

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Albert C. Johnston  
and Bonnie H. Johnston

: 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 and Nonresident:  
Earnings Tax under Chapter 46, Title U of the  
Administrative Code of the City of New York for the:  
Years 1971 through 1976.

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 22nd day of April, 1983, he served the within notice of Decision by certified mail upon Albert C. Johnston and Bonnie H. Johnston the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert C. Johnston  
and Bonnie H. Johnston  
25 Outlook Dr.  
Darien, CT 06820

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  
22nd day of April, 1983.

David Parchuck

David O. Haggard  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

April 22, 1983

Albert C. Johnston  
and Bonnie H. Johnston  
25 Outlook Dr.  
Darien, CT 06820

Dear Mr. & Mrs. Johnston:

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  | : |          |
| ALBERT C. AND BONNIE H. JOHNSTON                | : | DECISION |
| for Redetermination of a Deficiency or for      | : |          |
| Refund of Personal Income Tax under Article     | : |          |
| 22 of the Tax Law and Nonresident Earnings Tax  | : |          |
| under Chapter 46, Title U of the Administrative | : |          |
| Code of the City of New York for the Years 1971 | : |          |
| through 1976.                                   | : |          |

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Petitioners, Albert C. and Bonnie H. Johnston, 25 Outlook Drive, Darien, Connecticut 06820, 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 1976 and nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1976 (File Nos. 29719 and 29720).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 27, 1982 at 1:15 P.M. Petitioner Albert C. Johnston appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether an attorney admitted to practice in New York State and the District of Columbia, but whose residence is in the State of Connecticut, is entitled to an apportionment of his income from legal work performed in an office in his residence in determining his income tax liability as a nonresident.

FINDINGS OF FACT

1. Petitioners, Albert C. and Bonnie H. Johnston, filed New York State income tax nonresident returns for the years 1971 through 1976.

2. On January 30, 1980 the Audit Division issued a Notice of Deficiency against petitioners in the amount of \$13,634.99 plus interest and penalty of \$6,335.27 for a total due of \$19,970.26 for the years 1971 through 1974. On the same date a Notice of Deficiency was issued against petitioners in the amount of \$7,101.04 plus interest and penalty of \$2,083.16 for a total due of \$9,184.20 for the years 1975 and 1976. Statements of audit changes issued October 24, 1979 explained that the deficiency was based on the determination that all income derived from petitioner Albert C. Johnston's activities as a lawyer were allocable to New York State.

3. Petitioners executed consents fixing the period of limitation upon assessment of personal income and unincorporated business taxes at one year following the close of proceedings then pending before the State Tax Commission for the taxable years 1968 through 1970. A decision in the aforesaid proceedings was rendered on January 31, 1979.

4. Petitioner (all references to petitioner will refer to Albert C. Johnston only) during the years in issue was a resident of the State of Connecticut. He was, however, admitted to practice law in New York and the District of Columbia and maintained an office at 230 Park Avenue in New York City. Petitioner maintained no District of Columbia office. Petitioner was also admitted to various Federal courts including the United States Supreme Court and several United States Courts of Appeals and United States District Courts. Petitioner was not, however, admitted to practice law in Connecticut. His right to practice in the Federal courts was derived from his right to practice in the

courts of New York State and the District of Columbia. Petitioner was also registered to practice before the United States Patent Office. Petitioner's practice has been almost exclusively in matters relating to Patent and Trademark Law before the United States Patent and Trademark Office and the Federal courts.

5. During the years in issue petitioner resided in a house which he owned in Darien, Connecticut. He converted a bedroom in the house into an office consisting of a desk, bookshelves, telephone, typewriter, three chairs, a couch and a chest containing work related items. The office had an attached lavatory which allowed privacy for clients without having to use the baths for the family in the rest of the house. There was an entrance into this office, separate from the rest of the house, from a foyer common to both house and office.

6. Petitioner used the office in his home primarily for evening and weekend work because the lack of services in his New York office during those hours made it inconvenient to work there.

7. Petitioner recorded the hours worked in his New York City office and the office in his home on a calendar pad and on time sheets. At the end of the year these hours were transcribed to summary sheets which petitioner used to determine the number of hours worked in each state. During the years in issue, of the total hours worked, petitioner spent an average of 27 percent of his time at the office in Darien. Petitioner apportioned the time spent in New York and Connecticut and paid tax only on that portion of his income derived from time spent in the New York office on the ground that he was carrying on his profession partly within and partly without New York State.

8. None of the work which petitioner performed for any one client was done exclusively in Connecticut. Part of the work for each client was done in New York City. Bills for services rendered were issued from New York and all payments were made to New York where the only business bank account was maintained. Petitioner's business cards and stationery during this period listed both the New York office and the Connecticut office. In the New York City telephone directory petitioner was listed as an attorney, however, he was not so listed in any Connecticut telephone directory at that time.

9. Petitioner indicated that, in addition to being able to work more billable hours, part of his reason for setting up his office in Darien was to enable him to build up a Connecticut clientele so that he could eventually move his entire practice to Connecticut. In 1977 petitioner was admitted to the Connecticut bar and he began working full time from his Darien office with no office in New York.

10. Petitioner has claimed an expense deduction for the office in his home for over 30 years and said expense has been allowed by the Internal Revenue Service.

#### CONCLUSIONS OF LAW

A. That section 632(b)(1)(B) of the Tax Law, in pertinent part, includes within the New York adjusted gross income of a nonresident individual items of income derived from or connected with New York sources attributable to a profession carried on in New York State. Section 632(c) allows items of income from a profession carried on partly within and partly without New York to be apportioned and allocated.

B. That under Connecticut law no person not duly admitted to the Connecticut bar may practice law, solicit employment for a lawyer or hold himself out to

the public as being a lawyer (Conn. Gen. State., section 51-88). Petitioner, therefore, could not practice law in Connecticut as that term is usually understood.

C. That petitioner's right to perform legal services in places other than in the State of New York and the District of Columbia was primarily based on the fact that he was admitted to practice law in those locations. He could lawfully hold himself out as entitled to practice law only in the State of New York and the District of Columbia, and services performed elsewhere were incidental to the practice he maintained in New York State (See Carpenter v. Chapman, 276 A.D. 634).

D. That "[t]he practice of law is quite a different activity from that of ordinary business" (Carpenter, supra at 636). Petitioner was not practicing law in Connecticut; he was practicing law in New York only and performing various services in connection with this practice in an out-of-state location. The fact that petitioner had an office in his home which was acceptable to the Internal Revenue Service as a valid business expense is irrelevant to the issue of whether petitioner was practicing law in two states. Since petitioner could not practice law in Connecticut and since he maintained no law office in the District of Columbia, all of his business was derived from his New York City practice regardless of where the services were performed. Thus all his income was derived from the New York City practice which was a New York source within the meaning and intent of section 632(b)(1)(B) of the Tax Law and sections U46-2.0 and U46-4.0 of Chapter 46, Title U of the Administrative Code of the City of New York.

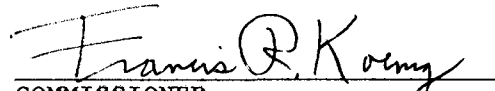
E. That the petition of Albert C. and Bonnie H. Johnston is denied and the Notice of Deficiency issued January 30, 1980 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 22 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER