

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Kurt & Helen L. Molter :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of New York City Nonresident Earnings Tax under :
Chapter 46, Title U of the Administrative Code of :
the City of New York and Article 22 of the Tax Law :
for the Year 1978. :

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Kurt & Helen L. Molter, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kurt & Helen L. Molter
1839 Emma St.
Wantagh, NY 11793

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
5th day of October, 1984.

David Parchuck

Gumie R. Haggan
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

Kurt & Helen L. Molter

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York City Nonresident Earnings Tax under
Chapter 46, Title U of the Administrative Code of :
the City of New York and Article 22 of the Tax Law
for the Year 1978. :

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Ernesto V. Luzzatto, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ernesto V. Luzzatto
Kirlin, Campbell & Keating
120 Broadway
New York, NY 10271

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
5th day of October, 1984.

David Parchuck

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

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

October 5, 1984

Kurt & Helen L. Molter
1839 Emma St.
Wantagh, NY 11793

Dear Mr. & Mrs. Molter:

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
Ernesto V. Luzzatto
Kirlin, Campbell & Keating
120 Broadway
New York, NY 10271
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
KURT MOLTER AND HELEN L. MOLTER : DECISION
for Redetermination of a Deficiency or for :
Refund of New York City Nonresident Earnings Tax :
under Chapter 46, Title U of the Administrative :
Code of the City of New York and Article 22 of :
the Tax Law for the Year 1978. :

Petitioners, Kurt Molter and Helen L. Molter, 1839 Emma Street, Wantagh, New York 11793, filed a petition for redetermination of a deficiency or for refund of New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York and Article 22 of the Tax Law for the year 1978 (File No. 38478).

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 February 10, 1984 at 9:15 A.M. Petitioners appeared by Ernesto V. Luzzatto, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the income derived by petitioner Kurt Molter from his New York City employer, American Bureau of Shipping, is subject to New York City nonresident earnings tax.

FINDINGS OF FACT

1. Kurt Molter (hereinafter petitioner) and his wife, Helen L. Molter, timely filed a joint New York State Income Tax Resident Return for the year 1978 whereon petitioner reported wages of \$39,829.24 derived from his New York

City employer, American Bureau of Shipping ("American"). According to a Wage and Tax Statement attached thereto, petitioner was paid New York City wages of \$39,829.24 from which New York City taxes of \$147.12 were withheld. Such "wages" were also reported as "Personal Service Income" on the maximum tax schedule filed in conjunction with said return.

2. Kurt Molter and Helen L. Molter also filed a 1978 Nonresident Earnings Tax Return for the City of New York, whereon they reported both the gross wages and the tax liability as zero. On Page 2 of said return petitioner wrote "No work performed in N.Y.C.".

3. On March 8, 1982, the Audit Division issued a Statement of Audit Changes to Kurt Molter and Helen L. Molter whereon New York City nonresident earnings tax was computed on petitioner's income of \$39,829.24 on the basis that "(a) nonresident of New York City who earns wages in the City of New York is required to pay New York City Nonresident Earnings Tax". Accordingly, a Notice of Deficiency was issued against Kurt Molter and Helen L. Molter on April 7, 1982 asserting New York City nonresident earnings tax of \$179.23, plus interest of \$51.25, for a total due of \$230.48.

4. On March 21, 1977 petitioner entered into an agreement with American wherein American accepted petitioner's request for early retirement as Vice President, effective April 1, 1977.

5. In view of petitioner's thirty-seven years of service with American, said agreement provided, in pertinent part, that:

(a) Petitioner was granted a two-year leave of absence with salary at the rate of \$32,679.24 per year, payable until March 31, 1979. In addition thereto, American was to make the necessary contributions so that petitioner would receive all benefits, including retirement, hospitalization, life insurance and all similar benefits which were provided to its officers.

(b) Petitioner was granted a severance allowance equivalent to four months' salary to be paid on his official retirement date, April 1, 1979.

(c) "During the period of this arrangement" petitioner was to render advisory or consultive services to American as it might request, limited to the rendering of advice or counsel not more than twice per month. Petitioner's failure to render such requested services by reason of his being on vacation, or by reason of illness or other incapacity, would not affect his right to receive said payments.

(d) During the period of the receipt of compensation at the rate of \$32,679.24 per year (April 1, 1977 to March 31, 1979), petitioner could not, without the written consent of American, "accept employment with any person, firm, corporation or association performing or rendering classification services similar to the classification services then being performed or rendered by American".

(e) Should petitioner accept employment in violation of the provisions hereof and continue such employment for a period of 15 days after American requested him, in writing, to cease such employment, then no further payments of compensation at the rate of \$32,679.24 per year would be due or payable to petitioner.

6. No services were rendered by petitioner to American during 1978.

7. Petitioner's representative alleged that the compensation at issue was payable pursuant to the aforestated agreement, for petitioner's availability to render consulting services and for his agreement not to compete. Accordingly, he contended that since no services were rendered, the income at issue is not subject to the New York City nonresident earnings tax.

8. Petitioner's income of \$39,829.24 derived from American during 1978 was in excess of that due him (\$32,679.24) pursuant to the aforestated agreement. No explanation was given as to the nature of the excess payment.

CONCLUSIONS OF LAW

A. That section U46-2.0(a)(2) of the Administrative Code of the City of New York provides that:

"For each taxable year beginning on or after January first, nineteen hundred seventy-one and ending on or before December thirty-first, nineteen hundred eighty-four, a tax is hereby imposed on the wages

earned, and the net earnings from self employment, within the city, of every nonresident individual, estate and trust which shall comprise:

(i) A tax at the rate of forty-five hundredths of one per cent on all wages."

B. That pursuant to section U46-1.0(e) of the Administrative Code of the City of New York, the term wages "means wages as defined in subsection (a) of section thirty-four hundred one of the internal revenue code of nineteen hundred fifty-four...".

C. That Internal Revenue Code section 3401(a) defines "wages" as all remuneration (other than fees paid to a public official) for services performed by an employee for his employer with certain exceptions, none of which are applicable herein.

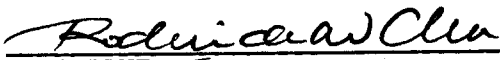
D. That petitioner's compensation during 1978 was paid under a "leave of absence with salary". The primary reason for such compensation was "in view of your [petitioner's] thirty-seven years service" with American and not for his agreement not to compete or his availability to render consulting services. Accordingly, said compensation constituted wages paid and is attributable to prior services rendered in the City of New York and, as such, is subject to New York City nonresident earnings tax within the meaning and intent of sections U46-1.0(e) and U46-2.0(a)(2) of the Administrative Code of the City of New York.


E. That the petition of Kurt Molter and Helen L. Molter is denied and the Notice of Deficiency dated April 7, 1982 is sustained together with such additional interest as may be lawfully owing.

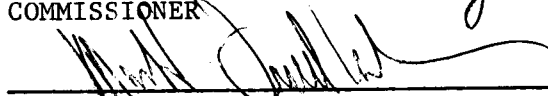
DATED: Albany, New York

OCT 05 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER