

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Arthur B. March :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Year :
1977. :
_____ :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon Arthur B. March, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur B. March
15 Pine River Dr.
Chagrin Falls, OH 44022

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
20th day of December, 1983.

David Parchuck

Annie A. Hogan
pursuant to Tax Law section 174

Authorized to administer oaths

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

December 20, 1983

Arthur B. March
15 Pine River Dr.
Chagrin Falls, OH 44022

Dear Mr. March:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ARTHUR B. MARCH	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1977.	:	

Petitioner, Arthur B. March, 15 Pine River Drive, Chagrin Falls, Ohio 44022, 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 1977 (File No. 33209).

On April 13, 1983, petitioner waived his right to a hearing and requested that a decision be rendered by the State Tax Commission based upon the record as contained in his file. Upon review of the file, the State Tax Commission renders the following decision.

ISSUES

- I. Whether the Audit Division's disallowance of petitioner's alimony adjustment was proper.
- II. Whether the days petitioner spent outside New York State searching for and purchasing a house and the subsequent move to his new residence are properly considered as working days worked outside New York State.
- III. Whether the moving and transfer expense reimbursement paid to petitioner, Arthur B. March, by his employer constitutes New York source income.

FINDINGS OF FACT

1. Petitioner, Arthur B. March (hereinafter petitioner), timely filed a 1977 New York State Income Tax Nonresident Return wherein he reported, among

other items of income, total wages of \$47,235.47 and other income of \$27,229.48. Wages totaling \$30,703.06 were allocated to New York State sources based on days worked within and without New York State. None of the other income, which was described on the return as "transfer expense included in Federal W-2", was allocated to New York State sources.

2. On March 30, 1979, petitioner amended his 1977 New York return to include adjustments from New York source income for moving expenses and alimony paid during the year. In addition, petitioner eliminated his wife's income from the income reported on the amended return.

3. The Audit Division issued to petitioner a Notice of Deficiency dated March 2, 1981 asserting additional tax due of \$1,549.47 plus interest of \$361.31 for a total due of \$1,910.78.

4. The above asserted deficiency was due to adjustments made by the Audit Division to petitioner's 1977 return and explained on a Statement of Audit Changes dated May 7, 1980 as follows:

"When married taxpayers file a joint Federal return, but choose to file separate New York State returns the income of both spouses must be included in the Federal amount even though one spouse had no New York source income.

A nonresident may claim an adjustment to income only if it is related to earning income in New York State. Since alimony payments are not related to earning income, they may not be deducted in computing New York income.

A study of your schedule of days worked in and out of New York State shows you used 11 additional nonworking days as days worked outside New York State. The 11 days spent house hunting, moving, etc., must be considered other nonworking days as you were not engaged in the normal duties of employment.

Your days within and outside New York State are recomputed as follows:

¹ Petitioner has agreed to this adjustment. Therefore, said adjustment will not be addressed hereinafter.

Days in year		365
Saturdays and Sundays	105	
Holidays	8	
Vacation	20	
Other nonworking days	12	
Total nonworking days		<u>145</u>
Total days worked in year		<u>220</u>
Less: Days worked outside NYS		<u>69</u>
Days worked in New York State		<u>151</u>

Since transfer expenses were paid in connection with services to be performed by you in New York State, the total amount is allocated to New York State on the same basis as the income to which they relate."

The Audit Division then allocated petitioner's moving and transfer expense reimbursement based on the recomputed schedule of days worked within and without New York State as shown above.

5. Petitioner was a nonresident of New York State for the entire year in issue. He moved from Milford, Massachusetts to Wilton, Connecticut on or about April 20, 1977 as a result of being transferred by his employer, the General Electric Company, to its Connecticut facility. Prior to the move, petitioner spent a total of 11 days in Connecticut searching for and purchasing a house and moving into his new residence. While petitioner spent the larger percentage of his time on these days house hunting and moving, petitioner was in telephone contact with his office and customers under his responsibility. Petitioner treated these 11 days for allocation purposes, as working days worked outside New York State. Such days were not reported by petitioner's employer as personal time and they paid his salary and expenses for these days.

6. Prior to and after petitioner's move to Connecticut, he worked both within and without New York State. Subsequent to his move to Connecticut, petitioner worked a total of 115 days in New York State out of a total of 156 working days.

7. Attached to petitioner's 1977 New York return was a wage and tax statement issued to petitioner from the General Electric Company. Said statement

reported total wages and other compensation of \$74,464.96 and New York State wages of \$30,703.06. Included in the total wages and other compensation was moving and transfer expense reimbursement of \$27,229.48 paid to petitioner because of his transfer from Massachusetts to Connecticut on or about April 20, 1977.

8. General Electric's policy with respect to state tax treatment of transfer expenses paid to its employees states that "transfer expenses are not reportable to any state of nonresidence" and an employee transferred to a new payroll is considered a resident of the state in which residency was declared prior to the transfer until the employee submits to the new payroll a new residency certificate. In accordance with company policy, petitioner reported and paid income tax on the moving and transfer expense reimbursement to the State of Massachusetts.

9. Petitioner deducted on his 1977 Federal income tax return an adjustment from gross income for alimony paid during 1977 in the amount of \$9,116.36. Of this amount, petitioner allocated \$408.66 to his present wife² and the remainder, \$8,707.70, was allocated to New York State sources on his 1977 amended New York State nonresident income tax return based on days worked within and without this State. It is petitioner's contention that since alimony is deductible by a New York resident it should be deductible by a nonresident.

CONCLUSIONS OF LAW

A. That the New York adjusted gross income of a nonresident individual includes items of income, gain, loss and deduction entering into his Federal adjusted gross income which is attributable to a business, trade, profession or occupation carried on in this State (section 632(b)(1)(B) of the Tax Law and 20 NYCRR 131.4).

² The record does not show the basis for this allocation.

B. That alimony is not a deduction attributable to petitioner's occupation carried on in this State within the meaning and intent of section 632(b)(1)(B) of the Tax Law and 20 NYCRR 131.4.

C. That when a nonresident employee performs services for his employer both within and without New York State, any allowance claimed for days worked outside of this State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employer to out-of-state duties in the service of his employer (20 NYCRR 131.16).

D. That the activities of petitioner during the 11 days spent in the State of Connecticut, during the year in issue, searching for and purchasing a house and moving into said residence were such that these days do not constitute working days worked outside the State of New York within the meaning and intent of 20 NYCRR 131.16. The Audit Division properly determined that these 11 days constituted nonworking days considering the personal nature of petitioner's activities on these days. The fact that petitioner was in telephone contact with his office and customers on these days and that his employer paid his salary and expenses on these days is not sufficient to classify these days as working days worked outside this State for New York State income tax purposes.

E. That section 82 of the Internal Revenue Code states:

"There shall be included in gross income (as compensation for services) any amount received or accrued, directly or indirectly, by an individual as a payment for or reimbursement of expenses of moving from one residence to another residence which is attributable to employment or self-employment."

F. That the moving and transfer expense reimbursement constituted compensation for services to be performed by petitioner during the year in issue while employed by the General Electric Company at its Connecticut facility. Since petitioner performed services within New York State after his transfer to Connecticut, that portion of the moving and transfer expense reimbursement

which is attributable to services performed in this State constitute New York source income. The tax policy of petitioner's employer regarding such payments (see Finding of Fact "8") is not determinative of which items of income are or are not subject to New York State income tax.

G. That the Audit Division incorrectly allocated petitioner's moving and transfer expense reimbursement based on the days petitioner worked within and without this State during the entire year in issue. Such reimbursement is properly allocated to New York sources based on the days petitioner worked within and without New York after his transfer to Connecticut. The correct allocation of such reimbursement based on the days worked within New York State after his transfer to Connecticut (115) divided by the total days worked during such period (156) would result in a greater deficiency. However, a greater deficiency may not now be asserted in accordance with section 689(d)(1) of the Tax Law.

H. That the petition of Arthur B. March is denied and the Notice of Deficiency dated March 2, 1981 is sustained.

DATED: Albany, New York

DEC 20 1983

STATE TAX COMMISSION

Rodrigue As Chu
PRESIDENT

Francis R. Koenig
COMMISSIONER

COMMISSIONER

I dissent from so much of this decision as is contained in Conclusion of Law "B", and I join in the remainder.

Mark Friedlander