

STATE OF NEW YORK
STATE TAX COMMISSION

HEARING UNIT - File Copy
Pop. Income Tax

ART. 22 SECS. 632(a)
20 NYC RR 131.16

KEY WORDS *Occupation*
or employment;
"carried on" outside State
CROSS REFS. *"necessity";* 12
"convenience"

CASE LAW CITATIONS *Burke v.*
Diaglini (1960) 10 A D 2d

REMARKS *654*
Determination S.T.C.
Greenman 9/24/68
Breen 3/12/65

In the Matter of the Petition
of
ORLANDO P. THOMAS and
ALICE A. THOMAS, his wife,
For a Redetermination of a Deficiency or
for a Refund of Personal Income Taxes
under Article 22 of the Tax Law for the
years 1961 and 1962.

The petitioners having filed a petition for a redetermination of a deficiency of personal income taxes under Article 22 of the Tax Law for the years 1961 and 1962; and a hearing having been duly held before Vincent P. Molineaux, Esq., Hearing Officer for the State Tax Commission, at its offices at 80 Centre Street, New York, New York, on December 1, 1964; and the petitioners having appeared by Dewey, Ballantine, Bushby, Palmer and Wood, Esquires, of New York, New York (Thomas R. Moore, Esq. of Counsel), and the petitioner, Orlando P. Thomas, having been present and having testified; and the record having been duly examined and considered, the State Tax Commission hereby finds that:

1. By a notice of deficiency, dated November 4, 1963, the Department found deficiencies for the years 1961 and 1962 in the personal income taxes reported by the petitioners in their nonresident return for those years, asserting a deficiency in the amount of \$712.19 with interest in the amount of \$66.43 to a total of \$778.62 for the year 1961, and a deficiency in the amount of \$798.16 with interest of \$26.56 to a total of \$824.72 for the year 1962, both as of the date of the said notice of deficiency (November 4, 1963).

In two statements of audit changes, the Department had determined as to each year that 55 days listed as days worked at home in Connecticut were to be disallowed as days worked in carrying on the occupation outside the State for the purpose of determining the amount of income from

the salary of Orlando Thomas to be attributed to New York and to be subject to tax, under an apportionment formula employing a ratio of the days worked in the occupation in New York as a numerator and the total of all days worked in carrying on the occupation both in New York and outside the State as a denominator (pursuant to provision of Tax Law Section 632(c) and to Income Tax Regulation 131.16). Accordingly, it reduced to 272 in 1961, and to 276 in 1962, the number of the days allowed as total days worked in carrying on the occupation (both within and without the State of New York) in the respective years. The days worked in New York were not in dispute; there were 178 in 1961, and 184 in 1962; accordingly, an allocation of the annual salary for 1961 was made in the ratio of 178/272nds; and in the amount of 184/276nds for the year 1962, as the portion of the petitioner's (Orlando P. Thomas) yearly salary to be attributed to New York and to be subject to tax. These changes in the allocation formula, made by the Department resulted in the deficiencies found.

2. In their nonresident return for the year 1961, the petitioners had reported allocable salary of Orlando Thomas in the amount of \$69,050, and made an allocation of 178 New York days worked to a total of days worked (within and without New York) of 327.

For 1962, the taxpayers had reported allocable salary of Orlando Thomas in the amount of \$76,000 and made an allocation of 184 New York days out of a total of 331 days worked within and without New York.

Both these totals of 327 days for 1961 and 331 for 1962 were 55 days higher than were allowed under the notice of deficiency.

3. In their petition, the petitioners asserted that the days worked by Orlando Thomas at his home in Greenwich, Connecticut should be recognized as days worked in carrying on the occupation outside the State for purpose of allocation. There were 56 of these in 1961 and 57 in 1962, the petition stated, slightly more than the number disallowed by the Department.

4. The petitioners were nonresidents of the State of New York and resided in Greenwich, Connecticut. Petitioner, Orlando Thomas, was Executive Vice President of Sinclair Oil Corporation of 600 Fifth Avenue, New York, N.Y. where he was stationed, and where he was provided with an

office and staff for the performance of his regular duties.

5. Sinclair Oil Corporation is a large corporation whose shares are publicly held, and it is not a close corporation.

6. With his employer's approval, the petitioner did certain portions of his work, consisting of conferences with other persons, (including on a few occasions a fellow official of the corporation who also resided in Greenwich), and of private study of various business problems at his home in Connecticut on some Saturdays, Sundays and holidays, finding it necessary or advisable to work on these days, sometimes because of some emergency's arising, but more commonly because of time pressures generally. This work was not such as had to be done by the petitioner at the corporation's offices in New York, N.Y. and these offices normally were closed generally on these days, so that although the corporation's offices could be used, it was necessary to give some notice if any of the building's services, including heat and air conditioning, which were suspended on such days, was needed; and the employer's policy was that such work done on these days preferably should be done out of the office.

7. Except as stated in paragraph 6, it is found that there was no advantage to the employer in the petitioner's performing the work in Connecticut or elsewhere outside New York State rather than within New York State.

8. It is further found that the work under consideration was done in Connecticut and outside the State because petitioner's home was in Connecticut, and for his convenience.

9. In the total circumstances, there was no adequate business reason, reflecting a substantial advantage to the employer, in the work's being done outside the State, rather than within it, it is found. *for*

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

DECIDES:

A. That pursuant to provision of Tax Law Sec. 632(c), which provides that if a business or occupation is carried on "partly without this State", as determined under regulations of the State Tax Commission,

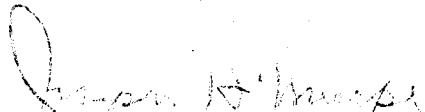
the income of a nonresident taxpayer derived from New York sources is to be determined by apportionment under such regulations, and pursuant to provision of income tax regulation Sec. 131.16 (20 NYCRR 131.16), which with reference to a corporate officer provides that allowance may be claimed for days worked outside the State only if based upon the performance of services which of necessity as distinguished from convenience - obligate the employee to out-of-State duties in the service of his employer, it is held with reference to the said days worked by the petitioner at his home in Connecticut which are under consideration, that they were properly disallowed and may not be counted in the allocation formula as days worked.

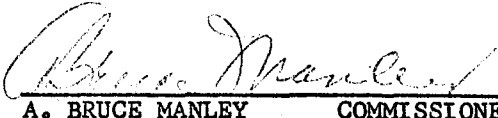
The occupation was not "carried on" outside the State on such days within the meaning intended which requires a situs of the occupation outside the State, in that as to such work the employee was not obligated to perform these services out-of-state in the service of the employer by any necessity, either absolute or practical, and there was no adequate business reason, reflecting a substantial advantage to the employer, for doing the work outside the State rather than within it.

B. Accordingly the deficiency asserted by the notice of deficiency set forth in paragraph 1 is affirmed as an assessment of such taxes as of the date thereof, and subject to further interest, and to penalties if any, as provided by Tax Law (Section 684 and succeeding sections).

Dated, Albany, New York,

May 21st 1969 .


JOSEPH H. MURPHY PRESIDENT


A. BRUCE MANLEY COMMISSIONER


MILTON A. KOERNER COMMISSIONER