

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Nathan & Roma Wagner :  
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 :  
1975 - 1977. :  
AFFIDAVIT OF MAILING

State of New York  
County of Albany

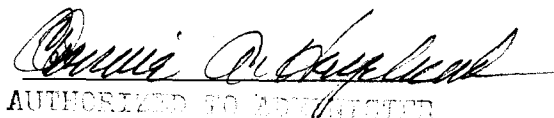
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Nathan & Roma Wagner, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nathan & Roma Wagner  
10-03 Bush Place  
Fairlawn, NJ 07410

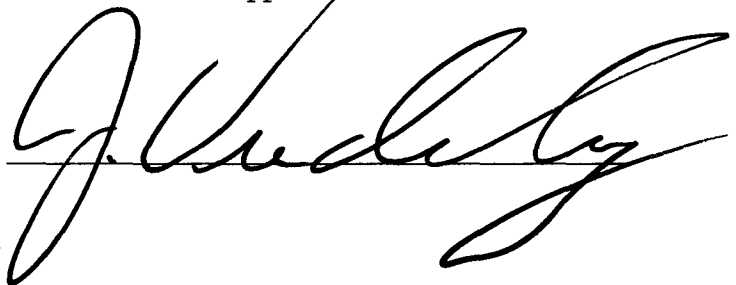
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
6th day of October, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



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

October 6, 1982

Nathan & Roma Wagner  
10-03 Bush Place  
Fairlawn, NJ 07410

Dear Mr. & Mrs. Wagner:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
NATHAN WAGNER AND ROMA WAGNER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1975, 1976	:	
and 1977.	:	

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Petitioners Nathan Wagner and Roma Wagner, 10-03 Bush Place, Fairlawn, New Jersey 07410, 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 1975, 1976 and 1977 (File No. 27488).

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 September 16, 1981 at 1:15 P.M. Petitioners appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether salary income received by nonresident petitioner Nathan Wagner was properly allocated based on the number of days worked within and without New York State for 1975.

II. Whether severance pay received by nonresident petitioner Nathan Wagner was properly allocated to New York State for 1976 and 1977.

FINDINGS OF FACT

1. Petitioners, Nathan Wagner and Roma Wagner, filed joint New York State income tax nonresident returns for subject years. For 1975, they allocated petitioner Nathan Wagner's salary from Burlington Industries, Inc., to New York

State on the basis of total number of days claimed to have been worked in New York State of (81) over the total number of days worked in the year of (179). For 1976 and 1977, none of the severance pay received by petitioner Nathan Wagner from Burlington Industries, Inc., was allocated to New York State.

2. On April 11, 1979, the Audit Division issued a Notice of Deficiency against petitioners asserting personal income tax of \$717.19, plus interest of \$163.14, for a total of \$880.33. The Notice was issued on the grounds that petitioner Nathan Wagner incorrectly included non-working days as days worked outside New York State for 1975. Also, that severance pay received by petitioner Nathan Wagner of \$17,888.00 and \$4,816.00 for 1976 and 1977 was considered to be related to prior services rendered partly in New York. Accordingly, the Audit Division allocated the severance pay to New York on the same percentage which New York wages earned during 1974 and 1975 were to total wages earned during 1974 and 1975.

3. During the years at issue the petitioners were domiciliaries and residents of New Jersey. Petitioner Nathan Wagner was employed by Burlington Industries, Inc. (hereinafter "corporation"), as a quality adjuster for approximately twenty-six years. Petitioner's duties required that he work within and without New York State. Petitioner terminated his employment on October 1, 1975, and, thereafter, received severance pay from the corporation. For the period from October 1, 1975 to December 31, 1975, petitioner reported sixty-six days as days worked without New York State. The Audit Division held such days as New York work days.

4. Petitioner Nathan Wagner contends, inter alia, that the corporation offered him an opportunity to terminate his employment prior to the normal retirement age. As an inducement to retire early, the corporation offered

petitioner severance pay from October 1, 1975 to March 31, 1977. Petitioner accepted the corporation's offer.

5. Petitioner Nathan Wagner further contends that the severance pay also represented payment to reflect a good job rendered to the corporation during his years of employment. The record contains no information pertaining to petitioner's earnings within and without New York State for the years prior to 1974.

#### CONCLUSIONS OF LAW

A. That if a nonresident employee performs services for his employer both within and without New York State, his income derived from New York sources includes that amount of his total compensation earned for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without the State. In making said allocation, no account is taken of non-working days (20 NYCRR 131.16).

B. That the allocation of petitioner Nathan Wagner's New York wage income for the year 1975 be revised to exclude the 66 days for which no services were rendered either within or without New York State, Finding of Fact "3" supra. Accordingly, New York work days are 81 and total work days employed both within and without New York State are 113.

C. That the severance pay received by petitioner Nathan Wagner from Burlington Industries, Inc., during the years 1976 and 1977 does not qualify as an annuity pursuant to 20 NYCRR 131.4(d)(2).

D. That said severance pay was attributable to past services rendered both within and without New York State. To properly determine that portion attributable to New York State, an allocation formula as described in 20 NYCRR

131.18 should be adopted. However, the information contained in the record is insufficient to determine the New York income in accordance with 20 NYCRR 131.18.

E. That where 20 NYCRR 131.18 is not appropriate, other methods of allocation are acceptable as long as such income is allocated to New York State in a fair and equitable manner. That the Audit Division allocated said income earned during 1976 and 1977 as explained in Finding of Fact "2" supra. That such allocation was made in a fair and equitable manner in accordance with 20 NYCRR 131.21.

F. That the Audit Division is hereby directed to recompute the Notice of Deficiency dated April 11, 1979 to be consistent with the decision rendered herein and that except as so granted, the petition of Nathan Wagner and Roma Wagner is otherwise denied.

DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER