

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Anthony & Marie Graae :
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 :
1978. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Anthony & Marie Graae, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony & Marie Graae
601 Belle Glade Lane
Knoxville, TN 37923

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
27th day of May, 1983.

David Parchuck

William A. Legend

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Anthony & Marie Graae
601 Belle Glade Lane
Knoxville, TN 37923

Dear Mr. & Mrs. Graae:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ANTHONY GRAAE AND MARIE GRAAE	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1978.	:	

Petitioners, Anthony Graae and Marie Graae, 601 Belle Glade Lane, Knoxville, Tennessee 37923, 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 1978 (File No. 32044).

On November 22, 1982 petitioners waived their right to a small claims hearing and requested that a decision be rendered based on the entire record as contained in their file. After due consideration of the record, the State Tax Commission hereby makes the following decision.

ISSUE

Whether termination pay received by a nonresident employee is subject to New York State income tax where said nonresident employee performed no services for his former employer, either within or without New York State, during the tax year that said termination pay was received.

FINDINGS OF FACT

1. Petitioners herein, Anthony Graae and Marie Graae,¹ timely filed a New York State Income Tax Nonresident Return for the year 1978. Attached to the

¹ Marie Graae is involved in this proceeding due solely to the filing of a joint income tax return with her husband. Accordingly, the use of the term petitioner hereinafter shall refer solely to Anthony Graae.

aforementioned return was petitioner's wage and tax statement from The International Nickel Co., Inc. (hereinafter "International"). Total wage income reported on the wage and tax statement amounted to \$39,120.92 and no portion of said wage income was reported on petitioner's return as being derived from or connected with New York State sources.²

2. On October 29, 1980, the Audit Division issued a Notice of Deficiency to petitioners for the year 1978, asserting that additional New York State income tax was due in the amount of \$1,495.43, together with interest of \$192.66, for a total due of \$1,688.09. The Notice of Deficiency was based on a Statement of Audit Changes dated November 13, 1979, wherein the following explanation and computation was offered:

"Termination pay received from the International Nickel Co. Inc. is taxable to New York State to the same extent as wages received prior to the date employment ceased.

Since you worked both within and without New York State while employed by the International Nickel Co., the portion of termination pay taxable to New York has been computed in accordance with the formula shown below.

	<u>Total Wages</u>	<u>N.Y. Wages</u>
Year 1976	\$37,053.00	\$23,968.00
Year 1977	38,868.00	23,751.00
Total	<u>\$75,921.00</u>	<u>\$47,719.00</u>

Allocation of termination pay:

Salary	Percentage	Termination Pay	=	N.Y.S. Amount
N.Y. wages				
Total wages				
\$47,719				
\$75,921	.6285	x	\$39,120.92	= \$24,587.50"

² The only income reported on petitioner's return as being derived from New York sources was interest income of \$1,147.00. A tax of \$19.54 was paid on this income. Petitioner subsequently claimed that the interest income was not taxable for New York State income tax purposes since he was a nonresident. The Audit Division concedes that the interest income is not taxable.

3. Prior to the tax year in question petitioner was employed by International as a metallurgist. During said prior years petitioner performed services for International both within and without New York State. Effective December 3, 1977, International advised petitioner that the work force was being reduced and that his employment was being terminated. After December 3, 1977 petitioner performed no services for International either within or without New York State. The wage income of \$39,120.92 received by petitioner from International in 1978 represented "...a termination settlement". No services were performed by petitioner for International in 1978.

4. Petitioner's 1978 New York State income tax return reported New York itemized deductions of \$5,126.00 before application of the limitation percentage. The Audit Division, in computing the \$1,495.43 of additional tax due, applied a limitation percentage of 56.48 percent to the \$5,126.00 to arrive at allowable New York itemized deductions of \$2,895.16. Subsequent to the issuance of the Notice of Deficiency dated October 29, 1980, petitioner substantiated that the proper amount of New York itemized deductions subject to the limitation percentage was \$5,375.00, and not \$5,126.00 as reported on the return.

5. Petitioner argued that he was not a resident of New York State during the year 1978 and that no services were performed in New York State in 1978 and, for these reasons, no portion of the termination pay of \$39,120.92 can be considered derived from or connected with New York State sources. The record contains no evidence as to the allocation of wage income received by petitioner from International in tax years other than 1976 and 1977.

CONCLUSIONS OF LAW

A. That the termination pay received by petitioner constituted a form of other retirement benefit attributable to past contractual services performed within and without New York State.

B. That with respect to an other retirement benefit regulations of the State Tax Commission in pertinent part provide:

"[w]here the employee's services were performed partly within and partly without New York State, the amount includible in the individual's New York adjusted gross income shall be the proportion of the amount included in the individual's Federal adjusted gross income which the total compensation received from the employer for the services performed in New York State during a period consisting of the portion of the taxable year prior to retirement and the three taxable years immediately preceding the retirement bears to the total compensation received from the employer during such period for services performed both within and without New York State." (20 NYCRR 131.18).

C. That information is not available in the record from which to establish the ratio by which petitioner allocated wage income received from International in years other than 1976 and 1977. Accordingly, the Audit Division has properly computed that portion of petitioner's termination pay attributable to New York State sources using only the wage income figures from the years 1976 and 1977.


D. That the amount of New York itemized deductions subject to the limitation percentage of 56.48 percent is to be increased from \$5,126.00 to \$5,375.00, as per Finding of Fact "4", supra.


E. That the petition of Anthony Graae and Marie Graae is granted to the extent indicated in Conclusion of Law "D", supra; that the Audit Division is directed to recompute petitioners' liability for the year 1978 consistent with the decision rendered herein; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

MAY 27 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER