

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Martin R. & Marguerite M. Baer	:	
for Redetermination of a Deficiency or for Refund	:	AFFIDAVIT OF MAILING
of Personal Income Taxes under Article 22 of the	:	
Tax Law and Chapter 46, Title U of the	:	
Administrative Code of the City of New York for	:	
the Years 1977 & 1978.	:	

State of New York  
County of Albany

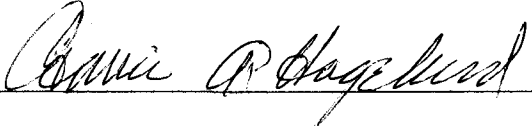
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Martin R. & Marguerite M. Baer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

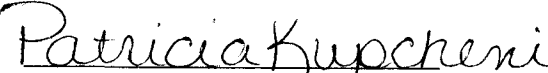
Martin R. & Marguerite M. Baer  
Curiosity Lane  
Essex, CT 06426

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  
21st day of October, 1983.

  
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AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Martin R. & Marguerite M. Baer :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Taxes under Article 22 of the :  
Tax Law and Chapter 46, Title U of the :  
Administrative Code of the City of New York for :  
the Years 1977 & 1978. :

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AFFIDAVIT OF MAILING

State of New York  
County of Albany


Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Albert Carmen the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

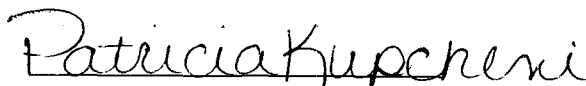
Albert Carmen  
Carmen & Pearl  
59-25 Kissena Blvd.  
Flushing, NY 11355

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  
21st day of October, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

October 21, 1983

Martin R. & Marguerite M. Baer  
Curiosity Lane  
Essex, CT 06426

Dear Mr. & Mrs. Baer:

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 and Chapter 46, Title U of the Administrative Code of the City of New York, 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 Law 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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Albert Carmen  
Carmen & Pearl  
59-25 Kissena Blvd.  
Flushing, NY 11355  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
MARTIN R. and MARGUERITE M. BAER : DECISION  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Taxes under Article 22 :  
of the Tax Law and Chapter 46, Title U of the :  
Administrative Code of the City of New York for :  
the Years 1977 and 1978. :

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Petitioners, Martin R. and Marguerite M. Baer, Curiosity Lane, Essex, Connecticut 06426, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York for the years 1977 and 1978 (File No. 33522).

A formal hearing was held before Robert Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 19, 1983 at 1:45 P.M. Petitioner appeared by Carmen & Pearl, C.P.A.'s (Albert Carmen, C.P.A.). The Audit Division appeared by Paul B. Coburn, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether petitioners, as nonresidents, properly allocated New York source income to New York.

FINDINGS OF FACT

1. On February 17, 1981, the Audit Division issued a Statement of Personal Income Tax Audit Changes against petitioners Martin R. and Marguerite M. Baer, alleging additional income tax due of \$4,235.06 plus interest and \$3,667.82

plus interest for the 1977 and 1978 taxable years, respectively. The following explanation was provided:

"Since you failed to reply to our letter dated 9/8/80, allocation of wage and salary income for New York State and New York City purposes is disallowed in full."

2. The Audit Division increased petitioners' New York State taxable income for 1977 by \$28,202.05 based upon the following computation:

	<u>CLAIMED</u>	<u>CORRECTED</u>	<u>ADJUSTMENTS</u>
Wages, Salaries, etc.	\$19,911.00	\$50,000.00	\$30,089.00
Exemptions	320.00	872.95	(552.95)
N.Y. Itemized Deductions	1,066.00	-0-	1,066.00
Standard Deduction <sup>1</sup>	-0-	2,400.00	(2,400.00)
TOTAL ADJUSTMENTS			<u>\$28,202.05</u>

3. The Audit Division increased petitioners' New York State taxable income for 1978 by \$29,520.37 based upon the following computation:

	<u>CLAIMED</u>	<u>CORRECTED</u>	<u>ADJUSTMENTS</u>
Wages, Salaries, etc.	\$19,912.00	\$50,000.00	\$30,088.00
Exemptions	375.00	942.63	(567.63)
TOTAL ADJUSTMENTS			<u>\$29,520.37</u>

The Audit Division recomputed petitioner Martin R. Baer's New York City nonresident earnings tax based on New York City wages of \$50,000.00 for each of the years in issue.

4. On April 1, 1981, the Audit Division issued a Notice of Deficiency against petitioners alleging a tax deficiency of \$7,902.88 plus interest for the 1977 and 1978 tax years combined.

5. Petitioner Martin R. Baer is the sole employee and shareholder of Martin Baer & Co., Inc., a Delaware corporation with an office in New York City. The corporation, according to its Certificate of Incorporation, engages

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<sup>1</sup> The Audit Division allowed a standard deduction in lieu of the New York itemized deductions since the New York itemized deductions were less than the standard deduction.

"in the general business of import and export of merchandise of every kind and description, specializing in animal by-products..."

6. Petitioners filed Forms IT-203/209, New York State Income Tax Nonresident Returns, with Forms NYC-203, Nonresident Earnings Tax Returns for the City of New York, for 1977 and 1978, and reported that petitioner Martin R. Baer, during each year at issue, worked 90 days in New York State/City and 136 days outside New York State/City on behalf of Martin Baer & Co., Inc. The alleged deficiencies described in Finding of Fact "1", supra, resulted from the disallowance of the allocation of Martin R. Baer's wage and salary income on the basis of days worked outside New York State/City.

7. The Audit Division conceded that the alleged deficiencies should be reduced to \$6,277.99 plus interest, since petitioner Martin R. Baer substantiated that he spent 23 days and 34 days out of the United States on behalf of his employer, Martin Baer & Co., Inc. during 1977 and 1978, respectively.

8. Petitioners' representative argued that the Audit Division in determining the alleged deficiencies herein treated petitioners as residents of New York. However, the Audit Division conceded that petitioners were Connecticut residents.

9. Petitioner introduced evidence to show that business correspondence was sent to petitioner Martin R. Baer at his home address in Essex, Connecticut. However, petitioners failed to establish that Martin Baer & Co., Inc. had a bona fide corporate office in Connecticut.

10. Petitioners were not present at the hearing herein and did not offer testimony under oath.

#### CONCLUSIONS OF LAW

A. That pursuant to section 632 of the Tax Law and section U46-2.0 of the Administrative Code of the City of New York, nonresidents of New York must pay taxes on net income derived from or connected with New York sources.

B. That "a nonresident who performs services in New York or has an office in New York is allowed to avoid New York State tax liability for services performed outside the State only if they are performed of necessity in the service of the employer." Matter of Speno v. Gallman, 35 N.Y.2d 256, at 259.

C. That petitioners did not shoulder their burden of proof under section 689(e) of the Tax Law and section U46-39.0(e) of the Administrative Code of the City of New York to show that petitioner Martin R. Baer performed services outside New York State of necessity in the service of his employer other than to the extent noted in Finding of Fact "7", supra. In addition, petitioner failed to establish that Martin Baer & Co., Inc. maintained a bona fide office in Connecticut to justify an allocation of wages and salary.

D. That the petition of Martin R. and Marguerite M. Baer is granted to the extent noted in Finding of Fact "7", supra, and, in all other respects, is denied.

DATED: Albany, New York

STATE TAX COMMISSION

Roderic W. Chin  
PRESIDENT

Frank R. Koenig  
COMMISSIONER

Mark J. Friel  
COMMISSIONER