

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John & Kathleen Carroll :
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 :
1968 - 1971. :

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 27th day of November, 1981, he served the within notice of Decision by certified mail upon John & Kathleen Carroll, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

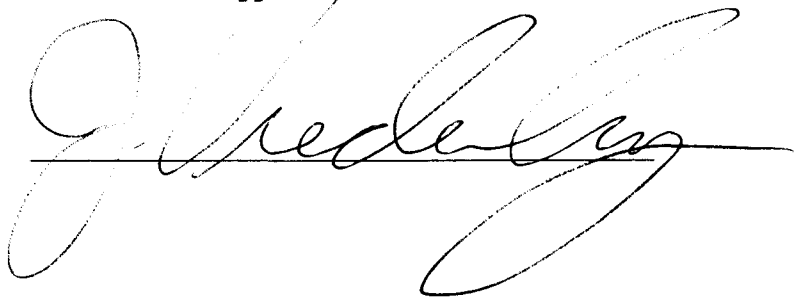
John & Kathleen Carroll
484 Weymouth Dr.
Wyckoff, NJ 07481

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
27th day of November, 1981.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
John & Kathleen Carroll :
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 Years :
1968 - 1971.

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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Alvin R. Cowan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alvin R. Cowan
424 Madison Ave.
New York, NY 10017

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
27th day of November, 1981.

Barrie A. Haglund

J. Vredenburg

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

November 27, 1981

John & Kathleen Carroll
484 Weymouth Dr.
Wyckoff, NJ 07481

Dear Mr. & Mrs. Carroll:

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
Alvin R. Cowan
424 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOHN CARROLL and KATHLEEN CARROLL	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1968, 1969,	:	
1970 and 1971.	:	

Petitioners, John Carroll and Kathleen Carroll, 484 Weymouth Drive, Wyckoff, New Jersey 07481, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1968, 1969, 1970 and 1971 (File No. 21035).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 13, 1978 and continued to conclusion on September 19, 1978. Petitioners appeared by Alvin R. Cowan, Esq. The Audit Division appeared by Peter Crotty, Esq. (Barry M. Bresler and Francis Cosgrove, Esqs., of counsel, at the hearing on July 13th, and Paul A. Lefebvre, Esq., of counsel, at the hearing on September 19th).

ISSUE

Whether petitioner, John Carroll, is entitled to allocate his income based on a percentage determined by placing the volume of business transacted within New York over the total volume of business transacted everywhere.

FINDINGS OF FACT

1. Petitioners, John Carroll and Kathleen Carroll, timely filed New York State income tax nonresident returns for the years 1968, 1969, 1970 and 1971.

On said returns, petitioners allocated business income between New York and non-New York sources.

2. Both petitioners executed a waiver extending the statute of limitations for assessment for the years 1968 and 1969 to April 15, 1974.

3. On December 28, 1973, the Income Tax Bureau issued a Notice of Deficiency, together with an explanatory Statement of Audit Changes, against petitioners for the years 1968, 1969, 1970 and 1971, imposing \$9,002.46 in personal income tax plus interest. The deficiency is based on the disallowance of the allocation of business income to sources outside New York State. Petitioners timely filed a petition for redetermination of the deficiency.

4. During the years 1968 through 1971, petitioner John Carroll was a nonresident traveling salesman for the Wofac Corporation (hereinafter "Wofac"), 21 East Euclid Avenue, Haddonfield, New Jersey. His primary function during said years was to sell the consulting services of Wofac to large industrial clients.

5. Petitioner John Carroll maintained an office at 10 East 49th Street, New York, New York, in the name of Science Management, Inc., the parent company of Wofac. During the years at issue, he performed services for Wofac at the New York City office, at Wofac's main office in Haddonfield, New Jersey, at an office maintained in his residence in Wyckoff, New Jersey, and also at other locations outside New York State. No evidence was adduced at the hearings held herein as to the total number of days worked and the number of days worked outside New York State.

6. Petitioner John Carroll received a minimum draw of \$20,000.00 per year plus commissions. The draw was guaranteed and was not offset or reduced by any commissions earned by him. The commissions were based on a percentage of Wofac

billings collected from clients. According to his contract, Mr. Carroll was to be paid 6% for booking new business; 4% for booking repeat business; 2½% for sales made in his territory where the services were to be performed outside the territory; and 2½% for sales made by others outside his territory for services performed in his territory. Mr. Carroll's territory consisted of New York City, Long Island, Westchester County and Rockland County, all of which are in New York State. He was not to receive commissions for billings made to clients for services performed by the three owners of Wofac. If Wofac appointed Mr. Carroll a "corporate coordinator" for a client, the commission was to be 1% on services performed outside his territory. (The commission schedule rates were apparently increased during the years at issue).

7. Petitioners contended that the compensation received from Wofac represented earnings of a salesman and should therefore be allocated based on the volume of business transacted by him in New York placed over the total volume of business transacted by him everywhere (20 NYCRR 131.15).

CONCLUSIONS OF LAW

A. That if the commissions for sales made or other compensation for services performed by a nonresident traveling salesman, agent, or other employee depend directly on the volume of business transacted by him, he may allocate his income to New York based on the proportion that the volume of business transacted by him in New York bears to the total volume of business transacted by him everywhere (20 NYCRR 131.15).

B. That the income received by petitioner John Carroll did not depend directly on the volume of business transacted by him. Accordingly, said income may not be allocated under 20 NYCRR 131.15 (See: Dalenz v. State Tax Commission, 9 A.D. 2d 599 [1959]).

C. That the compensation received by petitioner John Carroll could properly be allocated to sources within and without New York on the basis of days worked within and without the State (20 NYCRR 131.16); however, petitioners have failed to sustain the burden of proof required to show what portion of the days John Carroll worked were worked outside New York. Therefore, all compensation received by petitioner from Wofac is considered New York source income pursuant to section 632(b) of the Tax Law.

D. That the petition of John Carroll and Kathleen Carroll is denied and the Notice of Deficiency issued December 28, 1973 is sustained.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER