

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Morton D. & Gloria Davis :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under Article :
22 of the Tax Law and New York City Nonresident :
Earnings Tax under Chapter 46, Title U of the :
Administrative Code of the City of New York for :
the Year 1979. :
:

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 3rd day of December, 1982, he served the within notice of Decision by certified mail upon Morton D. & Gloria Davis, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

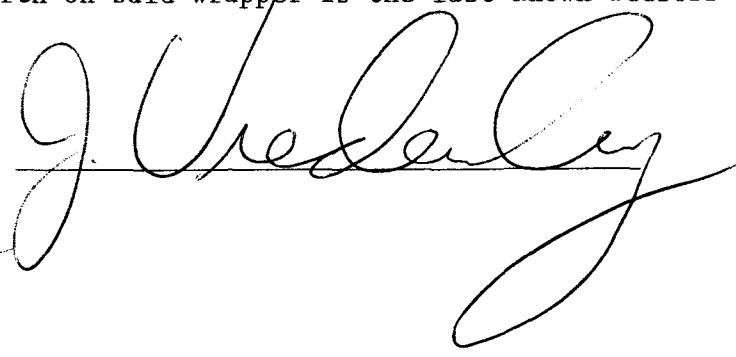
Morton D. & Gloria Davis
25 Brinkerhoff Ave.
Teaneck, NJ 07666

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
3rd day of December, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 3, 1982

Morton D. & Gloria Davis
25 Brinkerhoff Ave.
Teaneck, NJ 07666

Dear Mr. & Mrs. Davis:

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 & 1312 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MORTON D. DAVIS and GLORIA DAVIS	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Year 1979.	:	

Petitioners, Morton D. Davis and Gloria Davis, 25 Brinkerhoff Avenue, Teaneck, New Jersey 07666, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1979 (File No. 32973).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 21, 1982 at 1:15 P.M. Petitioner Morton D. Davis appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (James F. Morris, Esq., of counsel).

ISSUE

Whether days worked at petitioner Morton D. Davis' New Jersey home properly constituted days worked without the State of New York for salary allocation purposes.

FINDINGS OF FACT

1. Petitioners, Morton D. Davis and Gloria Davis, timely filed a combined 1979 New York State Income Tax Nonresident Return. Additionally, Morton D.

Davis (hereinafter petitioner) timely filed a 1979 Nonresident Earnings Tax Return for the City of New York. On each of said returns, petitioner allocated a portion of his salary income to sources without the City and State of New York. Pursuant to petitioner's computed allocation schedule, forty four (44) days were claimed as having been worked without New York.

2. Subsequent to the filing of said returns the Audit Division issued a Voucher for Income Tax Refund whereon petitioner's claimed allocation was disallowed in full for both New York State and New York City purposes on the basis that "Section 131.16 of the New York State Regulations states, any allowance claimed for days worked outside of the State must be based upon the performance of services which of necessity as distinguished from convenience obligate the employee to out-of-state duties in the service of his employer." Accordingly, petitioner's claimed total New York State and New York City refund of \$819.71 was reduced to \$99.67.

3. On December 1, 1980 petitioners filed a Claim for Credit or Refund of Personal Income Tax. Said claim requested a refund of \$720.04, such amount representing the disallowed portion of the total refund claimed on their return.

4. On January 21, 1981 the Audit Division issued a notice to petitioners advising them that their claim was disallowed in full on the grounds that "Days worked at home cannot be considered as days worked outside New York State. You have indicated that days worked at home were for your convenience rather than out of necessity to your employer. Therefore, these days would properly be included as days worked within New York State." Subsequently, on March 30, 1981, a formal Notice of Disallowance was issued to petitioners.

5. During the year at issue, petitioner was a tenured professor of mathematics at the City College of The City University of New York. As such, he contended that research was an essential part of his duties and that "scholarly work", such as writing articles for journals and books, was required by his employer.

6. The mathematics department was housed in a "hut" in the college complex located at 138th Street and Convent Avenue, Manhattan. The neighborhood where the college was situated was a high crime area. The "hut", where petitioner occupied a shared office, was a thin-walled, insecure structure which had been subject to periodic break-ins. There was constant noise from without and the atmosphere made research difficult.

7. During the year at issue, petitioner maintained a four (4) day teaching schedule. The fifth workday each week was spent by petitioner at his New Jersey residence doing "scholarly work" such as writing articles and conducting research. All forty four (44) days claimed by petitioner as having been worked without New York were days he spent at his New Jersey home engaged in "scholarly work".

8. Petitioner has written two (2) books and several articles which were published in trade journals. The City College did not become the recipient of, or directly benefit from petitioner's writings.

9. Although petitioner claimed that the faculty handbook of the City College required that there be scholarly achievement, review of the record shows that said handbook merely lists scholarly or professional achievement as one of three standards for promotion.

10. Since petitioner was tenured, he could not be removed from his position except for cause. Failure to do "scholarly work" was not considered cause.

11. Although petitioner testified that his "scholarly work" could not be done at The City College due to the aforesated adverse conditions, further testimony disclosed that he worked at his home since it "was much more convenient" and that "the university does not require you to work at home".

CONCLUSIONS OF LAW

A. That any allowance claimed for days worked outside of the State must be based upon the performance of services which of necessity -- as distinguished from convenience -- obligate the employee to out-of-state duties in the service of his employer (20 NYCRR 131.16).

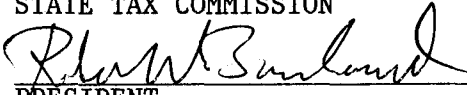
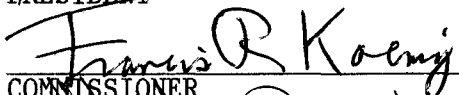
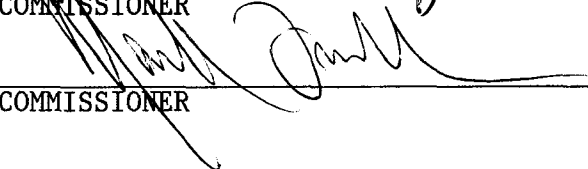
B. That the "scholarly work" performed by petitioner at his New Jersey residence was not performed in the service of his employer since said work was neither required by, nor for the benefit of his employer. Furthermore, such work was performed by petitioner at his New Jersey residence for his own convenience. Accordingly, petitioner may not allocate the income derived from those days which he worked at his residence to sources without New York State pursuant to section 632(c) of the Tax Law and 20 NYCRR 131.16.

C. That similarly, petitioner may not allocate the income derived from those days which he worked at his New Jersey residence to sources without New York City.

D. That the petition of Morton D. Davis and Gloria Davis is denied and the formal Notice of Disallowance dated March 30, 1981 is hereby sustained.

DATED: Albany, New York

DEC 03 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER