

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Paul W. Pendorf
and Barbara C. Pendorf : 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 :
1972.

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 1st day of April, 1983, he served the within notice of Decision by certified mail upon Paul W. Pendorf and Barbara C. Pendorf the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul W. Pendorf
and Barbara C. Pendorf
3200 Tyre Neck Rd.
Portsmouth, VA 23703

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
1st day of April, 1983.

David Parchuck

James A. Hargrett

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 1, 1983

Paul W. Pendorf
and Barbara C. Pendorf
3200 Tyre Neck Rd.
Portsmouth, VA 23703

Dear Mr. & Mrs. Pendorf:

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

In the Matter of the Petition
of
PAUL W. PENDORF and BARBARA C. PENDORF
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1972.

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DECISION

Petitioners, Paul W. Pendorf and Barbara C. Pendorf, 3200 Tyre Neck Road, Portsmouth, Virginia 23703, 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 1972 (File No. 16415).

On December 27, 1981, petitioners advised the State Tax Commission, in writing, that they desired to waive a small claims hearing and submit the case to the State Tax Commission, based on the entire record contained in the file. After due consideration of said record, the Commission renders the following decision.

ISSUE

Whether the Audit Division properly disallowed petitioners' claimed adjustment to income for unreimbursed moving expenses.

FINDINGS OF FACT

1. Petitioners herein, Paul W. Pendorf and Barbara C. Pendorf¹, timely filed a New York State Income Tax Nonresident Return for the year 1972. On

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Barbara C. Pendorf 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 Paul W. Pendorf.

said return petitioner claimed an adjustment to income of \$1,945.00 for unreimbursed moving expenses.

2. On April 12, 1976, the Audit Division issued a Notice of Deficiency to petitioners for the year 1972, imposing additional personal income tax of \$87.30, plus interest of \$34.78, for a total due of \$122.08. Said Notice of Deficiency was based on a Statement of Audit Changes dated January 8, 1976, wherein the claimed adjustment to income of \$1,945.00 for unreimbursed moving expenses was disallowed. The Audit Division also made other adjustments to the computation of taxable income, however, petitioner does not contest said other adjustments and, accordingly, same will not be addressed hereinafter. The disallowance of the unreimbursed moving expense deduction was explained in the Statement of Audit Changes in the following manner:

"Any adjustment item relating to wage income earned partly inside and partly outside New York State must be allocated to New York on the same basis as income to which it relates. However, since the adjustment for unreimbursed moving expenses relates to income earned entirely outside New York State after October 1, 1972, the adjustment is not deductible in arriving at total New York income."

3. From January 1, 1972 to September 29, 1972 petitioner worked for Pfizer, Inc., a corporation located at 235 East 42nd Street, New York, New York 10017. During this period petitioner performed services for Pfizer, Inc. both within and without the State of New York. Effective October 2, 1972, petitioner was loaned by Pfizer, Inc. to the federal government for a period of one year pursuant to the President's Executive Interchange Program. Since petitioner's participation in the President's Executive Interchange Program required him to perform services solely in Washington, D.C., it was necessary for petitioner to

move from New York City² to the Washington, D.C. area. The unreimbursed moving expense deduction of \$1,945.00 represents those expenses incurred by petitioner in moving from New York City to the Washington, D.C. area.

4. The wage and tax statement attached to petitioner's 1972 New York State income tax return indicated that he received wage income of \$21,097.24 from Pfizer, Inc. Petitioner allocated the wage income received from Pfizer, Inc. to sources within and without New York State based on a percentage, said percentage determined by placing the number of days worked in New York State over the total number of working days. The following chart represents a synopsis of Schedule A-1, Allocation of wage and salary income to New York State, as it appeared on page 2 of petitioner's 1972 New York State tax return:

Total days in year	365
Total nonworking days	129
Total days worked in year	<u>236</u>
Deduct days worked outside New York State	76
Days worked in New York State	<u>160</u>

$$160/236 \times \$21,097.00 = \$14,295.00$$

With the sole correction of a minor mathematical error, the Audit Division accepted petitioner's allocation of wage income earned from Pfizer, Inc. to sources within and without New York State. Included in the 76 days worked outside New York State were the 63 days worked by petitioner in Washington, D.C. from October 2, 1972 through December 31, 1972.

² For the period January 1, 1972 to approximately September 29, 1972 petitioner maintained a one room apartment in New York City. The Audit Division has conceded that petitioner was not a domiciliary of New York State for 1972, that he did not spend in excess of 183 days in New York State in 1972 and that he was taxable as a nonresident of New York State for the entire 1972 tax year.

5. After participating in the President's Executive Interchange Program for the one year period, petitioner once again resumed his work for Pfizer, Inc. in New York City. In the petition for redetermination petitioner asserts that:

"... my 'transfer' or 'move' was in every sense of the word part of my continuing employment with my New York employer and hence moving costs associated with said move should be fully deductible for state income tax purposes..."

CONCLUSIONS OF LAW

A. That the adjusted gross income of a nonresident individual is defined by section 632(a)(1) of the Tax Law as the net amount of income, gain, loss and deduction entering into his federal adjusted gross income, derived from or connected with New York sources. Income and deductions from New York sources is defined by subdivision (b) of the same section, as follows:

"(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

* * *

(B) a business, trade, profession or occupation carried on in this state."

B. That 20 NYCRR 131.2(b) provides that:

"The determination as to whether items of income, gain, loss and deduction are derived from or connected with New York sources is made in accordance with sections 131.3 and 131.4 below."

That 20 NYCRR 131.4(b) provides that:

"The New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within this State. Compensation for personal services rendered by a nonresident individual wholly without the State is not included in his New York adjusted gross income, regardless of the fact that payment may be made from a point within

the State or that the employer is a resident individual, partnership or corporation."


C. That by including the 63 days worked in Washington, D.C. from October 2, 1972 through December 31, 1972 as days worked outside New York State in the allocation of wage income, petitioner has, in effect, properly excluded the wage income earned during this period from total New York income. Since the unreimbursed moving expense deduction was directly connected with and attributable to petitioner's occupation in Washington, D.C. and since the personal services rendered by petitioner during the period of his employment in Washington, D.C. were rendered wholly without the State, said moving expense deduction can not be considered as being derived from or connected with a business, trade, profession or occupation carried on in this State, within the meaning and intent of section 632(b)(1)(B) of the Tax Law and 20 NYCRR 131.2 and 131.4(b).

D. That the petition of Paul W. Pendorf and Barbara C. Pendorf is denied and the Notice of Deficiency dated April 12, 1976 is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

APR 01 1983


PRESIDENT


COMMISSIONER


COMMISSIONER