

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Hunter & Gertrude Yager : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of NYS Personal Income Tax under Article 22 of the :
Tax Law for the Years 1975 - 1978 and Nonresident :
Earnings Tax under Chapter 46, Title U of the :
Administrative Code of the City of New York for :
the Years 1976 through 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 25th day of April, 1984, he served the within notice of Decision by certified mail upon Hunter & Gertrude Yager, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hunter & Gertrude Yager
517 W. Lyon Farm Dr.
Greenwich, CT 06830

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
25th day of April, 1984.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Hunter & Gertrude Yager : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of NYS Personal Income Tax under Article 22 of :
the Tax Law for the Years 1975 - 1978 and :
Nonresident Earnings Tax under Chapter 46, Title :
U of the Administrative Code of the City of New :
York for the Years 1976 - 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 25th day of April, 1984, he served the within notice of Decision by certified mail upon Hirsch Kaplan, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hirsch Kaplan
405 Lexington Ave.
New York, NY 10174

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
25th day of April, 1984.

David Parchuck

Samuel A. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 25, 1984

Hunter & Gertrude Yager
517 W. Lyon Farm Dr.
Greenwich, CT 06830

Dear Mr. & Mrs. Yager:

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, 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
Hirsch Kaplan
405 Lexington Ave.
New York, NY 10174
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HUNTER AND GERTRUDE YAGER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law for the Years	:	
1975 through 1978 and Nonresident Earnings Tax	:	
under Chapter 46, Title U of the Administrative	:	
Code of the City of New York for the Years 1976	:	
through 1978.	:	

Petitioners, Hunter and Gertrude Yager, 517 West Lyon Farm Drive, Greenwich, Connecticut 06830, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1975 through 1978 and nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1976 through 1978 (File Nos. 27795 and 34086).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 14, 1983 at 10:45 A.M., with all briefs to be submitted by November 18, 1983. Petitioners appeared by Hirsch Kaplan, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Arnold M. Glass, Esq., of counsel).

ISSUES

I. Whether petitioners may attribute a portion of petitioner Hunter Yager's earned income to non-New York sources based on days worked by Mr. Yager at his Connecticut home.

II. Whether petitioners may attribute a portion of petitioner Hunter Yager's earned income to non-New York sources based on days worked by Mr. Yager out of New York and not at his home in Connecticut.

FINDINGS OF FACT

1. Petitioners, Hunter Yager and Gertrude Yager, residents of Connecticut, timely filed New York State income tax nonresident returns for each of the years 1975 through 1978, including New York City nonresident earnings tax returns for each of the years 1976 through 1978. For each of the years at issue, petitioners allocated Hunter Yager's salary income within and without New York by a fraction, the numerator of which was the number of days claimed to have been worked in New York and the denominator of which was the total number of days claimed to have been worked, as follows:

<u>Year</u>	<u>Days Worked in New York</u>	<u>Days Worked Elsewhere</u>	<u>Total Days Worked</u>
1975	166	85	251
1976	183	90	273
1977	175	80	255
1978	165	83	248

2. On December 1, 1978 and on April 14, 1981, respectively, the Audit Division issued to petitioners statements of audit changes for 1975 and 1976, and 1977 and 1978, respectively, reflecting additional tax computed as due for each of the years at issue based upon disallowance of the aforementioned allocation of income, as follows:

<u>Year</u>	<u>Additional New York State Tax</u>	<u>Additional New York City Tax</u>
1975	\$2,440.69	\$ 0.
1976	3,465.22	176.69
1977	2,811.30	184.00
1978	5,094.95	301.56

Interest, but not penalties, was also computed for each of the years at issue.

3. On April 10, 1979 and on April 14, 1981, respectively, the Audit Division issued to petitioners notices of deficiency for the years 1975 and 1976, and 1977 and 1978, respectively, asserting additional tax due as computed on the aforementioned statements of audit changes, plus interest.¹

4. During the years at issue, Mr. Yager was employed by Grey Advertising Agency, Inc. ("Grey"), as an executive vice-president and member of Grey's senior management.

5. Grey's offices are located in New York City and allegedly are provided with heating and air conditioning services only between the hours of 8:00 A.M. to 6:00 P.M. daily. Mr. Yager asserts, in support of the claimed right to allocate income based upon days worked at his home in Connecticut, that his duties and management responsibilities frequently required him to work beyond the hours of 8:00 A.M. to 6:00 P.M. in order to complete his work load. It is asserted that Grey's offices are rendered unsuitable to work in when the noted services are not provided, and that the cost of extending the hours of such services is prohibitive unless a large number of employees are working in the offices. Finally, it is asserted that many of Mr. Yager's client accounts were international accounts requiring Mr. Yager to take business calls at his home (due to time zone differences) after working hours and on weekends.

6. In addition to the claimed allocation of days worked at home, Mr. Yager seeks to allocate additional days claimed to have been worked out of New York State and other than at his home in Connecticut. Mr. Yager's representative prepared a listing of days worked out of New York for each of the years at

¹ Petitioner Gertrude Yager's name appears solely by virtue of having filed a joint return with petitioner Hunter Yager. Accordingly, all references to petitioner apply solely to Hunter Yager.

issue reflecting the date, place of work and (in most cases) the name of the client involved.² These listings were prepared from appointment books allegedly maintained by Mr. Yager's secretaries and from various expense reimbursement vouchers. The listings indicate the following totals regarding the days sought to be allocated by Mr. Yager:

<u>Year</u>	<u>Days Worked At Home</u>	<u>Days Worked Away From Home</u>	<u>Total Days Worked Outside of New York</u>
1975	27½ days	60½ days	88 days
1976	36 days	55 days	91 days
1977	34½ days	63 days	97½ days
1978	29½ days	81 days	110½ days

7. The appointment books reflect entries in both pen and pencil, and contain numerous erasures. The entries are, in general, very sparse, with reference to individual or company names but usually not to specific geographic locations. A few entries do reflect airline flight numbers and departure/arrival times. The expense vouchers, submitted by year but not in daily chronological order, are somewhat more specific, usually indicating a geographic location, date and breakdown of expenses incurred. Such vouchers are signed and dated by Mr. Yager and date stamped when paid by Grey.

8. There are, during each of the years at issue, a number of days claimed for which no expense vouchers and/or no entries in the appointment books could be found. There are also instances where the appointment book entries are contrary to the claim of a day spent outside of New York.³ These instances,

² The listing for 1975 and 1976 was attached to and included as part of Exhibit "G", while the listing for 1977 and 1978 was attached to and included as part of Exhibit "O", each offered in evidence at the hearing.

³ Some entries reflect airline flights leaving at the end of a day spent in New York.

totalling 8 days in 1975, 14 days in 1976, 5 days in 1977 and 21 days in 1978, are specified in Appendix "A" attached hereto.

9. Mr. Yager did not appear and give testimony at the hearing nor was any explanation offered for his absence.

CONCLUSIONS OF LAW

A. That the New York adjusted gross income of a nonresident individual is defined by section 632(a)(1) of the Tax Law as the sum of the net amounts 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. That section 632(c) of the Tax Law provides:

"[i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations."

C. That regulations of the State Tax Commission in effect during the years at issue in pertinent part provided:

"...any allowance claimed for days worked outside of the 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 services of his employer." (former 20 NYCRR 131.16; currently renumbered as 20 NYCRR 131.17)

D. That the evidence presented does not establish that the services performed by Mr. Yager at his home in Connecticut during the years at issue were services which of necessity, as opposed to personal convenience, were required to be performed outside of New York rather than in New York (Kitman v. State Tax Comm., 92 A.D.2d 1018, mot. for lv. to app. den. 59 N.Y.2d 603). Accordingly, Mr. Yager may not allocate any of his earned income to non-New

York sources upon the basis of days claimed to have been worked at his Connecticut home.

E. That with regard to allocation based on the days claimed to have been worked outside of New York and not at Mr. Yager's Connecticut home, the documents presented support the claim that certain days were worked outside of New York by Mr. Yager. However, several days claimed to have been worked outside of New York were not substantiated (and in some cases were contradicted) by the documentary evidence submitted (see Finding of Fact "8" and Appendix "A"). In view of the lack of testimony by Mr. Yager, such inconsistencies and any ambiguities must be construed against his claim. Accordingly, the number of days claimed to have been worked by Mr. Yager outside of New York per the listing specified at Finding of Fact "6" are reduced by the number of unsupported days reflected in Finding of Fact "8" and Appendix "A".⁴

F. That the allowable number of days worked outside of New York and the resultant fractions by which Mr. Yager's income may be allocated to non-New York sources for each of the years at issue are to be revised as follows:

	<u>Allowable Days</u>			
	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
Days Claimed Worked Outside of New York (per listing)	88	91	97½	110½

⁴ The evidence submitted for three dates in 1976, specifically January 6, July 7 and August 11, indicates a midday departure from New York. Absent evidence to the contrary, it must be presumed that petitioner was working during the portion of these days spent in New York and thus each of these days is deemed to constitute a day worked in New York [see 20 NYCRR 102.2(c)].

Less				
Disallowed Days Worked at Home	(27½)	(36)	(34½)	(29½)
Less				
Disallowed Days Worked Worked Away from Home	<u>(8)</u>	<u>(14)</u>	<u>(5)</u>	<u>(21)</u>
Allowable Days Worked Outside of New York	<u>52½*</u>	<u>41</u>	<u>58</u>	<u>60</u>

	<u>Resultant Allocation Fraction</u>			
	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
Total Days Worked (per returns)	251	273	255	248
Less				
Allowable Days Worked Outside of New York	<u>(53)</u>	<u>(41)</u>	<u>(58)</u>	<u>(60)</u>
Days Worked in New York	<u>198</u>	<u>232</u>	<u>197</u>	<u>188</u>
Allocation Fraction	<u>198</u> 251	<u>232</u> 273	<u>197</u> 255	<u>188</u> 248

G. That the petition of Hunter and Gertrude Yager is granted to the extent indicated in Conclusions of Law "E" and "F", but is in all other respects

* The half day reflected as allowable results from the claim of 60½ days worked outside of New York not at Mr. Yager's Connecticut home (see chart at Finding of Fact "6"). This half day is treated herein as a full working day, no part of which was worked within New York by Mr. Yager, thus resulting in 53 total days allowable as days worked outside of New York [20 NYCRR 102.2(c)].


denied. The Audit Division is directed to modify the notices of deficiency in accordance herewith and such notices, as modified, together with applicable interest thereon, are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 25 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

APPENDIX "A"

<u>Month</u>	<u>1975</u> <u>Day</u>	<u>Item*</u>
Jan.	2	a, b
	3	a, b
	24	a, b
Mar.	7	a
Apr.	28	a, b
June	3	c
Aug.	7	c
Dec.	20	c
Total Days =		<u>8</u>

<u>Month</u>	<u>1976</u> <u>Day</u>	<u>Item*</u>
Jan.	6	g
Feb.	6	a, b
	25	a, b
Mar.	1	a, b
	16	d
	20	e
Apr.	23	a, b
June	21	a, b
	23	a, b
July	7	g
Aug.	5	a, b
	11	g
Oct.	8	a, b
Nov.	3	d
Total Days =		<u>14</u>

<u>Month</u>	<u>1977</u> <u>Day</u>	<u>Item*</u>
Feb.	16	c
Mar.	28	c
June	17	a
July	13	c
Aug.	31	a
Total Days =		<u>5</u>

<u>Month</u>	<u>1978</u> <u>Day</u>	<u>Item*</u>
Jan.	21	e
Feb.	4	a, b
	14	a, b
	19	a, b
Mar.	11	a, b
	26	a, b
May	18	a, b
	21	a, b
June	10	a, f
July	5	a, f
Aug.	5	a, b
	11	a, b
Sept.	2	a, b
	18	a, b
Oct.	4	a, b
Nov.	14	c
	25	a, b
	26	a, b
Dec.	11	c
	29	a, b
	30	a, b
Total Days =		<u>21</u>

* Key to Items

- a) no expense voucher supplied
- b) no entry in appointment book
- c) entry indicates plane departure at end of day spent in New York
- d) entry indicates plane department on following day
- e) entry indicates plane arrival on preceeding day
- f) entry contrary to claim of travel or purpose
- g) entry supports midday departure with $\frac{1}{2}$ day spent in New York