it would not be practical nor economically feasible for the Company to make an arrangement to provide ventilation, heat or air conditioning for the taxpayer on weekends.

(2) That the taxpayer on his 1962 New York State non-resident income tax return claimed an allocation of 41 days worked outside the State of New York, 11 of which consisted of work performed at his home in Connecticut; that of these 11 days 9 were Saturdays and Sundays and 2 were weekdays; that on May 13, 1963, the Department of Taxation & Finance issued a Statement of Audit Changes disallowing an allocation of the days of work performed at home and adjusted the taxpayer's income tax for the year 1962 accordingly and issued a notice of deficiency therefor; that the taxpayer claims that such work performed at home during the two week days was necessitated by reason of the fact it was necessary to prepare certain briefs which had to meet a deadline by reason of court dates of company management schedules and that this work could not be performed at the office because of the many interruptions; that because of the necessity of completing the work and submitting necessary briefs which could not be completed during the week, the taxpayer claims that he was compelled to perform certain work on Saturdays and Sundays at home because of the convenience of the employer; that the work performed by the taxpayer at home consisted of writing out in longhand briefs which were submitted to his secretary at the office in New York City for the preparation of drafts; that

no facilities were furnished to taxpayer at his home by his employer.

(3) That the Saturdays and Sundays worked by the taxpayer at home and which were disallowed from the allocation of days worked outside the State of New York were not, in fact, working days and were properly eliminated from the total claimed as working days outside the State.

Based upon the foregoing findings and all of the evidence presented herein,

The State Tax Commission hereby

**DECIDES:**

(A) That there was no necessary ingredient required by the nature of the services performed by the taxpayer which necessitated the state of Connecticut or the home of the taxpayer as the locus for performance; that such services were performed by the taxpayer at his home for his greater convenience and the income therefrom was attributable to services rendered within the State of New York in accordance with the provisions of section 632(e) of the Tax Law;

(B) That the statement of audit charges and notice of deficiency for the year 1963 are correct; that the same do not include any tax or other charge which could not have been lawfully demanded, and the petition of the taxpayer for redetermination of a deficiency filed by him with respect thereto is hereby denied.

DATED: Albany, New York, on the 27th day of January, 1967.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**President**

/s/

JAMES R. MACDUFF

**Commissioner**

/s/

WALTER MACLYN CONLON

**Commissioner**