

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

David & Elizabeth Habif

: 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.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon David & Elizabeth Habif, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David & Elizabeth Habif
32 Grandview Terrace
Tenafly, NJ 07670

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
9th day of April, 1982.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
David & Elizabeth Habif :

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.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Harry Auslander the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry Auslander
4400 Hillcrest Dr.
Hollywood, FL 33021

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
9th day of April, 1982.

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

April 9, 1982

David & Elizabeth Habif
32 Grandview Terrace
Tenafly, NJ 07670

Dear Mr. & Mrs. Habif:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Harry Auslander
4400 Hillcrest Dr.
Hollywood, FL 33021
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DAVID V. HABIF AND ELIZABETH HABIF	:	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.	:	

Petitioners, David V. Habif and Elizabeth Habif, 32 Grandview Terrace, Tenafly, New Jersey 07670, 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 1973 and 1974. (File No. 20285).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 29, 1981 at 1:15 P.M. Petitioner David V. Habif appeared with Harry Auslander, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the Audit Division issued a Notice of Deficiency asserting additional tax due for the year 1973.

II. Whether days worked at home by petitioner David V. Habif can be considered as days worked outside New York State for income allocation purposes.

FINDINGS OF FACT

1. Petitioners, David V. Habif and Elizabeth Habif, timely filed joint New York State nonresident income tax returns for the years 1973 and 1974. Petitioner Elizabeth Habif is involved in these proceedings due solely to the

filing of joint returns and, accordingly, the use of the term petitioner hereinafter will refer only to David V. Habif.

2. During the years at issue petitioner received a salary from Columbia University which he allocated to New York State sources based on a percentage which was determined by placing the number of days worked within the State over the total number of working days. For 1973 petitioner received a salary of \$51,563.73, of which \$21,918.53 was apportioned to New York State ($139/327 \times \$51,563.73$). Petitioner's 1974 salary amounted to \$72,637.30, with \$42,278.06 of said salary being allocated to New York ($188/323 \times \$72,637.30$).

3. Petitioner's 1973 return reported total tax withheld from wages of \$5,019.96, total New York tax of \$950.03 and a refund of \$4,069.93. Said refund was processed by the Audit Division without examination of the return. The 1974 return filed by petitioner claimed a refund of \$3,308.28, however, said claim for refund was audited and reduced before being processed by the Audit Division.

4. On September 10, 1975 the Audit Division issued to petitioner a Statement of Refund Adjustment for the years 1973 and 1974. Said Statement of Refund Adjustment determined an additional tax due of \$784.31 for 1973 and reduced the refund for the year 1974 from a claimed \$3,308.28 to an allowed \$1,634.92. The net overpayment of \$850.61 ($\$1,634.92 - \784.31) plus interest was refunded to petitioner on February 4, 1977.

5. The Audit Division did not issue a Notice of Deficiency to petitioner for the year 1973 setting forth a deficiency in tax of \$784.31 as shown on the aforementioned Statement of Refund Adjustment.

6. On September 26, 1977 the Audit Division issued to petitioner a formal notice of disallowance of his claim for refund for the taxable year 1974¹. Said notice of disallowance was based on the Statement of Refund Adjustment dated September 10, 1975 wherein the Audit Division revised petitioner's allocation of wage income by disallowing all days worked at home as days worked outside New York State. Those Saturdays, Sundays and holidays worked at home by petitioner and claimed as a day worked outside New York were considered as nonworking days, while days worked at home during the normal work week were considered as days worked in New York.

7. During 1974 petitioner, a physician, was employed solely by Columbia University, College of Physicians & Surgeons. His duties included teaching, patient care and research. Dr. Habif was provided with a private practice office by the University at the Columbia Presbyterian Medical Center. Said office was usually shared by one or two other doctors and consisted of a consultation room, examining room, secretarial office and doctors room for writing reports and insurance forms. Because of the limitations of space at the private practice office, it was necessary for petitioner to maintain an office in his home for the preparation of lectures, scientific articles and research. Said office consisted of an 8x10 room where petitioner kept his scientific books, journals, reprints, records and photographic material.

¹ The notice of disallowance dated September 26, 1977 indicated that the \$3,308.28 refund as claimed on petitioner's return was disallowed in full. It is presumed that the denial of the claim in full represents a clerical error since the Statement of Refund Adjustment dated September 10, 1975 granted a reduced refund of \$1,634.92.

CONCLUSIONS OF LAW

A. That the failure of the Audit Division to issue a Notice of Deficiency to petitioner for the year 1973 within the three year period provided for by section 683(a) of the Tax Law precludes the assessment of any tax for that year, and, accordingly, petitioner's 1974 refund can not be reduced.

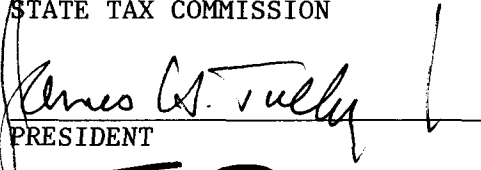
B. That the services rendered by petitioner at his home in New Jersey for Columbia University during 1974 were performed there by reason of his own convenience and not for the employer's necessity. Accordingly, the days worked at home by petitioner cannot be considered as days worked outside New York State for income allocation purposes within the meaning and intent of section 632(c) of the Tax Law and 20 NYCRR 131.16 (Page v. State Tax Commission, 46 A.D.2d 341, Simms v. Procaccino, 47 A.D.2d 149 and Wheeler v. State Tax Commission, 72 A.D.2d 878).


C. That the petition of David V. Habif and Elizabeth Habif is granted to the extent indicated in Conclusion of Law "A", supra, and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER