

STATE TAX COMMISSION

State of New York }  
County of Albany } ss.:

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 31st day of July, 1984, he served the within notice of Decision by certified mail upon Gerald & Francine Heller, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerald & Francine Heller  
208 N.W. 101 Terrace  
Coral Springs, FL 33065

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
31st day of July, 1984.

David Archuck

*Amunir Orkashid*  
Authorized to administer oaths  
pursuant to Tax Law section 174

## STATE TAX COMMISSION

*Donna J. DeGard*  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

July 31, 1984

Gerald & Francine Heller  
208 N.W. 101 Terrace  
Coral Springs, FL 33065

Dear Mr. & Mrs. Heller:

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, 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  
Barbara L. Wolf  
533 N.E. Third Ave.  
Fort Lauderdale, FL 33301  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
GERALD AND FRANCINE HELLER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1976.	:	

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Petitioners, Gerald and Francine Heller, 208 N.W. 101 Terrace, Coral Springs, Florida 33065, 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 1976 (File No. 23148).

On December 5, 1983, petitioners waived their right to a hearing and requested that a decision be rendered by the State Tax Commission based upon the Department of Taxation and Finance file, and briefs to be submitted by March 16, 1984. Upon review of the record, the State Tax Commission renders the following decision.

ISSUES

I. Whether the Audit Division's determination that petitioners were residents of New York State for the month of January 1976 was proper.

II. Whether, and to what extent, the income received by petitioner Gerald Heller from ILC Data Device Corporation while he resided in New Jersey constitutes income subject to New York State income tax.

III. Whether petitioners' capital loss deduction was proper.

FINDINGS OF FACT

1. Petitioners, Gerald and Francine Heller, filed a 1976 New York State Income Tax Resident Return wherein petitioners reported that they were residents

of New York State for seven months of the year. Said return also reported total wages of \$65,000.00, of which \$5,000.00 was reported as taxable to New York, and a loss of \$1,000.00 from the sale or exchange of capital assets. A wage and tax withholding statement attached to the return, and issued by ILC Data Device Corporation ("ILC") to petitioner Gerald Heller, showed wages of \$47,307.70 and New York State income tax withheld of \$870.54.

2. After corresponding with petitioners, the Audit Division proposed certain adjustments to their 1976 return. Said adjustments were explained on a Statement of Audit Changes, dated February 15, 1978, as follows:

"Based on information submitted, you are considered to have been a resident of New York State for one month (January) for tax year 1976.

Income of \$42,307.70 is considered taxable to New York State in the nonresident period, since it is considered to have been derived from New York sources.

Since you failed to submit a copy of Federal Schedule D as requested, capital loss \$1,000.00 from the sale or exchange of capital assets have (sic) been disallowed as unsubstantiated."

Accordingly, on May 5, 1978, a Notice of Deficiency was issued to petitioners asserting additional tax due of \$2,399.50<sup>1</sup>, plus interest of \$215.13, for a total due of \$2,614.63.

3. Petitioner Gerald Heller was employed by ILC in New York State from approximately 1971 to January 28, 1976. Prior to and during January of 1976, petitioners resided at 6 Daniel Lane, Dix Hills, New York. Petitioners resided in the State of New Jersey for the remaining eleven months of 1976. During this eleven month period, Mr. Heller was employed by the Optel Corporation at its New Jersey facility.

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<sup>1</sup> Petitioners' income tax return reported an overpayment of tax of \$870.54. Said overpayment was not refunded to petitioners, but rather, was applied against the recomputed tax resulting in net additional tax due of \$2,399.50.

4. Petitioners sold their Dix Hills residence immediately after leaving New York and moved into a residence in New Jersey which they had purchased. Petitioners voted in New Jersey in 1976. Mr. Heller stated, "[w]hen we left New York in January we did not intend to return and have not."

5. Petitioner Gerald Heller received \$42,307.70 from ILC after moving to New Jersey. Of this amount, \$35,000.00 represented payment in accordance with a "non-competition understanding" between ILC and Mr. Heller. The remaining \$7,307.70 represented salary payments for services performed by Mr. Heller while residing in New York State. Mr. Heller did not perform any services for ILC after leaving New York State.

6. The non-competition understanding was entered into by Mr. Heller and ILC sometime prior to 1972. Although Mr. Heller was unable to locate a copy of the agreement, he explained in a letter dated October 7, 1977 and addressed to the Audit Division, that the "[m]onies received from ILC were in payment not to compete with ILC for two years and to immediately end my association with them." ILC paid Mr. Heller the amount agreed to in seven monthly installments of \$5,000.00 each, commencing after his move to New Jersey.

7. During and prior to the year in issue, ILC was a Delaware corporation with five major locations around the world, including facilities in New York, California, Washington, England and Belgium. ILC was engaged in the business of electronics manufacturing and the sale of such products throughout the world. Approximately 15 percent of ILC's sales were made within New York State.

8. Prior to leaving New York State in 1976, petitioner Gerald Heller sold stock he had owned in Solid State Scientific, Inc. Such sale, which was the only transaction reported on petitioners' 1976 Federal Schedule D, resulted in

a net long-term capital loss of \$6,047.72. As a result of this transaction, petitioners deducted a capital loss of \$1,000.00 on their 1976 federal and New York State income tax returns.

CONCLUSIONS OF LAW

A. That, in light of the facts as set forth in Findings of Fact "3" and "4", it was proper for the Audit Division to conclude that petitioners were residents of New York State for the month of January, 1976 and nonresidents for the remaining eleven months of the year.

B. That Tax Law section 632, as in effect during 1976, provided in pertinent part:

"New York adjusted gross income of a nonresident individual. --  
(a) General. -- The New York adjusted gross income of a nonresident individual shall be the sum of the following:

(1) The net amount 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) Income and deductions from New York sources. -- (1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this state; or

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

C. That the non-competition understanding between petitioner Gerald Heller and ILC was directly related to and grew out of Mr. Heller's employment with ILC and the services he performed in New York State while so employed. Consequently, the \$35,000.00 received in accordance with the understanding constituted deferred income attributable to prior personal services rendered in New York State. As such, said amounts are items of income derived from or

connected with New York sources within the meaning and intent of Tax Law section 632(b)(1)(B) and are subject to income tax, in their entirety, during the period in 1976 when petitioners were nonresidents of New York State. That ILC had places of business and sold its products both within and without this State is irrelevant.

D. That the salary payment of \$7,307.70 received by petitioner Gerald Heller while a nonresident of New York State for services performed in this State while a resident constitutes New York source income. Therefore, such amount is properly includible in petitioners' New York adjusted gross income during their nonresident period (20 NYCRR 131.4[c]).

E. That petitioners have established that they incurred a capital loss in January of 1976 and that the deduction in the amount of \$1,000.00 for such loss during their resident period was proper. The Audit Division is directed to recompute the Notice of Deficiency accordingly.

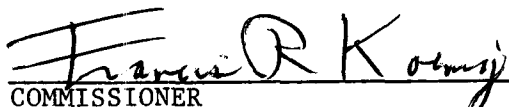
F. That the petition of Gerald and Francine Heller is granted to the extent indicated in Conclusion of Law "E" supra, and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER