

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Marvin Kitman

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 :  
1971-1974. :

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 2nd day of April, 1982, she served the within notice of Decision by certified mail upon Marvin Kitman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Marvin Kitman  
147 Crescent Ave.  
Leonia, NJ 07605

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  
2nd day of April, 1982.

*Connie C. Hagelund*

*Kathy Pfaffenbach*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
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Marvin Kitman :

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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 2nd day of April, 1982, she served the within notice of Decision by certified mail upon Terri S. Feinstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Terri S. Feinstein  
Kleinberg, Kaplan, Wolff & Cohen  
551 Fifth 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  
2nd day of April, 1982.

Connie A. Hagelund

Kathy Pfoffenbach

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

April 2, 1982

Marvin Kitman  
147 Crescent Ave.  
Leonia, NJ 07605

Dear Mr. Kitman:

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  
Terri S. Feinstein  
Kleinberg, Kaplan, Wolff & Cohen  
551 Fifth Ave.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
MARVIN KITMAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1971 through 1974.	:	

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Petitioner, Marvin Kitman, 147 Crescent Avenue, Leonia, New Jersey 07605, 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 1971 through 1974 (File No. 20568).

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 28, 1981 at 1:15 P.M. Petitioner, Marvin Kitman, appeared with Kleinberg, Kaplan, Wolff & Cohen, P.C. (Terri S. Feinstein, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUE

Whether days worked at home by petitioner for Newsday, Inc. during the years 1971 through 1974 are properly considered as days worked outside New York State for income allocation purposes.

#### FINDINGS OF FACT

1. Petitioner, Marvin Kitman, together with his wife, Carol Kitman, timely filed joint New York State nonresident income tax returns for the years 1971 and 1972. For the years 1973 and 1974 the Kitman's timely filed separate nonresident income tax returns on combined forms IT-209.

2. During the years at issue petitioner was employed as a columnist by Newsday, Inc., a Long Island daily newspaper with its principal office at 550 Stewart Avenue, Garden City, New York. Petitioner allocated the wages he received from Newsday, Inc. to New York State sources based on a percentage which was determined by placing the number of days worked within New York over the total number of working days.

3. On January 26, 1975 petitioner signed a consent extending the period of limitation upon assessment of personal income tax for the years 1971 and 1972 until one year after close of proceedings now pending for the tax year 1970. An identically worded consent was also signed by petitioner for the years 1973 and 1974 on July 20, 1976.

4. On September 26, 1977, the Audit Division issued to petitioner a Notice of Deficiency, asserting that for the years 1971 through 1974 additional personal income tax of \$4,122.69 was due together with interest. A typewritten statement at the bottom of the Notice of Deficiency indicated that "The 1973 and 1974 overpayment of \$9.14 and \$12.00 respectively plus interest of \$4.86 totaling \$26.00 due your wife will be applied against this deficiency..."

5. The aforementioned Notice of Deficiency was based on an explanatory Statement of Audit Changes, originally dated May 19, 1977, wherein petitioner's allocation of wage income received from Newsday, Inc., based on days worked within and without the State, was disallowed in full. Said disallowance was "...based on final decision of the Tax Commission dated September 28, 1976, concerning days worked at home".

6. Prior to his employment with Newsday, Inc. petitioner was a well-known free lance writer and journalist who worked out of his home. In December 1969,

petitioner accepted full-time employment with Newsday, Inc. as the TV critic. He was responsible for submitting approximately 5 columns per week for publication.

7. As a TV critic petitioner was required to report on every aspect of television programming. In order to perform these duties it was necessary for petitioner to watch many hours of television, often from 6 or 7 A.M. to after midnight. Petitioner performed the majority of his services for Newsday, Inc. at his personal residence located in Leonia, New Jersey. It was mutually beneficial and satisfactory to both Mr. Kitman and Newsday, Inc. to have petitioner work at home since Mr. Kitman felt that he could not write creatively in a sterile office atmosphere, not to mention the demanding hours involved, and Newsday, Inc. felt that to have someone watching four televisions all day long in a busy newsroom would have an extremely disruptive effect on the office.

8. Newsday, Inc. purchased and installed in petitioner's home four television sets, a special antenna to improve reception, a "Quip" machine which allowed petitioner to transmit his columns to Newsday, Inc. via telephone and, recently, a video tape recorder and play back machine. Newsday, Inc. pays for the repair and upkeep of all of the aforementioned equipment.

9. Newsday, Inc. did not provide petitioner with office space at its Garden City office. Mr. Kitman was present in New York for Newsday, Inc. at their Garden City office for occasional interviews and conferences which required no more than a portion of one day per week.

#### CONCLUSIONS OF LAW

A. That the services rendered by petitioner at his home for Newsday, Inc. 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 (Burke v. Bragalini, 10 A.D.2d 654; Page v. State Tax Commission, 46 A.D.2d 341; Simms v. Procaccino, 47 A.D.2d 149; Wheeler v. State Tax Commission, 72 A.D.2d 878).

B. That the services performed by petitioner at his out-of-state home could have just as easily been performed at Newsday's New York office. Petitioner's reliance on Fass v. State Tax Commission, 68 A.D.2d 977, aff'd. 50 N.Y.2d 932 is misplaced. In Fass, supra, it was physically impossible to set up the specialized facilities required by petitioner in the employer's New York office. In the present case, however, the specialized facilities required by Mr. Kitman could have just as easily been set up in the employer's New York office as opposed to petitioner's personal residence. In Page v. State Tax Commission, supra, the petitioner therein, a staff writer for a New York employer, worked primarily out of his out-of-state home because there was no space provided in the employer's New York office and due to the fact that creative writing was not easily accomplished in an office atmosphere. The Appellate Division opined that:

"However, there is no evidence to establish that an office could not have been set up in such a manner as to make adequate space available for petitioner's work and files, and to insulate him from interruptions which might interfere with a proper atmosphere."


C. That the petition of Marvin Kitman is denied and the Notice of Deficiency dated September 26, 1977 is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

APR 02 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

\_\_\_\_\_  
COMMISSIONER

I dissent. I am convinced that the work activities of this petitioner were conducted at his home because of the necessity of his employer. Employment of this nature could not have been conducted at an office location. The fact that petitioner's home happened to be in New Jersey should not affect the outcome of this decision. An employee who must work at home is not required to change his state of domicile in order to demonstrate that his work location is chosen for the necessity of his employer. Thus, it is irrelevant that this petitioner theoretically could have worked out of a New York residence. Under the peculiar facts of this specific situation, I would find for petitioner, and therefore I must dissent.

  
COMMISSIONER