

TAX INCOME TAXART. 22 SECS. 689KEY WORDS NON-RESIDENT;ALLOCATION OF  
EMPLOYMENT INCOME  
CRSTATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
RICHARD I. N. WEINGART :  
for Redetermination of a Deficiency of :  
Personal Income Taxes under Article 22 :  
of the Tax Law for the year 1962 :

CASE CITATIONS

DECISION

Richard I.-N. Weingart has filed a petition for redetermination of a deficiency of personal income taxes under Article 22 of the Tax Law for the year 1962. A hearing has been held before Lawrence A. Newman, Hearing Officer, at which time the petitioner appeared through his representative, Harry Posner, CPA, and the Income Tax Bureau was represented by Edward H. Best, Esq. of Counsel (Solomon Sies, of Counsel).

The matter has been duly examined and considered and the State Tax Commission hereby finds:

1. Richard I. N. Weingart has timely filed a non-resident personal income tax return for the year 1962. The petitioner reported that total income as it appeared on his Federal Form 1040 was \$196,805.53. Of this total, \$26,533.25 was attributed to New York sources.

Included in these totals was a salary of \$82,535.91, of which the petitioner attributed \$22,160.33 as income allocated to services rendered within New York State. The petitioner based his allocation on a fractional formula of 98 days worked in New York State, over 365 working days for the year, applied to the total salary received.

The New York itemized deduction was computed as \$8630.51 by determining the proportion that the New York income bears to total Federal income and applying this proportion to the total Federal deduction (after proper adjustments) of \$64,015.21.

2. On audit of the petitioner's tax return, the Income Tax Bureau disallowed the allocation of salary income and considered the entire salary of \$82,535.91 to be earned within the State of New York. The New York itemized deductions were recomputed and increased from \$8630.51 to \$28,268.95 based upon the increased proportion of total income attributed to New York State.

On August 17, 1964, the Bureau issued a notice of deficiency to the petitioner, based on this recomputation, in the amount of \$3182.76.

3. The petitioner entered into an employment contract in September, 1958 with Universal Controls Inc., a publicly held corporation of which the petitioner is a minority stockholder. The petitioner's address shown on the contract was 860 Fifth Avenue, New York City which was then his residence. The corporate mailing address shown was that of its president, M. Mac Schwebel, 30 Broad Street, New York City. The petitioner's present address is in Nassau, the Bahamas, British West Indies.

4. The petitioner is employed by Universal Controls, Inc., in its American Totalisator Division receiving under a contract, a fixed annual salary and one percent of the net profits of this Division of the employer. The terms of the written employment contract require the petitioner to furnish service of an advisory or consultative nature. The contract further stated that the petitioner may devote a substantial portion of his time and effort, other than in the performance of his duties to the employer provided the activities are not in competition with his employer.

5. The petitioner contends that he is available for consultation 365 days each year by his employer. The petitioner contends that he spent 98 days in the State of New York during the year 1962 while engaged in this employment and an unspecified number of days outside the State of New York and/or the United States in this employment. The petitioner contends that he is on call for consultation by telephone on a seven day per week basis, including Saturdays, Sundays and Holidays. The petitioner submitted a list of 98 days during the year 1962 which he contended he was within New York State on business for his employer.

6. The taxpayer was present within the United States and/or New York State during the year 1962 for medical attention which eventually resulted in the removal of his larynx and he now speaks with the assistance of a mechanical device. The petitioner also underwent surgery in the United States during the year 1962.

7. The petitioner has failed to submit evidence of his employment activities on behalf of his employer at locations outside New York State as to number of days or nature of activities. The petitioner has failed to submit evidence of his employment activities during the days which he contends he was present within the State of New York. The petitioner has failed to present evidence that consultations by telephone while he is residing in the Bahama Islands were not solely for the convenience of the petitioner rather than a requirement of his employment.

8. The taxpayer, Richard I. N. Weingart has failed to prove that he was required to perform services for his employer outside the State of New York, or that any consultive services performed by the taxpayer at his home outside the State of New York was for any reason except the convenience of the taxpayer.

9. The taxpayer has failed to prove or establish the total number of working days in which he performed services for his employer during the year 1962.

Based upon all the evidence presented, and the resulting findings of fact,

The State Tax Commission hereby

DECIDES:

1. The entire salary and other compensation derived by the petitioner from the terms of his employment during the year 1962 with Universal Controls, Inc., is attributable to his employment activities within the State of New York.

2. The allocation of salary compensation as claimed by the Petitioner in his non-resident personal income tax return for the year 1962 was correctly disallowed by the Income Tax Bureau and the resulting recomputation of the New York itemized deduction was proper.

3. The notice of deficiency issued against the petitioner dated August 17, 1964 in the amount of \$3182.76 as previously determined by the Income Tax Bureau, is correct and is hereby sustained.

Dated: Albany, New York this 11th day of September , 1969 .

STATE TAX COMMISSION

*Norman Gellman*

PRESIDENT

*Richard M. Mowley*

COMMISSIONER

*Martin Korman*

COMMISSIONER