

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Fernando L. & Ida N. Kindler :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income
Tax under Article(s) 22 of the Tax Law for the :
Year 1979.

State of New York :

ss.:

County of Albany :

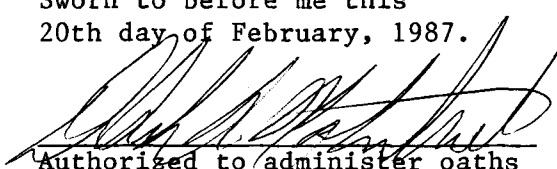
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of February, 1987, he/she served the within notice of Decision by certified mail upon Fernando L. & Ida N. Kindler the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

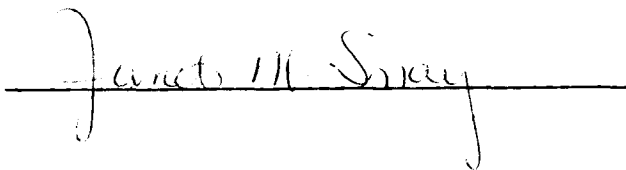
Fernando L. & Ida N. Kindler
1 Kenneth Terrace
Flanders, NJ 07836

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
20th day of February, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

February 20, 1987

Fernando L. & Ida N. Kindler
1 Kenneth Terrace
Flanders, NJ 07836

Dear Mr. & Mrs. Kindler:

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
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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
FERNANDO L. KINDLER AND IDA N. KINDLER
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1979.

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DECISION

Petitioners, Fernando L. Kindler and Ida N. Kindler, 1 Kenneth Terrace, Flanders, New Jersey 07836, 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 1979 (File No. 46541).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 30, 1986 at 2:45 P.M. Petitioner Fernando L. Kindler appeared pro se and in behalf of his wife, Ida N. Kindler. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether petitioner Fernando L. Kindler, an employee of a New York corporation during the period in issue, properly allocated his income for New York State personal income tax purposes.

FINDINGS OF FACT

1. On January 17, 1983, the Audit Division issued a Statement of Personal Income Tax Audit Changes to petitioners, Fernando L. Kindler and Ida N. Kindler, asserting liability for additional personal income tax due for the year 1979. An attachment to the Statement of Personal Income Tax Audit Changes explained the pertinent reason for the adjustment as follows:

"Since you failed to present any proof that you performed services out of New York for your New York employer, your salary income has been deemed to be fully taxable to New York."

Said statement set forth additional tax due of \$2,380.19, interest of \$735.19, for a total liability of \$3,115.37.

2. On May 12, 1983, the Audit Division issued a Notice of Deficiency to Fernando L. Kindler and Ida N. Kindler asserting liability for additional personal income tax due for the year 1979 in the sum of \$2,380.19, together with interest of \$811.31, for a total amount due and owing of \$3,191.49.

3. During the tax year 1979, petitioners were residents of the State of New Jersey and Mr. Kindler was an employee of Merrill Lynch, Pierce, Fenner and Smith, Inc., 1 Liberty Plaza, 165 Broadway, New York, New York 10080, where he served as an account executive.

4. Petitioners filed a joint New York State Income Tax Nonresident Return for the year 1979. On said return, petitioners allocated Fernando L. Kindler's wages, computed on schedule A-1, based on days worked within and without the State of New York. Petitioners claimed 120 days worked outside of New York State, yielding an allocation of wages to New York State of \$29,477.45.

5. At conference, the Audit Division conceded that the petitioner worked outside the State of New York for 70 days during the year 1979 and reduced the additional tax due to \$1,123.59.

6. Petitioner Fernando L. Kindler contends that he was out of the country on business during four separate periods during the year 1979:

- (a) Panama City, January 3, 1979 through February 17, 1979;
- (b) Mexico City, April 7, 1979 through May 13, 1979;
- (c) Columbia, South America, July 8, 1979 through August 15, 1979; and
- (d) Panama, October 9, 1979 through November 25, 1979.

Petitioner had "salesman's practical notes," a handwritten log which documented his business activities in each of these four locations.

7. Petitioners submitted no further substantiation or documentation of these trips like airline ticket receipts, credit card receipts or hotel bills, even though said substantiation was requested by the Audit Division.

CONCLUSIONS OF LAW

A. That petitioners were nonresident individuals required to file a New York State Income Tax Nonresident Return for the tax year 1979 in accordance with Tax Law §§ 605(b); 632(b)(1)(B); 632(c) and the regulation at 20 NYCRR § 131.4(c).

B. That the regulations promulgated pursuant to Tax Law § 632(c) at 20 NYCRR § 131.18 state, in pertinent part, as follows:

"(a) If a nonresident employee... performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State."

C. That Tax Law § 689(e) provides that, in any case before the Tax Commission, the burden of proof is upon the petitioner, except in specifically enumerated circumstances which are not present herein.


D. That the documentation submitted by the petitioners to substantiate total days worked outside of New York State, consisting of only the "salesman's practical notes," was not sufficient for the purpose of substantiating that petitioner Fernando L. Kindler worked more than 70 days outside the State of New York in the year 1979.


E. That the petition of Fernando L. Kindler and Ida N. Kindler is granted to the extent indicated in Finding of Fact "5"; that the Audit Division is directed to modify the Notice of Deficiency dated May 12, 1983; and that, except so as granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER