

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas & The Estate of Genevieve Mitchell : 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 for the Year :
1974.

State of New York
County of Albany

Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Thomas & The Estate of Genevieve Mitchell, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

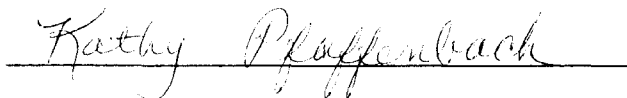
Thomas & The Estate of Genevieve Mitchell
4608 Browning Ave.
Tampa, FL 33609

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
24th day of January, 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
Thomas & The Estate of Genevieve Mitchell : AFFIDAVIT OF MAILING
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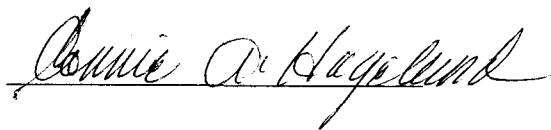
Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Benjamin Wilkins the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Benjamin Wilkins
401 Broadway
New York, NY 10013

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
24th day of January, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

January 24, 1983

Thomas & The Estate of Genevieve Mitchell
4608 Browning Ave.
Tampa, FL 33609

Dear Mr. Mitchell:

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
Benjamin Wilkins
401 Broadway
New York, NY 10013
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
THOMAS A. MITCHELL and
THE ESTATE OF GENEVIEVE S. MITCHELL
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1974.

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DECISION

Petitioners, Thomas A. Mitchell and The Estate of Genevieve S. Mitchell, 4608 Browning Avenue, Tampa, Florida 33609, 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. 24812).

Petitioners have waived a formal hearing and have submitted their case for decision by the State Tax Commission based on the record as it exists. After due consideration of the record, the Commission renders the following decision.

ISSUES

- I. Whether days worked at home by petitioner Thomas A. Mitchell can be considered as days worked outside New York State for income allocation purposes.
- II. Whether interest asserted against petitioners may be waived.

FINDINGS OF FACT

1. Thomas A. Mitchell and Genevieve S. Mitchell, husband and wife, timely filed a New York State Income Tax Nonresident Return for the year 1974.
2. On January 15, 1979 the Audit Division issued to Mr. and Mrs. Mitchell a Notice of Deficiency asserting additional tax due for 1974 in the amount of \$3,690.86 plus interest. By a signed statement dated October 24, 1977, Mr. and

Mrs. Mitchell had consented to an extension allowing assessment of their 1974 income tax liability at any time on or before April 15, 1979.

3. A Statement of Audit Changes dated May 13, 1977 explained that the above asserted deficiency was based on a recomputation of Mr. and Mrs. Mitchell's 1974 income tax liability to reflect a disallowance by the Audit Division of the claim that certain days worked at home in 1974 by Mr. Mitchell constituted days worked outside of New York State for purposes of allocating wages received from New York sources.

4. On February 11, 1979 Thomas A. Mitchell and The Estate of Genevieve S. Mitchell filed a petition contesting the above asserted deficiency, and by a signed letter dated April 19, 1982, waived a formal hearing in this matter and submitted the case for decision by the State Tax Commission.

5. Prior to January 25, 1973 petitioners were domiciliaries of New York State residing at 60-42 70th Street, Maspeth, New York. Petitioner Thomas A. Mitchell was employed as an executive of W. H. Peepels Company, Inc., ("Peepels") located at 12-17 Jackson Avenue, Long Island City, New York.

6. On January 25, 1973, petitioners effected a change of domicile from New York State to Florida. During the period at issue herein, petitioners resided at 4608 Browning Avenue, Tampa, Florida. Mr. Mitchell continued to work for Peepels during this period.

7. Although petitioners resided in Florida in 1973 and 1974, Mr. Mitchell's employment during those years made it necessary for him to spend time in New York in order to be an active participant in the management of Peepels. He was, however, able to perform some of his administrative duties, as well as estimating, bid preparation and customer contact work by phone and/or correspon-

dence from his home in Tampa, Florida. Mr. Mitchell was able to perform more of his work duties for Peepels from his Tampa, Florida home in 1974 than in 1973.

8. When he worked in New York, Mr. Mitchell stayed at his former residence in Maspeth, New York which had remained unsold by petitioners during the period at issue.

9. On their 1974 income tax nonresident return, petitioners reported an allocation ratio (at Schedule A-1) of 120/242. This ratio by which petitioners allocated wage income partly in and partly out of New York State is based on the claim that in 1974 petitioner Thomas A. Mitchell spent 122 days working at his home in Tampa, Florida. In a letter to the Audit Division dated March 4, 1977, Mr. Mitchell states the above figure of 122 days claimed as days worked at his home in Florida was an estimate arrived at by him in 1974 based on his workpapers, memos and correspondence.

10. The file contains no evidence, other than the above statement in Mr. Mitchell's letter, in substantiation of the claimed 122 days worked in Florida, nor proof that any days worked outside of New York by Mr. Mitchell in 1974 were done so out of necessity rather than for Mr. Mitchell's personal convenience.

11. On January 14, 1980 petitioners paid the amount of tax asserted as due on the Notice of Deficiency (\$3,690.86). However, petitioners did not pay any of the interest accrued on the asserted deficiency and seek waiver of such interest.

CONCLUSIONS OF LAW

A. That the New York adjusted gross income of a nonresident individual is defined by section 632(a)(1) of the Tax Law as the sum of the net amounts of

items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources.

B. That section 632(c) of the Tax Law provides:

"[i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations."

C. That regulations of the State Tax Commission, in pertinent part, provide:

"...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 services of his employer." (20 NYCRR 131.16).

D. That petitioners have failed to provide evidence showing petitioner Thomas A. Mitchell was obligated to perform work in Tampa, Florida in 1974 out of necessity rather than for his own convenience. Accordingly, wages received from his New York employer in 1974 are not subject to allocation, constitute income derived from and connected to New York sources and thus are taxable to New York in accordance with the meaning and intent of section 632 of the Tax Law and regulations thereunder.

E. That interest was properly asserted against petitioners in accordance with section 684 of the Tax Law. The Tax Law does not provide for the abatement or waiving of interest which is properly due.

F. That the petition of Thomas Mitchell and The Estate of Genevieve Mitchell is hereby denied and the Notice of Deficiency issued January 15, 1979 is sustained. The Audit Division is hereby directed to compute the

interest due and owing by petitioners only until the date on which petitioners paid the tax due.

DATED: Albany, New York

JAN 24 1983

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER

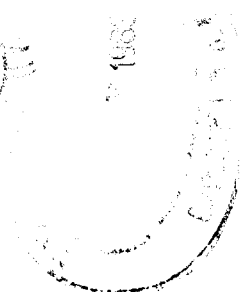
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STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

*Rep's
Copy*

Benjamin Wilkins
401 Broadway
New York, NY 10013

*NY
1-27-83*



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

January 24, 1983

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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
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401 Broadway
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Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
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THOMAS A. MITCHELL and	:	DECISION
THE ESTATE OF GENEVIEVE S. MITCHELL	:	
	:	
for Redetermination of a Deficiency or for	:	
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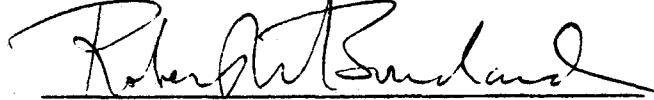
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DATED: Albany, New York

JAN 24 1983

STATE TAX COMMISSION



ACTING PRESIDENT


COMMISSIONER
COMMISSIONER