

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stanley & Corinne Sawyer :
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 Years :
1974 & 1975. :
_____ :

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 4th day of February, 1983, he served the within notice of Decision by certified mail upon Stanley & Corinne Sawyer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley & Corinne Sawyer
Box 63 Cedar Crest Rd.
Stillwater, NJ 07875

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
4th day of February, 1983.

David Parchuck

Corinne P. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
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AFFIDAVIT OF MAILING
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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 4th day of February, 1983, he served the within notice of Decision by certified mail upon Guy P. Novo the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Guy P. Novo
Coudert Brothers
200 Park Ave.
New York, NY 10166

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
4th day of February, 1983.

David Parchuck

Connie A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

February 4, 1983

Stanley & Corinne Sawyer
Box 63 Cedar Crest Rd.
Stillwater, NJ 07875

Dear Mr. & Mrs. Sawyer:

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
Guy P. Novo
Coudert Brothers
200 Park Ave.
New York, NY 10166
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions
of
STANLEY SAWYER AND CORINNE SAWYER
for Redetermination of Deficiencies or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1974 and 1975.

DECISION

Petitioners, Stanley Sawyer and Corinne Sawyer, Box 63, Cedar Crest Road, Stillwater, New Jersey 07875, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1974 and 1975 (File Nos. 27615 and 27472).

On December 9, 1981, petitioners advised the State Tax Commission, in writing, that they desired to waive a formal hearing and to submit the case to the State Tax Commission based on the entire record contained in the file.

ISSUES

I. Whether income from "performance royalties" constituted taxable compensation for personal services rendered in New York State or rather nontaxable compensation from soundtracks which were recorded both in and out of New York.

II. Whether a loss incurred as guarantor of a note of a corporation, organized under the laws of New York State, constituted a capital loss derived from or connected with New York sources.

FINDINGS OF FACT

1. Petitioners, Stanley Sawyer and Corinne Sawyer, filed joint New York State income tax nonresident returns for 1974 and 1975 in which they allocated wages of \$56,679.00 and \$19,072.00, for 1974 and 1975 respectively, on the basis of days worked within and without this State. For 1975, petitioners

deducted a \$1000.00 capital loss from New York source income in arriving at total New York income.

2. On July 17, 1978, the Audit Division issued a Statement of Audit Changes for 1974 imposing personal income tax, plus interest, for a total sum of \$4,600.65. Said statement was issued on the ground that since petitioners failed to submit information requested by the Audit Division in its letter of November 3, 1976, they were taxable on wage or salary income of \$56,679.00. On April 5, 1979, a Notice of Deficiency was mailed to petitioners asserting tax and interest of \$4,819.68. On October 16, 1977, petitioners signed a "Consent Fixing Period of Limitation Upon Assessment of Personal Income Tax" for 1974. Said consent extended the period for assessment until April 15, 1979.

3. On October 16, 1978, the Audit Division issued a Statement of Audit Changes for 1975 imposing personal income tax, plus interest, for a total sum of \$1,333.91. Said statement was issued on the grounds that all compensation received from petitioner Stanley Sawyer's New York employers was subject to personal income tax without allocation and that petitioners capital loss deduction of \$1,000.00 was disallowed as not being derived from New York sources. On April 5, 1979, a Notice of Deficiency was issued to petitioners asserting personal income tax, plus interest, of \$1,377.45.

4. Petitioner Stanley Sawyer is a well known and highly regarded announcer who derived income during the years at issue from his recording activities and from residuals. His activities were related to the commercial broadcasting field. When a company desired to have a commercial made to advertise a particular product, an artist had to be obtained and a soundtrack had to be recorded. (If the commercial was to be used for television, the visual portion had to be filmed which was often done with a different artist. The soundtrack and film

were then joined to produce the commercial) The usual procedure is for the company to use the services of an advertising agency. The advertising agency would then retain the services of an artist to record the soundtrack of the commercial.

The contract between the artist and the advertising agency required the artist to record the soundtrack at a recording session in a recording studio. For this single session, and the right to one use of the soundtrack which it produced, the advertising agency was required to pay the artist the agreed upon fee for his services. This completed all obligations under the contract, and the artist had no further right to payment for his services rendered at the recording session.

Thereafter, the completed commercial was to be tested to determine its "selling power". If the commercial was deemed to be effective in the promotion of sales, it could be used in a variety of ways. The company for which the commercial was produced could then purchase advertising time on a nationally broadcast television or radio show. If national broadcasting was not used, regional or local broadcasting was used. The "spot" in which the commercial was used lasted anywhere from five seconds up to one minute.

For each such use of the commercial, the artist who recorded the soundtrack was entitled to a specific payment, hereinafter referred to as a residual, under a separate "master agreement" between the Screen Actors Guild, representing the artist, and the advertising agency. This agreement required a residual payment for each and every use of the soundtrack, based on a complicated formula involving whether the broadcast was made on a national, regional or local level, and the length of the broadcast. There was a set payment schedule for each such use. This residual was entirely separate from the fee paid for

the recording session. Thus, an artist could be entitled to a full fee for the recording session (which is paid for his direct personal services) even if the soundtrack was never used. He would be entitled to the residual for the eventual use of the soundtrack only if the soundtrack was actually used, and then he would be paid on the basis of a detailed schedule for such payments.

During 1975, Mr. Sawyer's income included payments for actual recording sessions, some of which were held in New York, others of which were held elsewhere in the United States, outside New York, and royalties from the use of soundtracks which he had recorded and which were broadcast throughout the United States, including New York. Petitioner Stanley Sawyer does not contest that fees paid for actual recording sessions held in New York are New York source income and contended that such fees have been reported on his New York tax return. He contended that residuals paid for the use of soundtracks which he had recorded did not represent New York source income even if the soundtrack was recorded in New York.

5. Petitioner, Stanley Sawyer, spent time in New York for the sole purpose of taping commercials which were played in different parts of the United States and Canada. In 1974, his withholding statements, on which New York tax was withheld, showed wages of \$56,679.00 of which \$12,333.00 were allocated to New York on the basis of days worked within New York over total days worked in year. The wages of \$56,679.00 were derived from eleven commercials recorded in New York by petitioner, residuals on sessions recorded in 1974, and income derived from residuals recorded in prior years. Petitioner Corinne Sawyer was paid wages by Stanley Sawyer, Inc. for 1974 and 1975 in the respective amounts of \$21,250.00 and \$13,000.00. The taxability of her wages is not at issue.

6. Petitioner, Stanley Sawyer, submitted copies of check stubs from Talent & Residuals, Inc. showing gross payments made to him and the amounts withheld. The stubs also showed media type (film, video tape), type of payment (session, non-air, re-use), union (AFTRA, SAG), and year. The stubs did not show the location where the film or video tape footage was shot. Petitioner also submitted copies of checkstubs from Benton & Bowles, Inc. which acted as agent for Proctor & Gamble Productions. The stubs indicated that all commercials were recorded in New York, but were recorded in years prior to the periods at issue. The compensation from Compton Advertising, Inc. ("Compton") for 1975 of \$14,342.60 was, in part, wages for recording sessions (session fees) and, in part, wages for rebroadcast of commercials on the networks. Petitioner submitted a number of receipts from Compton which indicated in the "Comments" section "New Jersey Resident Recorded In New York". The only receipt that was different indicated that petitioner received a "holding fee" based on a contract which provided that agencies must pay a holding fee every thirteen weeks or lose the privilege of using a particular commercial.

7. Petitioners contend that receipt of residuals for use of commercial soundtracks recorded by petitioner Stanley Sawyer did not constitute New York source income and that said receipts were not derived from a business, trade, occupation or profession carried on in New York pursuant to Regulation section 131.4; thus, they contend, income derived from residuals is not subject to New York tax.

8. Petitioner, Stanley Sawyer, was a shareholder in Georges of Astoria, Inc. a corporation organized under the laws of New York State. He personally guaranteed certain indebtedness of said corporation and when the corporation became defunct and failed to repay its indebtedness, petitioner, as guarantor,

made payment of \$2,820.00. Petitioners claimed \$1000.00 of said amount as a long term capital loss on their 1975 New York tax return.

CONCLUSIONS OF LAW

A. That nonresidents are taxed under the New York State law on income from (a) property located within the State of New York; and (b) a business, trade, profession or occupation carried on within this state (See Tax Law section 632(b)). 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 to the extent that his services were rendered within this state. If personal services are performed within New York, whether or not as an employee, the compensation for such services includible in Federal adjusted gross income constitutes income from New York sources regardless of the fact that such compensation is received in a taxable year after the year in which the services were performed (section 632(b)(1)(B) of the Tax Law and 20 NYCRR 131.4). That income, including residuals, derived from the use of soundtracks which were recorded in New York State by petitioner Stanley Sawyer constituted payments received for personal services performed within the State of New York within the meaning and intent of section 632 of the Tax Law (see Matter of the Petition of Tony Bennett, State Tax Commission decision, signed November 19, 1976).

B. That Regulation section 20 NYCRR 131.5 provides: "Items of income, gain, loss and deduction attributable to intangible personal property of a nonresident individual, including annuities, dividends, interest, and gains and losses from the disposition of intangible personal property, do not constitute items of income, gain, loss and deduction derived from or connected with New York sources except to the extent attributable to property employed in a

business, trade, profession or occupation carried on in this state" (emphasis added). Therefore, the loss incurred as guarantor of a note for Georges of Astoria, Inc. did not constitute a loss derived from New York sources.

C. That the petitions of Stanley Sawyer and Corinne Sawyer are denied and the Notices of Deficiency are sustained together with any additional interest that may be lawfully owing.

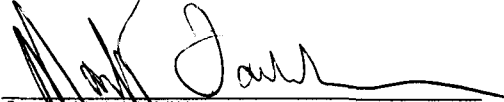
DATED: Albany, New York

FEB 04 1983

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

TAX APPEALS



REASON RETURNED
Undelivered _____
Address unknown _____
Insufficient address _____
No such street _____
No such office in state _____
Do not remail in this country _____

Stanley & Corinne Sawyer
Box 63 Cedar Crest Rd.
Stillwater, NJ 07875

1st Notice 2/8/83
2nd 2/15/83
Return 2/23/83

CERTIFIED

P 389 758 527

MAIL

D

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

February 4, 1983

Stanley & Corinne Sawyer
Box 63 Cedar Crest Rd.
Stillwater, NJ 07875

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Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

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Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Guy P. Novo
Coudert Brothers
200 Park Ave.
New York, NY 10166
Taxing Bureau's Representative

STATE OF NEW YORK

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DATED: Albany, New York

FEB 04 1983

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER