

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alvin & Thelma Fischer :
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 Year :
1974. :
_____ :

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 28th day of September, 1983, she served the within notice of Decision by certified mail upon Alvin & Thelma Fischer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Alvin & Thelma Fischer
886 Broad St.
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
28th day of September, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alvin & Thelma Fischer :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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Tax under Article 22 of the Tax Law for the Year :
1974. :

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 28th day of September, 1983, she served the within notice of Decision by certified mail upon Jack H. Dorfman the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack H. Dorfman
295 Madison 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
28th day of September, 1983.

[Signature]

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

Connie A. Hagelund

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

September 28, 1983

Alvin & Thelma Fischer
886 Broad St.
Teaneck, NJ 07666

Dear Mr. & Mrs. Fischer:

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 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
Jack H. Dorfman
295 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ALVIN FISCHER and THELMA FISCHER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1974.	:	

Petitioners, Alvin Fischer and Thelma Fischer, 886 Broad Street, Teaneck, New Jersey 07666, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1974 (File No. 28262).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on February 3, 1982 at 1:30 P.M. Petitioners appeared by Jack H. Dorfman, Esq. The Audit Division appeared by Paul B. Coburn, Esq., (William Fox, Esq., of counsel).

ISSUE

Whether any portion of the salary income received by petitioner Alvin Fischer during 1974 could be allocated for services performed without New York State.

FINDINGS OF FACT

1. Petitioners timely filed a New York State Income Tax Non-resident Return for the year 1974, in which Alvin Fischer allocated his income and claimed that 128 days were worked outside New York and that 111 days were worked in New York.

2. On September 7, 1977, the Audit Division issued a Statement of Audit Changes against petitioners for the year 1974 wherein the days that were claimed to have been worked by Alvin Fischer at petitioners' home in New Jersey were not recognized as a basis for allocation of income. In addition, a penalty for underestimation of tax was asserted pursuant to section 685(c) of the Tax Law.

3. On July 18, 1979, the Audit Division issued a Notice of Deficiency against petitioners in the amount of \$7,458.00 plus penalty and/or interest of \$2,747.04 for a total due of \$10,205.04.

4. Petitioners had signed consents fixing the period of limitation upon assessment of personal income taxes to any time on or before April 15, 1980.

5. Petitioner Alvin Fischer, a New Jersey resident, is a consulting engineer licensed in New York and New Jersey. He is a principal in the firm of Alvin Fischer & Robert D. Redlien, P.C. with offices in New York City, New York. The firm is engaged in structural engineering. It is retained to draw plans of the basic structures of proposed buildings or alterations to existing buildings. The plans must be closely coordinated with the architectural plans as well as plans of other engineers for air conditioning, heating, plumbing, electrical and site work. Work at the building site includes supervision of soil borings, observation of standard penetration resistances and water levels and ordering specific additional work while the men and equipment are at the site. During construction, the firm is responsible for general supervision at the work site, to solve unforeseen problems, to detect and correct mistakes and "to get input for any necessary redesign of the structure due to design changes from the architect or other engineers". In order not to delay the project, the work must be done promptly and in close contact with the architect and other engineers.

6. Petitioner's firm was required by its clients to work in close proximity to a project in order to check on the project's progress, suggest changes and get information needed so as not to interrupt or delay the work. The business is very competitive and communication with clients is frequent and on short notice. Some of the work, by necessity, cannot be done at the trailer situated on the building site, resulting in the use of facilities at petitioners' home in New Jersey where a "light table", which projects light through plans as a visual aid, is available. The firm does much of its work for New Jersey school districts and municipalities which desire local firms. These clients will not send their people to the firm's New York office due to distance, time, traffic, and parking problems.

7. Mr. Fischer used one-fifth of his residence as an office. The office contained drawing tables, a library, filing cabinets, secretary's table, typewriter, computer, chairs and lamps. His wife, who had an improperly set broken leg and was not able to walk and use public transportation, performed secretarial duties for the firm at the home office. She worked about 25 hours a week and was paid by the firm. Mr. Fischer was also reimbursed by the firm for maintaining the home office. Mr. Fischer worked a total of 128 days outside New York State and 111 days in New York. He prepared a schedule showing the 128 days worked outside New York State were worked as follows:

- 13 days at construction sites or at client's offices;
- 51 days spent partly at construction sites and partly at his home office;
- 64 days spent solely at his home office.

Mr. Fischer estimated that 25 percent to 30 percent of the firm's business in 1974 was in New Jersey. It was also estimated that one-half to two-thirds of the day was spent at work sites and the balance at the residence office. Mr.

Fischer offered substantial architects' field reports, development reports and other status reports on various jobs in support of his position.

8. The documentation submitted by Mr. Fischer does not support the schedule of days worked outside New York State which he prepared. The documentation raises questions of the accuracy of the schedule of days worked outside New York State. A review of the schedule and the documentation indicates that many of the days worked at home had no close connection in terms of time to services performed at other locations. Further, Mr. Fischer stated on the schedule that the days worked at home were worked there "to serve our N.J. clients better, save commuting time and provide a quieter environment for our work".

CONCLUSION OF LAW

A. That if a nonresident employee performs services for his employer both within and without the State, his income derived from New York sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within the state bears to the total number of working days employed both within and without the State. However, 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 petitioner Alvin Fischer has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that the 64 days worked solely at his home were done so by reason of his employer's necessity rather than his own convenience. Further, although a portion of the services performed on the 51 days Mr. Fischer worked both at job sites and at his home may have been for the necessity of his employer, he has failed

to show the actual portion of the services which were rendered for his employer's necessity rather than his convenience. Therefore, these days are considered days worked in New York State. (see Wheeler 72 A.D. 2d 878).

C. That the petition of Alvin Fischer and Thelma Fischer is denied and the Notice of Deficiency dated July 18, 1979 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983


PRESIDENT


COMMISSIONER


COMMISSIONER