

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
                  of :  
                  Norman & Sondra Waxman :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Year :  
1978. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

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 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Norman & Sondra Waxman, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Norman & Sondra Waxman  
7 Emerson Rd.  
Brookville, NY 11545

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  
2nd day of May, 1984.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

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AFFIDAVIT OF MAILING

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 2nd day of May, 1984, he served the within notice of Decision by certified mail upon S. George Greenspan, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

S. George Greenspan  
580 Sylvan Ave.  
Englewood Cliffs, NY 07632

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  
2nd day of May, 1984.

David Parchuck

James P. Heglund  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

May 2, 1984

Norman & Sondra Waxman  
7 Emerson Rd.  
Brookville, NY 11545

Dear Mr. & Mrs. Waxman:

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  
S. George Greenspan  
580 Sylvan Ave.  
Englewood Cliffs, NY 07632  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
NORMAN WAXMAN AND SONDRAX WAXMAN	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1978.	:	

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Petitioners, Norman Waxman and Sondra Waxman, 7 Emerson Road, Brookville, New York 11545, 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 1978 (File No. 32678).

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 September 28, 1983 at 10:45 A.M., with all briefs to be submitted by October 17, 1983. Petitioners appeared by S. George Greenspan, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether the Audit Division properly recalculated petitioner's allocation of wage income to New York State sources disallowing eleven (11) days claimed by petitioner Norman Waxman as having been worked outside the State.

FINDINGS OF FACT

1. Petitioners herein, Norman Waxman and Sondra Waxman,<sup>1</sup> timely filed New York State resident and nonresident income tax returns for the year 1978.

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<sup>1</sup> Sondra Waxman is involved in this proceeding due solely to the filing of joint tax returns with her husband. Accordingly, the use of the term petitioner hereafter shall refer solely to Norman Waxman.

Petitioner's nonresident return covered the period January 1, 1978 to August 31, 1978, while his resident return was for the period September 1, 1978 to December 31, 1978. On the nonresident return, petitioner allocated a portion of the wage income he received from the Corsonna Corp. to sources within and without New York State based on a percentage determined by placing the days worked within New York State over total working days. For the year 1978 petitioner claimed he was due a refund in the amount of \$3,338.00.

2. The Audit Division did not process the refund as requested by petitioner on his 1978 return, electing to first question petitioner concerning his claimed allocation of the wage income received from the Corsonna Corp. As the result of its examination, the Audit Division issued a Statement of Refund Adjustment to petitioner wherein he was allowed a refund of \$2,360.37, plus interest of \$86.30, for a total refund of \$2,446.67. On the aforementioned Statement the Audit Division made several adjustments to the computation of petitioner's 1978 New York State personal income tax liability, of which petitioner contests only the disallowance of eleven (11) days as days worked outside New York State in the allocation of Corsonna Corp. wage income to New York State sources. On November 24, 1980, the Audit Division issued a formal notice to petitioner advising that his claimed refund of \$3,338.00 was allowed in the amount of \$2,446.67<sup>2</sup> and disallowed in the amount of \$891.33.

3. Effective May 1, 1978 and through the end of said year, petitioner was employed by the Corsonna Corp., a furniture manufacturer with offices in New York State and factories in North Carolina and Mississippi. From January 1, 1978 until August 31, 1978, petitioner was a nonresident of New York State

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<sup>2</sup> The Audit Division erroneously included both the tax and interest as the amount of the refund allowed in the notice dated November 24, 1980. The actual refund of tax was \$2,360.37 and the correct refund denial should be \$977.63 (\$3,338.00 - \$2,360.37).

residing at 104 Bowen Street, Providence, Rhode Island. Petitioner, on September 1, 1978, moved to his current address at 7 Emerson Road, Brookville, New York and became a resident of New York State. Petitioner worked both within and without the State of New York for the period when he was employed by the Corsonna Corp. but still a nonresident of New York State (May 1, 1978 to August 31, 1978).<sup>3</sup>

4. Part of petitioner's responsibilities as president of a division of the Corsonna Corp. was to maintain and improve the sales of the company. Petitioner's duties required that he travel throughout the United States meeting with major accounts and also to handle problem accounts.

5. In response to a request from the Audit Division, petitioner, on July 9, 1979, submitted a schedule of days worked outside New York State. On said schedule petitioner claimed a total of 39 days worked outside New York State during the period May 1, 1978 through August 31, 1978, of which eleven (11) days were shown as days worked at home in Providence, Rhode Island preparing for sales trips. A letter dated July 9, 1979 from petitioner's representative indicated that petitioner "...[W]hile he lived in Providence he would return home to continue his sales efforts and prepare reports. It was more convenient, efficient and less expensive than living in a NY hotel for the company."

6. Of the eleven (11) days in question herein, two (2) days were a Saturday and a Sunday. The Audit Division considered these days to be non-working days since they were not normal work days. The remaining nine (9) days were normal work days and the Audit Division considered these to be days worked in New York State on the basis that the services performed by petitioner at home

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<sup>3</sup> For the period January 1, 1978 to April 30, 1978, petitioner was a nonresident of New York State working for a Massachusetts corporation, performing no services in New York and earning no income from New York sources during said period.

were not services which of necessity, as opposed to convenience, were required to be performed outside the State.

7. At the hearing held herein petitioner claimed that the eleven (11) days originally designated as days worked at home were in fact spent outside of his personal residence visiting with major customers in the New England area. No credible documentary or other evidence was adduced at the hearing held herein to support that petitioner was actually visiting with customers on the eleven days in question and not working at home.

CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law places the burden of proof on petitioner except in three (3) specifically enumerated instances, none of which are applicable in the instant matter. That petitioner has failed to sustain the burden of proof to show that the eleven (11) days in question were either:

1. worked at home for the employer's necessity as opposed to the convenience of the employee (Kitman v. State Tax Commission, 92 A.D.2d 1018, mot. for lv. to appeal denied 59 N.Y.2d 603); or

2. worked outside of his personal residence visiting with major customers in the New England area.

B. That the petition of Norman Waxman and Sondra Waxman for refund is denied and that the notice of partial disallowance dated November 24, 1980 is sustained.

DATED: Albany, New York

MAY 02 1984

STATE TAX COMMISSION

Richard W. Chen  
PRESIDENT  
Francis R. Koenig  
COMMISSIONER  
Mark J. Friedman  
COMMISSIONER