

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Robert S. & Cheryl L. Fishko : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income &
UBT under Article 22 & 23 of the Tax Law for the :
Years 1978 & 1979.

State of New York :

ss.:

County of Albany :

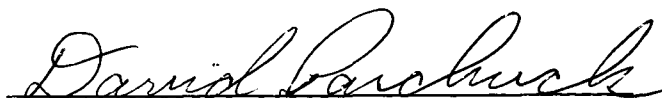
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of February, 1985, he served the within notice of Decision by certified mail upon Robert S. & Cheryl L. Fishko, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Robert S. & Cheryl L. Fishko
219 West 86th St.
New York, NY 10024

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
6th day of February, 1985.




Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

Robert S. & Cheryl L. Fishko
219 West 86th St.
New York, NY 10024

Dear Mr. & Mrs. Fishko:

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 & 722 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ROBERT S. FISHKO and CHERYL L. FISHKO : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income and Unincorporated :
Business Taxes under Articles 22 and 23 of the :
Tax Law for the Years 1978 and 1979. :

Petitioners, Robert S. Fishko and Cheryl L. Fishko, 219 West 86th Street, New York, New York 10024, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1978 and 1979 (File No. 36318).

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 March 12, 1984 at 10:00 A.M., with all briefs to be submitted by May 14, 1984. Petitioner Robert S. Fishko appeared pro se and for his wife, Cheryl L. Fishko. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether, and if so to what extent, petitioner Robert S. Fishko may allocate his unincorporated business income to sources without the State of New York.

II. Whether, and if so to what extent, petitioners paid estimated personal income taxes for the years 1978 and 1979.

FINDINGS OF FACT

1. Petitioners, Robert S. Fishko and Cheryl L. Fishko, filed a New York State Income Tax Resident Return for each of the years 1978 and 1979 under

filing status "married filing separately on one return". On their 1978 return petitioners claimed credit for state estimated tax paid of \$2,000.00. On their 1979 return they claimed credit for state estimated tax paid of \$200.00.

2. Petitioner Robert S. Fishko filed a New York State Unincorporated Business Tax Return for each of said years whereon he reported the income derived from his activities engaged in as a theatrical producer. On each return he allocated a portion of his business income without New York State. The formula basis method was utilized in computing the business allocation percentage for each year.

3. On July 28, 1981 the Audit Division issued a Statement of Audit Changes to petitioners wherein the aforestated allocations were disallowed based on the explanation that "a permanent business office must be maintained outside New York State for business allocation purposes". Additionally, based on a review of records, petitioners' credits claimed for state estimated taxes paid were reduced to \$500.00 for 1978 and to zero for 1979. Accordingly, two (2) notices of deficiency were issued against petitioners on October 30, 1981. One such notice asserted unincorporated business tax of \$796.58, plus interest of \$140.34, for a total due of \$936.92. The other notice asserted additional personal income tax of \$337.64, plus interest of \$69.33, for a total due of \$406.97.

4. On April 18, 1983 petitioners paid the deficiency asserted with respect to personal income tax. Accordingly, the sole issue remaining to be decided herein is whether petitioner Robert S. Fishko is properly entitled to allocate his business income.

5. During the years at issue Robert S. Fishko (hereinafter petitioner) was engaged in activities as a theatrical general manager. As such, he negotiated

contracts between the producer and various artists, assisted in promotion, publicity and advertising for theatrical productions and supervised cast rehearsals, scenery construction, prop acquisitions, costume fittings and musical orchestrations. On occasion petitioner personally produced a play.

6. On petitioner's 1978 and 1979 unincorporated business tax returns he listed his business address as 1501 Broadway, New York, New York. Said address constituted his principal business office.

7. On petitioner's business allocation schedules he reported the following places of business:

<u>1978</u>	
<u>Place of Business</u>	<u>Description</u>
1501 Broadway, New York, NY	Office
Elitch Theatre, Denver, Colorado	Office & Theatre
Paramount Theatre, Austin, Texas	Office & Theatre
Southwest Concerts Inc., Houston, Texas	Office & Theatre

<u>1979</u>	
<u>Place of Business</u>	<u>Description</u>
1501 Broadway, New York, NY	Office
St. James Theatre, London, England	Office & Theatre
Elitch Theatre, Denver, Colorado	Office & Theatre
Coconut Grove Playhouse, Miami, Florida	Office & Theatre
Wilbur Theatre, Boston, Massachusetts	Office & Theatre

