

File

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Personal Income

22 *689*

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JAMES L. AND HARRIETT L. MILLER

For a Redetermination of a Deficiency
or for Refund of Personal Income Tax
under Article 22 of the Tax Law for
the Year 1964

DECISION

The taxpayers having filed a petition pursuant to Section 722 of the Tax Law for a redetermination of a deficiency determined under date of April 24, 1967, of personal income taxes under Article 22 of the Tax Law for the year 1964 and a hearing having been duly held before Vincent P. Molineaux, Hearing Officer, and the file pertaining to said assessment having been duly examined and considered,

The State Tax Commission hereby

FINDS:

(1) The sole issue raised at the hearing is the allocation to New York State of a sum of \$19,500 received allegedly as salary. It is assumed by taxpayer, and not contested by the Department, that such sum should be allocated separately from other sums received during the same year from the same employer.

(2) The taxpayer is a non-resident of the State of New York.

(3) The asserted deficiency is in the amount of \$1157.62 plus interest.

(4) The deficiency is based on the addition to income from New York sources of \$26,769.49 as follows: \$1,000, representing one-third allocation of \$3,000 salary received from Mohasco

Industries on January 1, 1964; \$19,500 representing 100% of other amounts received from Mohasco Industries from February through August 1964; \$5,925.36 representing an allocable portion of salary received from Kingston Carpeting Inc. from August through December 1964; and \$344.13 of other income allocable wholly to New York. Certain contributions were also disallowed in the determination and a conforming adjustment in the allowance of itemized deductions was made, neither of which is contested.

(5) The \$19,500 here in question was received from Mohasco Industries after the taxpayer resigned from his position with that company.

(6) The taxpayer asserts that the income in question was not for past services and refuses to come forward with any data on which an allocation based on past services could be made (see Reg. 20 NYCRR 131.18).

(7) The taxpayer asserts that the income in question was for current services as a consultant to his successor in his former position and for an unwritten agreement not to compete with his former employer. The taxpayer asserts that he received three telephone calls at his home in Connecticut for advice under this agreement. The employer stated, in a letter, that no services were actually performed under this agreement and the taxpayer's presence was not required in New York State.

Upon the foregoing findings and all the evidence in the case, the State Tax Commission hereby

DECIDES:

A. The income of \$19,500 here in dispute was attributable to employment after January 1964 by Mohasco Industries Inc.. Any services after January 1964 (if any, and even if actually performed outside the State) were not required by the employer

to be performed outside the State and so were not subject to allocation (See Reg. 20 NYCRR 131.16).

B. The allocation of the income earned in January 1964 and the allocation of the income earned after 1964 may be separately computed even though received from the same employer. The drastic change in taxpayer's duties upon retirement in January 1964 require such a separation to arrive at a fair and equitable apportionment and allocation (Tax Law Sec. 632(c); Reg. 20 NYCRR 131.21).

C. The deficiency as set forth in paragraph number three is affirmed in its entirety together with such interest, if any, as may be due pursuant to Section 684 of the Tax Law.

Dated: Albany, New York

STATE TAX COMMISSION

March 9, 1960

Norman Gelman
PRESIDENT

Robert M. H. H. H.
COMMISSIONER

Martin Kerner
COMMISSIONER