

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jack L. Levenson :
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. :

AFFIDAVIT OF MAILING

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Jack L. Levenson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

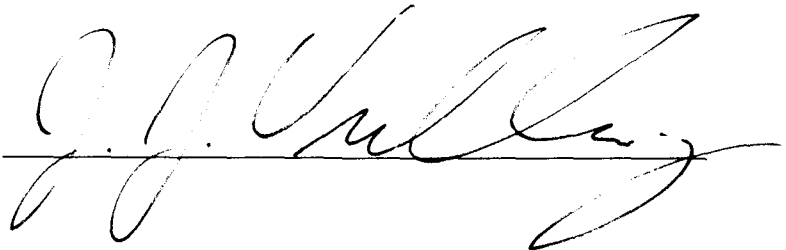
Jack L. Levenson
5151 Collins Ave.
Miami Beach, FL 33140

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
7th day of July, 1980.

Deborah A Bank



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Jack L. Levenson

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Edward C. Burfeindt the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

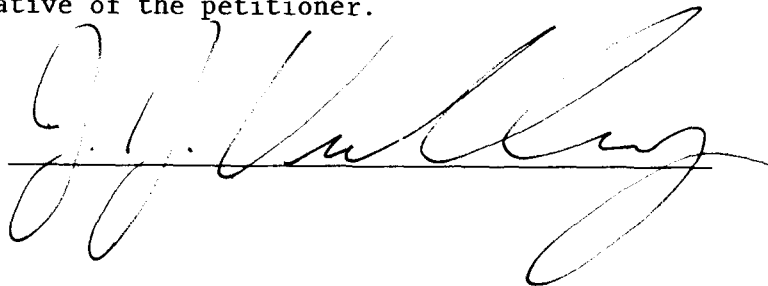
Mr. Edward C. Burfeindt
150 Broadway
New York, NY 10038

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
7th day of July, 1980.

Dorothy A. Bank



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

July 7, 1980

Jack L. Levenson
5151 Collins Ave.
Miami Beach, FL 33140

Dear Mr. Levenson:

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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Edward C. Burfeindt
150 Broadway
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JACK L. LEVENSON : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article :
22 of the Tax Law for the Year 1972. :

Petitioner, Jack L. Levenson, 5151 Collins Avenue, Miami Beach, Florida 33140, 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. 14179).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 15, 1977 at 10:45 A.M. Petitioner appeared by Edward C. Burfeindt, Esq. The Audit Division appeared by Peter Crotty, Esq. (James Morris, Esq., of counsel).

ISSUE

Whether the days on which petitioner worked at his home in Miami Beach, Florida during 1972 constituted days worked outside New York State for purposes of income allocation.

FINDINGS OF FACT

1. Petitioner, Jack L. Levenson, filed a New York State Income Tax Non-resident Return for 1972 on which he allocated salary income by multiplying the Federal amount of salary income (\$92,943.35) by the number of days claimed to have been worked in New York State (45) over the total number of days claimed to have been worked in the year (235) for a New York State amount of \$17,797.72.

2. On December 22, 1975, the Income Tax Bureau issued a Notice of Deficiency against petitioner, imposing a deficiency in tax of \$4,747.21, plus interest. The deficiency was based on the disallowance of 83 out of the 190 days claimed to have been worked outside New York State. The 83 days disallowed represented days worked at home by petitioner in Florida during the period August 21, 1972 to December 31, 1972. It was contended by the Income Tax Bureau that said days worked at home in Florida were worked there for petitioner's convenience and, therefore, could not be claimed as days worked outside New York State (20 NYCPR 131.16).

3. Petitioner, Jack L. Levenson, was a nonresident nondomiciliary of New York State during the entire 1972 tax year, residing solely in the State of Florida. Throughout this period, petitioner's employer, Target Sportswear, Inc. ("Sportswear"), had its main offices in New York State.

4. Petitioner performed services as an employee for Sportswear within and without New York State during the period January 1, 1972 to August 18, 1972.

5. Petitioner's employment status with Sportswear changed from an employee to a consultant on August 21, 1972. His consultant activities involved the observation of Florida clothing styles and the occasional forwarding to Sportswear of sketches and reports which were then incorporated into the design of Sportswear's fall and spring lines.

6. Petitioner's consultant activities were performed solely and exclusively within the State of Florida.

CONCLUSIONS OF LAW

A. That petitioner, Jack L. Levenson, had two separate and distinct periods of employment with Sportswear. The first period, from January 1, 1972 to August 18, 1972, involved the performance of services as an employee both within and without

New York; while the second period, covering the balance of the year, involved the performance of services as a consultant entirely outside New York.

B. That 20 NYCRR 131.4(b) provides in pertinent part that:

Compensation for personal services rendered by a non-resident individual wholly without the State is not included in his New York adjusted gross income, regardless of the fact that payment may be made from a point within the State or that the employer is a resident individual, partnership or corporation.

C. That only when some work is performed within New York may some or all of the income be taxed in New York, and only then should it be determined if work was performed for the employer's necessity (Matter of Hayes v. State Tax Commission, 61 A.D.2d 62).

D. That compensation earned by petitioner, Jack L. Levenson, as a consultant during the period August 21, 1972 to December 31, 1972 does not constitute New York source income within the meaning and intent of 20 NYCRR 131.4(b).

E. That the petition of Jack L. Levenson is granted and the Notice of Deficiency issued on December 22, 1975 is cancelled.

DATED: Albany, New York

JUL 07 1980

STATE TAX COMMISSION
James H. Tully

PRESIDENT
Samuel D. L...

COMMISSIONER

COMMISSIONER

I DISSENT: *Francis Q. Kolmy*

COMMISSIONER