8. Petitioner's claimed allocations were computed by the formula method as follows:

<u>Factors</u>	<u>1978</u>		<u>Percentage</u>
	<u>Total Amount</u>	<u>New York State Amount</u>	
Real property rented from others	\$ 57,728.00	\$55,048.00	95.36%
Personal service compensation paid	51,328.00	37,463.00	72.99%
Charges for services	313,200.00	-0-	-0-
Total of Percentages			<u>168.35%</u>

Business allocation percentage (total percentage divided by 3) 56.12%

<u>Factors</u>	<u>1979</u> <u>Total</u> <u>Amount</u>	<u>New York</u> <u>State Amount</u>	<u>Percentage</u>
Real property rented from others	\$ 53,656.00	\$46,056.00	85.8 %
Personal service compensation paid	10,479.00	7,976.00	76.1 %
Charges for services	195,465.00	-0-	-0-
Total of Percentages			<u>161.9 %</u>

Business allocation percentage (total percentage divided by 3) 53.9%

9. Petitioner alleged that he maintained a bona fide permanent business office during the years at issue at the Coconut Grove Playhouse, 3500 Main Highway, Miami, Florida.

10. From 1972 until November, 1977 petitioner was the chief operating officer of the Coconut Grove Playhouse. In November, 1977 petitioner represented the partnership that owned the Coconut Grove Playhouse in the sale of the theatre complex. As a term of sale, petitioner was retained to make a monthly inspection of the complex and determine whether the purchaser was operating it properly. These activities were carried on throughout 1978 and 1979. Petitioner received fees for said activities. The record herein shows no indication as to whether or not such fees were included in petitioner's reported unincorporated business income for the years at issue.

11. As part of the arrangement in the aforestated sale petitioner was furnished with a gratuitous office on the second floor of the Coconut Grove Playhouse. Said office was approximately 9 by 12 feet. Petitioner's name was not on the office door.

12. Petitioner also used the Florida office in connection with a touring production of the play "Ain't Misbehavin", which ran in Florida from June, 1979 through September, 1979. Petitioner was co-producer and general manager of the production. Throughout the production in Florida, petitioner, as well as the

limited partnership, Ain't Misbehavin International Company, used petitioner's office situated in the Coconut Grove Playhouse.

13. Petitioner's office at the Coconut Grove Playhouse was not listed as a place of business on his 1978 business allocation schedule.

14. The balance of the out-of-state business places listed on petitioner's business allocation schedules for 1978 and 1979 were theatres which ran his theatrical productions during portions of said years. Petitioner characterized these places as "temporary business locations".

CONCLUSIONS OF LAW

A. That the Notice of Deficiency dated October 30, 1981, which was issued with respect to personal income tax, is hereby cancelled since the deficiency asserted therein has been paid.

B. That section 707(a) of the Tax Law provides that:

"If an unincorporated business is carried on both within and without this state, as determined under regulations of the tax commission, there shall be allocated to this state a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions. If the unincorporated business has no regular place of business outside this state, all such excess shall be allocated to this state."

C. That an unincorporated business is carried on at any place either within or without New York State where the unincorporated business entity has a regular place of business. A regular place of business is any bona fide office, factory, warehouse or other place which is systematically and regularly used by the unincorporated business entity in carrying on its business (20 NYCRR 207.2(a)).

D. That the theatres listed on petitioner's business allocation schedules for 1978 and 1979 did not constitute regular places of business within the meaning and intent of section 707(a) of the Tax Law and 20 NYCRR 207.2(a).

E. That section 689(e) of Article 22 of the Tax Law provides in pertinent part that:

"In any case before the tax commission under this article, the burden of proof shall be upon the petitioner..."

Said section provides for three exceptions, none of which are applicable herein.

F. That petitioner Robert S. Fishko has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law as incorporated into Article 23 by section 722(a) of the Tax Law, to show that his office at the Coconut Grove Playhouse in Miami, Florida constituted a regular place of business of his unincorporated business during the years at issue.

G. That petitioner's unincorporated business had no regular place of business without New York State during 1978 and 1979. Accordingly, all of the unincorporated business income is to be allocated to New York State within the meaning and intent of section 707(a) of the Tax Law.

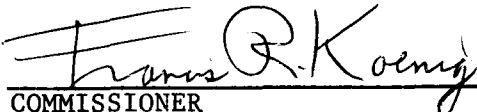
H. That the petition of Robert S. Fishko and Cheryl L. Fishko is granted to the extent provided in Conclusion of Law "A", supra, and except as so granted, said petition is, in all other respects, denied. The Notice of Deficiency dated October 30, 1981, which was issued with respect to unincorporated business tax, is hereby sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER