

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

Francis X. & Patricia M. McDermott :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of

Personal Income Tax :

under Article 22 of the Tax Law

for the Year 1972. :

State of New York

County of Albany

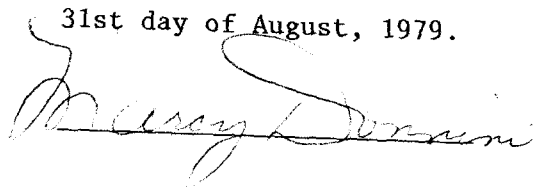
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Decision by certified mail upon Francis X. & Patricia M. McDermott, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

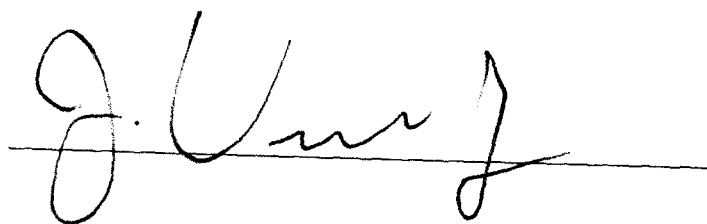
Francis X. & Patricia M. McDermott  
312 Massachusetts St.  
Westfield, NJ 07090

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
31st day of August, 1979.





STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
FRANCIS X. MC DERMOTT	:	DECISION
and	:	
PATRICIA M. MC DERMOTT	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1972.	:	
	:	

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Petitioners, Francis X. McDermott and Patricia M. McDermott, 312 Massachusetts Street, Westfield, New Jersey 07090, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1972 (File No. 13761).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 13, 1978 at 1:15 P.M. Petitioner Francis X. McDermott appeared pro se and for his wife. The Income Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the wages received by petitioner Francis X. McDermott, a nonresident, from National Fund for Graduate Nursing Education (a New York State employer), was subject to New York State personal income tax.

FINDINGS OF FACT

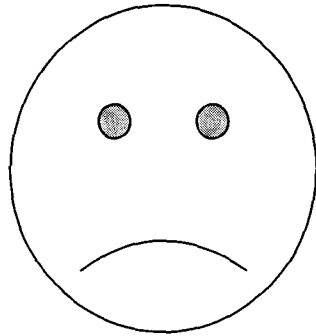
1. Petitioners, Francis X. McDermott and Patricia M. McDermott, timely filed a New York State Income Tax Nonresident Return (Form IT-203) for 1972. On it, petitioner Francis X. McDermott allocated wages received from National Fund for Graduate Nursing Education (hereinafter "National Fund") on the basis of days worked within and without New York State.

2. On November 24, 1975, the Income Tax Bureau issued a Notice of Deficiency against petitioners, asserting personal income tax of \$370.70, plus interest of \$72.59, for a total of \$443.29. Said Notice was issued on the grounds that wages of \$14,000.00 were fully taxable to petitioner Francis X. McDermott, since National Fund did not require that he perform services in New Jersey.

3. Petitioner Francis X. McDermott was Executive Director of National Fund. The nature of his work was to contact various prospective donors and to direct the business of said employer. He performed his services on a part-time daily basis during the entire year at issue. Petitioner would telephone the New York office from his law office or from his home in New Jersey, to discuss important matters with his secretary. The phone calls ranged from 5 minutes to 20 minutes each day. Petitioner contended that out of a total of 33 days worked for National Fund during 1972, he was required to be present in New York State for 12 days.

4. Petitioner Francis X. McDermott had no formal contract with National Fund. He contended that there was an oral understanding that he could schedule his time in this New York office, as well as the time he spent soliciting contributions, on his own. There was no requirement by his employer to perform services at the New York place of business, nor was Mr. McDermott required to perform services outside New York State.

**CORRECTION  
FOLLOWS**



STATE OF NEW YORK  
STATE TAX COMMISSION

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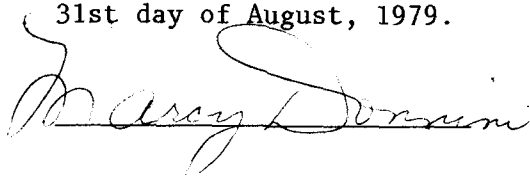
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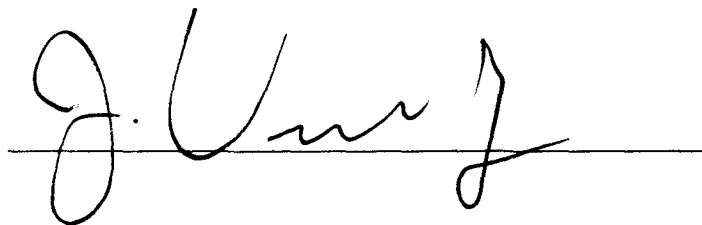
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Sworn to before me this  
31st day of August, 1979.







STATE OF NEW YORK  
STATE TAX COMMISSION  
TAX APPEALS BUREAU  
ALBANY, NEW YORK 12227

STATE TAX COMMISSION

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

August 31, 1979

Francis X. & Patricia M. McDermott  
312 Massachusetts St.  
Westfield, NJ 07090

Dear Mr. & Mrs. McDermott:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

A handwritten signature in black ink, appearing to read "John J. Sollecito", written in a cursive style.

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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1. Petitioners, Francis X. McDermott and Patricia M. McDermott, timely filed a New York State Income Tax Nonresident Return (Form IT-203) for 1972. On it, petitioner Francis X. McDermott allocated wages received from National Fund for Graduate Nursing Education (hereinafter "National Fund") on the basis of days worked within and without New York State.

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CONCLUSIONS OF LAW

A. That the days worked outside New York State during 1972 by petitioner Francis X. McDermott, a nonresident employee of National Fund for Graduate Nursing Education, were not based on the performance of services which of necessity (as distinguished from convenience) obligated him to out-of-state duties in the service of said employer, in accordance with the meaning and intent of section 632(c) of the Tax Law and 20 NYCRR 131.16. The services performed by an employee must be of such a nature that they could not have been performed within the State (Matter of Speno v. Gallman, 35 NY 2d 256); therefore, the allocation of wages based on days worked within and without New York State is denied.

B. That the petition of Francis X. McDermott and Patricia M. McDermott is denied and the Notice of Deficiency issued November 24, 1975 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

AUG 31 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER