



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Raymond & Ruth Fisher	:	
for Redetermination of a Deficiency or for Refund	:	AFFIDAVIT OF MAILING
of Personal Income Tax under Article 22 of the Tax	:	
Law and New York City Nonresident Earnings Tax	:	
under Chapter 46, Title U of the Administrative	:	
Code of the City of New York 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 29th day of February, 1984, he served the within notice of Decision by certified mail upon John J. Kelley, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John J. Kelley  
Shea, Oesterle, Siana & Deegan  
P.O. Box 308  
Villanova, PA 19085

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 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  
29th day of February, 1984.

David Parchuck

James A. Haglund  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

February 29, 1984

Raymond & Ruth Fisher  
P.O. Box 308  
Villanova, PA 19085

Dear Mr. & Mrs. Fisher:

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 & 1312 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York, 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: Petitioner's Representative  
John J. Kelley  
Shea, Oesterle, Siana & Deegan  
P.O. Box 308  
Villanova, PA 19085  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
RAYMOND AND RUTH FISHER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and New York City Nonresident	:	
Earnings Tax under Chapter 46, Title U of the	:	
Administrative Code of the City of New York for	:	
the Year 1977.	:	

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Petitioners, Raymond and Ruth Fisher, P.O. Box 308, Villanova, Pennsylvania 19085, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1977 (File No. 33496).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 23, 1983 at 2:00 P.M., with all briefs to be submitted by August 5, 1983. Petitioners appeared by Shea, Oesterle, Siana & Deegan, C.P.A.'s (William C. Briggs, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the income received by petitioner Raymond Fisher from his New York employer during the period January 1, 1977 to April 30, 1977 is subject to New York State personal income tax and New York City nonresident earnings tax.

II. Whether the income earned by petitioner Raymond Fisher as a consultant to two New York based clients during the period May 1, 1977 to December 31,

1977 is subject to New York State personal income tax and New York City nonresident earnings tax.

III. Whether petitioner Raymond Fisher may deduct from his New York income a distributive share of a loss from the partnership, Norton Mailman Associates.

FINDINGS OF FACT

1. On February 25, 1981, the Audit Division issued a Statement of Personal Income Tax Audit Changes against petitioners, Raymond and Ruth Fisher,<sup>1</sup> asserting additional personal income taxes due of \$21,474.97 plus interest. The alleged deficiency was based upon the following: (i) an increase in the amount of wages allocable to New York from the \$15,874.00 allocated by petitioner to \$23,551.43, (ii) the disallowance of a partnership loss in the amount of \$8,719.00 on the basis that the loss was not a New York loss, and (iii) the treatment of petitioner's income earned after retirement of \$130,592.00 as New York source income.

2. On April 1, 1981, the Audit Division issued a Notice of Deficiency against petitioners Raymond and Ruth Fisher, alleging additional personal income taxes due of \$21,474.97 plus interest.

3. Petitioners filed jointly for 1977 a Form IT-203/209, New York State Income Tax Nonresident Return with Form NYC-203, Nonresident Earnings Tax Return For the City of New York. Petitioners reported total New York income of \$14,369.00 calculated as follows:

Wages Allocable to New York	\$15,874.00
Partnership loss allocable to New York	(8,719.00)
Other income allocable to New York	7,214.00
	<u>\$14,369.00</u>

<sup>1</sup>

Ruth Fisher, the wife of Raymond Fisher, is a party herein merely by reason that she filed the 1977 New York State income tax return jointly with her husband. Therefore, references in this decision to "petitioner" are to Raymond Fisher.

However, on the Nonresident Earnings Tax Return for the City of New York petitioner reported net earnings from self employment allocable to the City of New York of \$130,592.00. Petitioner claims that this latter return was incorrectly filed.

Petitioners also remitted New York State minimum income tax of \$8.70 on items of tax preference allocable to New York of \$894.00.

4. Petitioner reported on his Schedule C, Profit or (Loss) From Business or Profession, attached to his 1977 federal personal income tax return, net profits from a consulting business of \$130,592.00 on gross receipts of \$137,334.00. Petitioner's three statements of miscellaneous income attached to his federal return showed the following:

<u>Payer</u>	<u>Amount</u>
Continental Group Co., Inc. 633 Third Avenue New York, New York 10017	\$ 74,037.04
Universe Tankships (Delaware), Inc. 1345 Avenue of the Americas, Room 3305 New York, New York 10019	\$ 59,500.32
National Bulk Carriers, Inc. 1345 Avenue of the Americas, Room 3305 New York, New York 10016	<u>\$ 2,630.00</u>
TOTAL	\$136,167.36 <sup>2</sup>

5. The Audit Division subsequently increased the alleged tax liability of petitioner from the additional tax due of \$21,474.97 plus interest, as noted in Findings of Fact "1" and "2", supra, to \$23,549.90 plus interest. This increase in additional tax due of \$2,074.93 was based on the disallowance of an allocation

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<sup>2</sup> The difference between petitioner's gross receipts of \$137,334.00 and this total amount is unexplained.

of petitioner's wages of \$35,630.00 to non-New York sources.<sup>3</sup> The Audit Division allocated all of petitioner's wages to New York because on each of the two wage and tax statements (W-2 forms) attached to petitioner's 1977 New York State income tax return in items nine and ten, the total amount of wages is reported as New York wages.<sup>4</sup>

6. Petitioner retired from Continental Group Co., Inc. (hereinafter "Continental Group") on June 30, 1976 upon reaching the age of sixty-five. At the request of the corporation's board of directors, he continued to provide services and remained a salaried employee.<sup>5</sup> Until April 30, 1977, petitioner was provided with an office in the corporate headquarters in New York City. However, from January 1, 1977 to April 30, 1977, petitioner also performed services for the corporation outside New York in locations including Chicago, London, Mexico, Florida and in an office in his home in Greenwich, Connecticut.

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<sup>3</sup> The Statement of Audit Changes dated February 25, 1981 and the subsequent Notice of Deficiency dated April 1, 1981 were based upon audit papers dated February 23, 1981 which allocated \$23,551.43 of petitioner's wage to New York. Although the revision noted above was dated February 25, 1981, a modified Statement of Audit Changes was not issued and the Notice of Deficiency was issued based on the February 23, 1981 work papers. It appears that it was not until the hearing herein that the increased deficiency was asserted.

<sup>4</sup> Both statements were issued by the same employer, The Continental Group, Inc., 633 Third Avenue, New York, New York 10017. One is in the amount of \$1,500.00 and the second is for \$32,175.00 which totals \$33,675.00. The difference between the wages of \$35,630.00 reported by petitioner on his New York income tax return and the total reported in the statements is unexplained.

<sup>5</sup> Robert S. Hatfield, chairman of Continental Group during the year at issue, stated in his affidavit dated July 27, 1983 that after petitioner's retirement, Mr. Fisher was compensated as a consultant. However, this conflicts with the fact that for the period from January 1, 1977 until April 30, 1977, petitioner received W-2 forms as noted in Finding of Fact "5", supra, which supports a conclusion that the corporation treated petitioner as a salaried employee at least to the extent of the wages reported in such statements.

There is nothing in the record concerning the nature of the work performed by petitioner in his home office on behalf of the corporation.

During the period, January 1, 1977 through April 30, 1977, there are seventy working days. Petitioner worked inside New York on thirty-three days; in Greenwich, Connecticut, on twenty days; and outside New York in places other than Greenwich, Connecticut, seventeen days.

7. After April 30, 1977, petitioner conducted a profitable consulting business. As noted in Finding of Fact "4", supra, petitioner had a net profit of \$130,592.00 on gross receipts of \$137,334.00. \$74,037.04 of the gross receipts was from his former employer, Continental Group, for whom he continued to provide services as a consultant. According to an affidavit of Robert S. Hatfield, the chairman of Continental Group during the year at issue, petitioner performed no services for the corporation in New York after April 30, 1977.<sup>6</sup>

The only other clients of petitioner were Universe Tankships (Delaware), Inc. (hereinafter "Universe Tankships") and National Bulk Carriers, Inc. with offices at the same location in New York City. Gross receipts from these two apparently related entities, amounted to \$62,130.32.

8. In a letter dated July 5, 1983 from petitioner to his representative, petitioner wrote as follows:

"All work for Universe Tankship was carried out at my Greenwich, Ct. office, the Greenwich, Ct. office of Universe Tankships, in Brazil or in States other than New York. Trips were made from time to time to the New York office of Universe Tankships for the purpose of consulting with the owner, D.K. Ludwig, and senior members of his organization. Fifty two such visits were made during 1977."

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A letter of petitioner Raymond Fisher dated July 5, 1983 to his representative and schedules attached thereto support Mr. Hatfield's statement that petitioner performed no services for such corporation after April 30, 1977 in New York.



Petitioner's representative argues that "Since there are two hundred and twenty work days between May 1 and December 31, and Mr. Fisher had performed services for this company throughout the year, we propose that twenty-five percent, or  $55/220$ <sup>7</sup> of the fee generated from Universe Tankships be included in New York income."

From May 1, 1977 through December 31, 1977, petitioner provided service outside New York and not in his home office in Greenwich, Connecticut on eight days according to the expense reports submitted by petitioner to Universe Tankships. According to such reports, all other meetings were in New York City. There is nothing in the record describing the services that petitioner provided Universe Tankships or the services provided from petitioner's home office in Greenwich, Connecticut. In fact, there is no evidence concerning the number of days that petitioner actually provided services to this corporation from his home office.

9. Norton Mailman Associates is a real estate limited partnership with offices at 60 East 42nd Street, Suite 2220, New York City, New York 10017. During the year at issue, it owned rental property in Beaumont, Texas and Massapequa, New York. Its 1977 Form IT-204, New York State Partnership Return showed total partnership loss of \$522,125.00 and petitioner's distributive share of such loss of \$8,719.00. However, the partnership failed to allocate such loss between its Texas and New York properties.<sup>8</sup>

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<sup>7</sup> The representative later argued that the percentage should be  $52/220$ .

<sup>8</sup> Apparently, the partnership failed to prepare and file a Form IT-204-A, Nonresident Partner Allocation Schedule. Since New York and Texas losses reported on its IT-204 are lumped together, it is impossible to determine what portion of petitioner's distributive share of the partnership's loss of \$8,719.00 is properly allocable to New York.

10. Petitioner did not appear and testify at the hearing herein. In lieu of such appearance and testimony, he submitted a statement in the form of an affidavit, but it was not sworn to before a notary public or any other officer having authority to administer oaths.

CONCLUSIONS OF LAW

A. That pursuant to section 632 of the Tax Law and section U46-2.0 of the Administrative Code of the City of New York, nonresidents of New York State/City must pay taxes on net income derived from or connected with New York State/City sources.

B. That "a nonresident who performs services in New York or has an office in New York is allowed to avoid New York State tax liability for services performed outside the State only if they are performed of necessity in the service of the employer". Matter of Speno v. Gallman, 35 N.Y.2d 256, 259.

C. That petitioners have not shouldered their burden of proof under section 689(e) of the Tax Law and section U46-39.0(e) of the Administrative Code of the City of New York to show that petitioner Raymond Fisher during the period January 1, 1977 to April 30, 1977 performed services outside New York State/City in the office in his home in Greenwich, Connecticut of necessity in the service of Continental Group. However, pursuant to Finding of Fact "6", supra, out of seventy working days during such period, petitioner worked outside New York, in locations other than the office in his home, on behalf of Continental Group on seventeen days. Therefore, petitioner may apportion 17/70 of his wages from Continental Group for the four month period to sources outside New York, and such portion is not subject to the taxes at issue.

D. That 20 NYCRR 131.4(a) provides, in part, as follows:

"Business is carried on within the State if activities within the State in connection with the business are conducted in this State with a fair measure of permanency and continuity."

E. That petitioner rendered consulting services for Continental Group wholly outside New York State. Therefore, petitioner's consulting income of \$74,037.04 from Continental Group is not subject to the taxes at issue.

F. That petitioner performed a substantial amount of work on behalf of Universe Tankships in New York City as noted in Finding of Fact "8", supra, and it is reasonable to conclude that his consulting activities on behalf of Universe Tankships were systematically and regularly carried on in New York State/City especially in light of the fact that petitioner has failed to prove that he systematically and regularly carried on such consulting activities in a locale other than in New York State/City. See Matter of Eugene G. Fubini and Jane E. Fubini, State Tax Commission, April 10, 1981. In addition, petitioner has failed to introduce sufficient evidence to show that he is entitled to an allocation of his consulting income from Universe Tankships under 20 NYCRR 131.13 which sets forth the methods for allocating income from a business carried on partly within and partly without New York. Further, since petitioner was reimbursed for his expenses by Universe Tankships, no business deductions are allowed.

G. That pursuant to Finding of Fact "9", supra, petitioners have failed to sustain their burden of proof to show what portion, if any, of petitioner Raymond Fisher's distributive share of the partnership loss of Norton Mailman Associates was derived from New York sources.

H. That the petition of Raymond and Ruth Fisher is granted to the extent noted in Conclusions of Law "C" and "E" and the Audit Division is directed to recompute petitioners' tax liability for the years at issue and to amend the


Notice of Deficiency to so conform. In all other respects, the petition is denied.


DATED: Albany, New York

FEB 29 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER