

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Joan M. D'Incecco :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State 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 Years 1979, 1980 and 1981. :

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 13th day of September, 1985, he served the within notice of Decision by certified mail upon Joan M. D'Incecco, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joan M. D'Incecco
256 Voorhis Avenue
River Edge, NJ 07661

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
13th day of September, 1985.

David Parchuck

James A. DeGennaro

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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Administrative Code of the City of New York for :
the Years 1979, 1980 and 1981. :
:

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 13th day of September, 1985, he served the within notice of Decision by certified mail upon Irwin K. Nissen, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Irwin K. Nissen
233 Broadway
New York, NY 10007

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
13th day of September, 1985.

David Parchuck

Conrad A. DeGardner
Authorized to administer oaths
pursuant to Tax Law section 174

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

September 13, 1985

Joan M. D'Incecco
256 Voorhis Avenue
River Edge, NJ 07661

Dear Ms. D'Incecco:

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
Irwin K. Nissen
233 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOAN M. D'INCECCO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State 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 Years 1979, 1980 and 1981.	:	

Petitioner, Joan M. D'Incecco, 256 Voorhis Avenue, River Edge, New Jersey 07661, 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 and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1979, 1980 and 1981 (File No. 45476).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 15, 1985 at 9:00 A.M., with all briefs to be submitted by June 5, 1985. Petitioner appeared by Irwin K. Nissen, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether days worked at home by petitioner can be considered as days worked outside New York State and New York City for purposes of allocating wage income to sources within and without the State and City.

II. Whether the Audit Division properly disallowed a portion of petitioner's claimed deductions for charitable contributions.

FINDINGS OF FACT

1. Petitioner herein, Joan M. D'Incecco, filed New York State income tax nonresident returns and New York City nonresident earnings tax returns for the years 1979, 1980 and 1981. On said returns, petitioner allocated the wage income she received from American Broadcasting Co., Inc. (hereinafter "ABC") to New York State and City sources based on a percentage determined by placing the total number of days worked within the State and City over the total number of working days. The following table sets forth the allocation claimed by petitioner for each of the years at issue.

<u>Year</u>	<u>Total Days Worked</u>	<u>Days Worked Outside NYS & NYC</u>	<u>Days Worked Inside NYS & NYC</u>	<u>Allocation Percentage to NY</u>
1979	242	107	135	55.79% (135/242)
1980	243 ¹	107	135	55.56% (135/243)
1981	265	142	123	46.42% (123/265)

2. Petitioner's New York State returns also claimed a deduction for charitable contributions. Claimed charitable contributions totalled \$3,787.03, \$5,094.63 and \$4,953.01 for 1979, 1980 and 1981, respectively.

3. On May 27, 1983, the Audit Division issued a Statement of Audit Changes to petitioner for the years 1979 and 1980 wherein the claimed allocations of ABC wage income to sources outside the State and City were disallowed in full and charitable contributions of \$1,208.00 for 1979 and \$1,335.75 for 1980 were disallowed "[s]ince you are not allowed to deduct for your time and services...". Based on the Statement of Audit Changes, the Audit Division, on May 27, 1983, issued a Notice of Deficiency to petitioner for 1979 and 1980

1 There exists an arithmetic error in the 1980 allocation since 107 days plus 135 days equal a total of 242 days and not 243 days as reported by petitioner.

proposing additional New York State and City tax due of \$1,470.43, plus interest of \$430.19, for a total allegedly due of \$1,900.62.

4. Petitioner's 1981 return claimed an overpayment of \$2,385.45; however, the Audit Division elected to examine said return before processing the refund. As the result of its examination, the Audit Division issued an undated Statement of Refund Adjustment for 1981, wherein petitioner's refund was reduced from \$2,385.45 to \$940.59. The claimed refund was reduced as the result of several adjustments; however, petitioner contests only the following two adjustments:

(i) the revision of the allocation of ABC wage income to sources within and without the State and City wherein the Audit Division considered all days worked at home in New Jersey as days worked in New York; and

(ii) the disallowance of \$1,165.50 of charitable contributions on the ground that the value of petitioner's time and services did not constitute deductible charitable contributions.

5. On July 7, 1983, petitioner timely filed a petition requesting a redetermination of the deficiency dated May 27, 1983, pertaining to the years 1979 and 1980, and also requesting a refund for the year 1981.

6. During the years at issue, petitioner was employed by ABC as a casting director for the hour long daytime television series "All My Children." As casting director, petitioner selected the various professional performers required for the production of said series. A one week taping sequence for "All My Children" would require, on the average, between 80 to 120 different actors and actresses.

7. Petitioner has been active as a casting director for some 24 years. During this time span, she has accumulated extensive personnel files of many actors and actresses. Said files would contain the performer's name, professional

experience, acting parts, profile of personal data, agent representation, union affiliation and Mrs. D'Incecco's personal impressions and observations. Said files, consisting of approximately seven large file cabinets, were kept by petitioner in an office maintained in her personal residence in River Edge, New Jersey.

8. Petitioner generally worked between two to four days per week at ABC's office in New York City and between one and three days per week at her home in New Jersey. Petitioner performed services at home primarily to have access to her extensive files. Said files were maintained at petitioner's personal residence for the following reasons:

(i) ABC would not guarantee petitioner that her files would be secure if left in its office;

(ii) Said files were petitioner's private property and were, inter alia, what made her valuable to ABC. Petitioner felt it would constitute poor judgement to leave these files on the premises of the firm in need of her services; and

(iii) Petitioner also used her files in the performance of services for firms and persons other than ABC and, if the files were kept at ABC, she felt said other activities would have to cease since it would be improper to use ABC office space to perform services for others.

9. The charitable contributions disallowed by the Audit Division for all three years at issue did not represent a deduction for petitioner's time and services as alleged by the Audit Division, but instead represented actual out-of-pocket expenses. In a schedule appended to each of her Federal income tax returns for 1979, 1980 and 1981, petitioner made the following statement prefacing a detailed

computation of claimed charitable contributions:

"The taxpayers have two children and strongly believe that parents must always be available to help, supervise and share in children's activities, church, school, community and sports. Therefore, both parents are active participants in all youth programs on a continuing basis run by church, school and township."

10. The dollar amount of charitable contributions in dispute was computed by totalling the number of times both petitioner and her husband were active in such things as fund raisers, youth sports programs, auxiliary groups, etc. and multiplying said "days of participation" by an average amount expended at said activities. The average amount expended for each "day of participation" was \$8.00 for 1979, \$9.75 for 1980 and \$10.50 for 1981.

11. When questioned on how the average amount expended per "day of participation" was computed, petitioner responded in the following manner:

"Well, for instance, when John (petitioner's son) was playing football, my husband would go to the school, pick up all the kids, probably put about six or seven in a car, take them to wherever the game was, that would be mileage and time, and stop and maybe have something to eat or afterwards buy them pizza and Cokes, so that would be your mileage and your pizza and Coke and that would cover maybe \$12, maybe \$16." (Transcript p. 35).

CONCLUSIONS OF LAW

A. That for New York State income tax purposes, 20 NYCRR 131.16 provides that:

"...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 service of his employer."

For New York City tax purposes, 20 NYCRR Appendix 20 § 4-4(b) contains a similar provision.

B. That the services rendered by petitioner at her home in New Jersey for ABC were performed there for her own convenience and there is no evidence to support that the work being performed at home was performed there of the employer's necessity (Matter of Fischer v. State Tax Comm., 107 A.D.2d 918).

The work performed by petitioner at home could have just as easily been performed at the employer's New York office and, moreover, the record does not support that petitioner's facilities at home were of a highly specialized nature, such as found in Matter of Fass v. State Tax Comm. (68 A.D.2d 977, aff'd 50 N.Y.2d 932). Accordingly, petitioner cannot claim days worked at home as days worked outside New York State and New York City for the purposes of allocating ABC wage income to sources within and without the State and City (Matter of Kitman v. State Tax Comm., 92 A.D.2d 1018, mot. for lv. to app. den. 59 N.Y.2d 603).

C. That petitioner has failed to sustain her burden of proof, pursuant to section 689(e) of the Tax Law, to show that the charitable contributions disallowed by the Audit Division constituted deductible contributions made to qualified organizations. Petitioner's testimony as to how the average amount expended per "day of participation" clearly shows that these expenses were nondeductible personal expenses.


D. That the petition of Joan M. D'Incecco is denied and the Notice of Deficiency dated May 27, 1983 and the undated Statement of Refund Adjustment are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER