

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Justin & Judith LeWand : 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 1980 and 1981. :
:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 30th day of June, 1986, he/she served the within notice of Decision by certified mail upon Justin & Judith LeWand the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Justin & Judith LeWand
417 St. Marks Ave.
Westfield, NJ 07090

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
30th day of June, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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of New York for the Years 1980 and 1981. :
:

State of New York :
ss.:
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 30th day of June, 1986, he served the within notice of Decision by certified mail upon Seymour I. Hurwitz, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Seymour I. Hurwitz
36 West 44th St.
New York, NY 10036

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
30th day of June, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

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

June 30, 1986

Justin & Judith LeWand
417 St. Marks Ave.
Westfield, NJ 07090

Dear Mr. & Mrs. LeWand:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Seymour I. Hurwitz
36 West 44th St.
New York, NY 10036

STATE OF NEW YORK

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In the Matter of the Petition	:	
of	:	
JUSTIN and JUDITH LEWAND	:	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 New York City Administrative	:	
Code for the Years 1980 and 1981.	:	

Petitioners, Justin and Judith LeWand, 417 St. Marks Avenue, Westfield, New Jersey 07090, 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 New York City Administrative Code for the years 1980 and 1981 (File No. 54266).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on February 11, 1986 at 2:00 P.M. Petitioners appeared by Seymour I. Hurwitz, Esq. (Lester Yudenfriend, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq., (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether days worked at home by petitioner Justin LeWand, a New Jersey resident, may be considered as days worked without New York State and New York City for income allocation purposes.

FINDINGS OF FACT

1. Petitioners, Justin and Judith LeWand, filed New York State income tax nonresident returns with City of New York nonresident earnings tax for the

years 1980 and 1981. On the returns petitioners allocated petitioner Justin LeWand's salary income based on days worked outside of New York State and New York City.

2. Analysis of schedules completed by Mr. LeWand in response to Audit Division questionnaires shows that with respect to 1980, 56 days were claimed to have been worked at home and 20 days were claimed to have been worked at other locations outside New York State. With respect to 1981, 69 days were claimed to have been worked at home and 35 days were claimed to have been worked at other locations outside New York State.

3. On March 26, 1984, a Notice of Deficiency was issued to petitioners in the amount of \$2,874.94 in tax, plus interest, for the years 1980 and 1981. Aside from a subtraction modification for state and local income tax refunds, which is not at issue, the deficiency was based on the disallowance of an allocation for days worked at home.

4. During the years at issue, petitioner Justin LeWand worked for National Expositions Company, Inc. ("NEC"). NEC was engaged in the business of creating and organizing industrial trade shows. Mr. LeWand's primary job function was the sale of exhibit space to exhibitors at the trade shows.

5. Mr. LeWand had a private office in NEC's offices at 14 West 40th Street, New York, New York. The office had a telephone, dictating machine and file cabinets.

6. Mr. LeWand was told by NEC to work at home if he believed that he could get more done at home than in the New York office. Mr. LeWand felt there were many distractions in his New York office and he found that he could make fifty telephone calls a day when he was working at home rather than the twenty calls which he could normally make in the New York City office. This was due

to the elimination of the distractions which took place in the New York office and the gain of time which otherwise would have been spent commuting.

7. Mr. LeWand worked in his "den" at his home in Westfield, New Jersey; the room contained a desk, file cabinets and two telephones. One of the telephones was his personal telephone and the other was a telephone installed on behalf of NEC and paid for by NEC. He would generally use the company phone to make the outgoing phone calls and if he had to leave a message for someone he would give the number on his personal phone for incoming responses. The phone calls were generally in the nature of selling space to prospective exhibitors at future trade shows. He also had a dictating machine at the office in his home with which he dictated letters to follow up on the phone calls.

8. NEC had a listing in the New Jersey Bell Yellow Pages. The address shown was petitioners' home address.

CONCLUSIONS OF LAW

A. That under section 632(a) of the Tax Law, the New York adjusted gross income of a nonresident individual includes income derived from or connected with New York sources. Section 632(c) of the Tax Law provides as follows:

"(c) Income and deductions partly from New York sources. If 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."

(The New York City Nonresident Earnings Tax is similarly allocated on Schedule A of Form NYC-203).

C. That 20 NYCRR 131.16, as in effect for the years at issue, provided in part, as follows:

"If a nonresident employee ... performs services for his employer both within and without the State, his income derived from New York sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within the State bears to the total number of working days employed both within and without the State. The items of gain, loss and deduction (other than deductions entering into the New York itemized deduction) of the employee attributable to his employment, derived from or connected with New York sources, are similarly determined. However, 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. In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay...."

This section has been retained in the current regulations and renumbered 20 NYCRR 131.18(a).


D. That despite the fact that petitioner Justin LeWand found it more efficient to work at home for the days at issue, the fact remains that the work could have been performed in his employer's New York City office. The work was not performed at the petitioners' New Jersey home for the employers' necessity. See Kitman v. State Tax Commission, 92 AD2d 1018, Motion for lv. to appeal denied, 59 NY2d 603.


E. That the petition of Justin and Judith LeWand is denied and the Notice of Deficiency issued March 26, 1984 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 30 1986


PRESIDENT


COMMISSIONER


COMMISSIONER