

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Leigh J. & Florence J. Bair :

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 Years 1970 - 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 20th day of February, 1981, he served the within notice of Decision by certified mail upon Leigh J. & Florence J. Bair, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leigh J. & Florence J. Bair
1688 Hibiscus Dr.
Sanibel, FL 33957

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
20th day of February, 1981.

Carrie A. Hagellund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Leigh J. & Florence J. Bair :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
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for the Years 1970 - 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 20th day of February, 1981, he served the within notice of Decision by certified mail upon Stuart R. Shamberg 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. Stuart R. Shamberg
6 So. Moger Ave.
Mt. Kisco, NY 10549

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
20th day of February, 1981.

Cornelia Q. Haglund

J. Vredenburg

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

February 20, 1981

Leigh J. & Florence J. Bair
1688 Hibiscus Dr.
Sanibel, FL 33957

Dear Mr. & Mrs. Bair:

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
Stuart R. Shamberg
6 So. Moger Ave.
Mt. Kisco, NY 10549
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
LEIGH J. BAIR and FLORENCE J. BAIR	:	DECISION
	:	
for Redetermination of Deficiencies or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1970, 1971 and 1972.	:	

Petitioners, Leigh J. Bair and Florence J. Bair, 1688 Hibiscus Drive, Sanibel, Florida 33957, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1970, 1971 and 1972 (File Nos. 15946 and 15611).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 1, 1977 at 3:15 P.M. Petitioners appeared by Stuart R. Shamberg, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether days worked by petitioner Leigh J. Bair at his home in Florida were allocable as days worked without New York State for 1970, 1971 and 1972.

FINDINGS OF FACT

1. Petitioners, Leigh J. Bair and Florence J. Bair, timely filed nonresident income tax returns for 1970, 1971 and 1972.
2. On February 25, 1974, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency asserting additional income taxes against petitioners as follows:

<u>YEAR</u>	<u>TAX DEFICIENCY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1970	\$1,804.98	\$309.81	\$2,114.79
1971	<u>3,742.37</u>	<u>417.80</u>	<u>4,160.17</u>
TOTAL	\$5,547.35	\$727.61	\$6,274.96

3. On July 29, 1974, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency asserting additional income taxes for 1972 against petitioners. The tax deficiency of \$1,632.04, plus interest of \$154.42, was reduced by the overpayment of tax on the return of \$33.00, for a net allegedly due of \$1,753.46. The statement of audit changes indicate that since no basis was found for an allocation of income for personal service compensation received for services performed from Leigh J. Bair's home, his entire income had been held taxable to New York State. The audit statements indicate "...since it appears that there is no reason why these personal services could not have been performed from your office within New York State."

4. On April 23, 1974, petitioners, Leigh J. Bair and Florence J. Bair, filed a petition for redetermination of the deficiency in income tax asserted against them for 1970 and 1971. On September 20, 1974, the petitioners filed a petition for redetermination of the deficiency in income tax asserted against them for 1972.

5. During the 1970, 1971 and 1972 tax years, petitioners, Leigh J. Bair and Florence J. Bair, were nonresidents of New York State.

6. Petitioner Leigh J. Bair was engaged in the business of soliciting sales of group-life pension plans, and in the servicing of the purchasers of such plans. He received both salary and commissions from the Bair Griffin Corporation, with offices in New York City. Federal and New York State income taxes were withheld from his compensation. He had no office other than his home in Sanibel, Florida, where he spent all of his time in 1970, 1971 and 1972.

7. Petitioner Leigh J. Bair had no personal office in the New York office of the employer corporation.

8. All the services performed by petitioner Leigh J. Bair for the Bair Griffin Corporation were performed in Florida. No services were performed in New York State.

CONCLUSIONS OF LAW

A. That the income for personal services by a nonresident performed outside New York State is allocable for New York State income tax purposes, only where the nonresident has an office within New York State or performs services both within and without the State. Here neither precondition exists. There is no taxable "source within the State" (1919 Report of Atty. General 301). There can be no allocation:

"In Matter of Oxnard v. Murphy, 19 A.D.2d 138, 140, 241 NYS2d 333, 335, aff'd. 15 NY2d 593, 255 NYS2d 260, 203 Ne2d 648, we construed the applicable statutory language [Tax Law, §632 subd. (b), par (1)] as relating source of income to 'the work done, rather than the person paying for it'. (See 20 NYCRR chapter II, Taxation and Finance, §131.4(b)). Linsley v. Gallman, 38 A.D.2d 367, 329 NYS2d 486, 489.

B. That there being no taxable source of income within the State, the application of the convenience doctrine was neither proper nor appropriate.

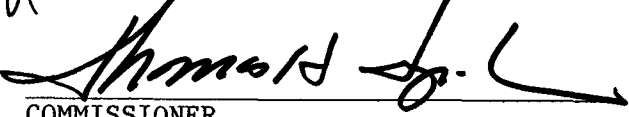
C. That the petitions of Leigh J. Bair and Florence J. Bair, his wife, are granted and the notices of deficiency dated February 25, 1974 and July 29, 1974 are cancelled.

DATED: Albany, New York

FEB 20 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER