

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Mendel & Rima S. White

: 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 1975.

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Mendel & Rima S. White, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mendel & Rima S. White
2 Forest Hill Dr.
Howell, NJ 07731

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
6th day of May, 1983.

David Parchuck

Annice A. Heglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 6, 1983

Mendel & Rima S. White
2 Forest Hill Dr.
Howell, NJ 07731

Dear Mr. & Mrs. White:

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 | : | |
| MENDEL WHITE and RIMA S. WHITE | : | DECISION |
| for Redetermination of a Deficiency or for | : | |
| Refund of Personal Income Tax under Article 22 | : | |
| of the Tax Law for the Year 1975. | : | |

Petitioners, Mendel White and Rima S. White, 2 Forest Hill Drive, Howell, New Jersey 07731, 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 1975 (File No. 26046).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 30, 1981 at 1:15 P.M. Petitioner Mendel White appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (James F. Morris, Esq., of counsel).

ISSUE

Whether petitioner Mendel White is properly entitled to allocate a portion of his income to sources without New York State for certain days, each of which was worked partly within and partly without the State of New York.

FINDINGS OF FACT

1. Petitioners, Mendel White and Rima S. White, timely filed a joint New York State Income Tax Nonresident Return for the year 1975, whereon Mendel White (hereinafter petitioner) allocated his income to sources within and without New York State. In computing such allocation, petitioner claimed twenty-four days worked completely without New York State and 214 days worked

partly within (to the extent of 65 percent) and partly without (to the extent to 35 percent) New York State.

2. On April 10, 1978, the Audit Division issued a Statement of Audit Changes, wherein it held all days claimed as having been worked partly within and partly without New York State as full days worked within New York State. Additionally, both petitioner's reported total days worked and the total days worked in New York, as adjusted, were reduced by ten, the number of vacation days inadvertently omitted from petitioner's computed allocation schedule. Based on said adjustments, petitioner's allocation was determined to be 204 days worked in New York State over 228 days worked in the year, or 89.474 percent allocable to New York State. Accordingly, a Notice of Deficiency was issued against petitioners on November 13, 1978 asserting additional personal income tax of \$567.25, plus interest of \$124.44, for a total due of \$691.69.

3. Petitioner's income to which the allocation at issue was applied was derived from the Zullo Lumber Division of Tidewater Industries, Inc., Bronx, New York. Petitioner, an attorney licensed to practice in both New York and New Jersey, was retained by Tidewater Industries, Inc. (Tidewater) in January, 1974. He was assigned the title and duties of General Counsel and paid on a \$36,000.00 annual retainer basis. His duties consisted, in part, of drawing contracts, filing liens and litigating court cases.

4. Tidewater provided petitioner with an office in New York State. Additionally, petitioner maintained a business office at his residence in Howell, New Jersey. Such office, which petitioner contends was used as Tidewater's New Jersey corporate office, comprised the entire second floor of the dwelling and contained typing stations, desks, a photostat machine and other usual office furnishings.

5. Petitioner's duties for Tidewater necessitated work in New Jersey. On such days that petitioner worked in New Jersey, he was required to personally report to Tidewater's New York office subsequent to completion of that day's New Jersey activities. The nature and extent of petitioner's activities for Tidewater required full-time devotion by petitioner.

6. Petitioner argued that he is properly entitled to allocate to sources without New York the income attributable to services rendered in New Jersey during 204 partial days.

7. Petitioner submitted a 1975 diary and a schedule drawn therefrom listing the matter, location and activity engaged in during 142 days worked partially in New Jersey "on solely New Jersey matters". Fifty-six of the partial days petitioner spent at the office above his residence in Howell, New Jersey. Various other New Jersey locations were shown for the remaining eighty-six partial days. He testified that each day in New Jersey was "at minimum, one-half day". No documents or records were submitted which would provide the actual time spent in New York and New Jersey for the days worked partly within each state.

8. Petitioner terminated his affiliation with Tidewater on December 4, 1975.

CONCLUSIONS OF LAW

A. That although there is some question as to whether petitioner's relationship with Tidewater was that of an employee or that of an independent contractor, the fact that petitioner was paid on a yearly retainer basis coupled with his devotion of full time to Tidewater warrants the use of an allocation method normally restricted to an employee who uses days worked within and days worked without New York State as the controlling factor.

B. That days worked without New York 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 service of his employer (20 NYCRR 131.16).

C. That petitioner has not sustained the burden of proof required by section 689(e) of the Tax Law to show that the fifty-six partial days worked at the office above his Howell, New Jersey residence were so worked because of the necessity of his employer rather than petitioner's convenience or the convenience of his employer. Accordingly, such days are considered as days worked in New York State.

D. That while some portion of the remaining eighty-six partial days worked outside of New York State may have been for the necessity of his employer, petitioner did not sustain the burden of proof in substantiating the amount of time actually worked within and without New York State during these partial days. Consequently, each such day is considered as a day worked within New York State.

E. That the petitioner has not established that he is entitled to an allocation of his compensation from Tidewater different from that allowed by the Audit Division.

F. That the petition of Mendel and Rima S. White is hereby denied and the Notice of Deficiency dated November 13, 1978 is sustained.

DATED: Albany, New York

MAY 06 1983

STATE TAX COMMISSION

Roderick W. Clem
PRESIDENT

Francis Q. Koenig
COMMISSIONER

Mark Richard
COMMISSIONER