

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of

Hilary & Janet Smith :

: 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 :  
1973 & 1974.

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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 19th day of June, 1981, he served the within notice of Decision by certified mail upon Hilary & Janet Smith, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hilary & Janet Smith  
334 Lake Ave.  
Greenwich, CT 06831

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  
19th day of June, 1981.

*Bonnie R. Hegeland*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Hilary & Janet Smith :

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of a Determination or a Refund of Personal Income  
Tax under Article 22 of the Tax Law for the Years :  
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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 19th day of June, 1981, he served the within notice of Decision by certified mail upon Theodore Q. Childs 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. Theodore Q. Childs  
Farber & Childs  
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  
19th day of June, 1981.

*Annice A. Hagelund*

*J. Vredenburg*

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

June 19, 1981

Hilary & Janet Smith  
334 Lake Ave.  
Greenwich, CT 06831

Dear Mr. & Mrs. Smith:

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  
Theodore Q. Childs  
Farber & Childs  
150 Broadway  
New York, NY 10038  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
HILARY SMITH and JANET SMITH	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1973 and 1974.	:	

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Petitioners, Hilary Smith and Janet Smith, 334 Lake Street, Greenwich, Connecticut 06831, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973 and 1974 (File Nos. 19556 and 25376).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 18, 1980 at 10:45 A.M. Petitioners, Hilary Smith and Janet Smith, appeared by Farber & Childs, Esqs. (Theodore Q. Childs, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the days on which petitioner Hilary Smith worked at his home in Greenwich, Connecticut, constituted days worked outside of New York for purposes of income allocation.

II. Whether the Audit Division's failure to file an answer for 1974 should result in a cancellation of the Notice of Deficiency.

FINDINGS OF FACT

1. Petitioners, Hilary Smith and Janet Smith, filed New York State Income tax nonresident returns for 1973 and 1974. On said returns, petitioner Hilary

Smith allocated his income on the basis of days worked within and without New York State.

2. On November 23, 1976, petitioners signed a Consent Extending Period of Limitation for Assessment for the year 1973 to April 15, 1978.

3. On April 11, 1977, the Audit Division issued a Notice of Deficiency against petitioners for 1973, asserting personal income tax of \$2,305.42, plus interest of \$516.81, for a total due of \$2,822.23. The Notice was issued on the basis that income earned by petitioner Hilary Smith for days worked at his home in Greenwich, Connecticut, was not allocable to sources outside New York, but rather such income was attributable to New York State.

4. On April 24, 1978, the Audit Division issued a Notice of Deficiency against the petitioners for 1974, asserting personal income tax of \$1,994.81, plus interest of \$512.86, for a total due of \$2,507.67. The Notice was issued on the basis that income earned by petitioner Hilary Smith for days worked at his home in Greenwich, Connecticut, was not allocable to sources outside New York, but rather such income was attributable to New York State.

5. Petitioner Hilary Smith, for 1973, was employed in the New York offices of Goldman, Sachs and Co. (hereinafter "company"), as an institutional security analyst. Petitioner continued in the employ of company through May 31, 1974. From June 1, 1974 through December 31, 1974 petitioner was employed by E. F. Hutton & Co., Inc. (hereinafter "corporation"). Each of these employers provided him with an office.

6. Petitioner Hilary Smith's duties and services for both the company and corporation were similar, which required, in part, travel within and without New York to visit companies and institutional clients of his employers.

Petitioner, prior to taking business trips, did extensive research and preparation to familiarize himself with all aspects of the companies and institutional clients he was to visit. Upon return from clients' office, he was required to submit extensive written reports of his findings and analyses to his employers within twenty four (24) hours thereafter. The deadline imposed for submission of the required written reports was a condition imposed pursuant to his oral employment agreements with his employers which he argued contemplated that he would be required to work at home in order to comply with the imposed time limitation.

7. Petitioner's research and preparation of the detailed reports required an environment free of disturbance and interruption. Petitioner contended that the necessary environment was unavailable at the offices provided him by his employers because of the constant interruptions and disturbances. He further contended that the only place conducive to preparing the detailed reports was at the office he maintained in his home.

8. The Audit Division failed to file an answer for the year 1974. The petitioners at the hearing, for the first time, raised as an affirmative defense that such failure should result in the cancellation of tax for 1974.

#### CONCLUSIONS OF LAW

A. That days worked by petitioner Hilary Smith at his home in Greenwich, Connecticut for 1973 and 1974, were not days worked without New York State for income allocation purposes. That the services performed at his out-of-state home were for his convenience and not for the necessity of his employer. That the nature of his work was such that it could have been undertaken at the employers' New York offices (Matter of Speno v. Gallman, 35 N.Y.2d 256; Matter of Gross v. State Tax Commission, 62 A.D.2d 1117).

B. That the Audit Division's failure to file an answer does not result in a cancellation of the Notice of Deficiency. That the requirement of 20 NYCRR 601.6(a)(1) that the Law Bureau of the Department of Taxation and Finance file an answer "within 60 days" from a specified date should not be regarded as mandatory but is directory only (Matter of Santoro v. State Tax Commission, Albany County Special Term, Conway, J., January 4, 1979; Matter of Jay S. and Rita T. Hamelburg v. State Tax Commission, Albany County Special Term, Prior, Jr., December 6, 1979).

C. That the Notice of Deficiency issued on April 24, 1978 for the year 1974 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JUN 19 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER