

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Earl & Columba Kostuk :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1969. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 18th day of June, 1980, he served the within notice of Decision by certified mail upon Earl & Columba Kostuk, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Earl & Columba Kostuk
4027 Barton St.
Niagara Falls, NY 14305

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

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

June 18, 1980

Earl & Columba Kostuk
4027 Barton St.
Niagara Falls, NY 14305

Dear Mr. & Mrs. Kostuk:

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EARL KOSTUK and COLUMBA KOSTUK	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1969.	:	

Petitioners, Earl and Columba Kostuk, 4027 Barton Street, Niagara Falls, New York 14305, 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 1969 (File No. 13265).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, One West Genesee Street, Buffalo, New York, on April 25, 1979 at 2:45 P.M. Petitioner Columba Kostuk appeared pro se and for her husband, petitioner Earl Kostuk. The Income Tax Bureau appeared by Peter Crotty, Esq. (Kathy Sanderson, Esq., of counsel).

ISSUE

Whether amounts expended for meals and lodging for 1969 were allowable deductions under section 162(a)(2) of the Internal Revenue Code.

FINDINGS OF FACT

1. Petitioners, Earl and Columba Kostuk, filed a joint New York State Income Tax Resident Return for 1969.

2. On September 24, 1971, the Income Tax Bureau issued a Statement of Audit Changes against petitioners for additional income tax in the amount of \$276.90 plus interest of \$23.94 for a total due of \$300.84. The explanation

was that:

"When an employee is assigned to a post of duty for more than one year, the assignment changes in nature from temporary to indefinite. Travel, meals and lodging expenses incurred on an indefinite assignment are not deductible, and any re-imbursement or per diem received for such an assignment must be reported as taxable income."

3. On November 18, 1971, petitioners paid the tax and interest due of \$300.84.

4. On September 14, 1972, petitioners submitted a claim for refund of additional tax, plus interest, in the amount of \$300.84 based on additional evidence. On May 22, 1973, the Income Tax Bureau issued a Notice of Claim Disallowance to petitioners.

5. Petitioners maintained a permanent residence at 4027 Barton Street, Niagara Falls, New York during 1969.

6. Petitioner, Earl Kostuk, was employed as a superintendent of construction projects by Albert Elia Building Co., Inc. whose only place of business is at 2749 Lockport Road, Niagara Falls, New York. In prior years while residing in Niagara Falls, Mr. Kostuk worked at various locations within the Niagara Falls area.

7. Albert Elia Construction Co., Inc. was awarded a contract to build a dormitory and dining facility for the State University of New York at Fredonia. In order to gain the experience of supervising a large project, Earl Kostuk accepted the assignment even though it meant temporarily being away from his family. Fredonia is approximately 70 miles from petitioner's home.

Since completion of construction projects are run by a timetable, Mr. Kostuk knew that the job would not last over an extended period of time. He also knew that he could be reassigned to another project at any time. The

decision as to how long he would remain the superintendent on the Fredonia job was up to the project officer.

Mr. Kostuk remained at this project for almost two years.

8. During 1969, Mr. Kostuk worked in Fredonia on weekdays and returned to his family in Niagara Falls on weekends. During this period, he received compensation in the sum of \$4,742.40 for meals and lodging expenses incurred while at the Fredonia site. On completion of petitioner's assignment at Fredonia, he again worked in the Niagara Falls area for his employer. Petitioner does not ordinarily travel away from home.

CONCLUSIONS OF LAW

A. That petitioner, Earl Kostuk's employment history is not that of a taxpayer who's employment is temporary and so widely scattered that there is no particular city or other reasonable confined area in which he usually works. That petitioner is not an itinerate worker who customarily moves from one employer to the next with no fixed place of abode, and is not regularly associated with and particular locality. On the contrary the petitioner has a general area where he usually works, it is clear that such place constitutes his "tax home" and service as the point of origin for determining his traveling expenses while "away from home". (Special Ruling, May 4, 1956, which is reported in (1956) Stand. Fed. Tax Rep. (CCH) ¶6428).

B. That petitioner, Earl Kostuk's job assignment from his permanent employer of many years in Fredonia during 1969 was of a temporary nature. The permanent nature of a job is judged at the time the job began and not by later events. (Gardin, 64 T.C. 1079) That the assignment, by lasting more than one year, does not change assignment from temporary to indefinite in nature. (Rolbin, 29 T.C.M. 848 and Hellis 35 T.C.M. 268). Therefore, petitioner's tax

home remained Niagara Falls and petitioner properly deducted expenses in accordance with section 162(a)(2) of the Internal Revenue Code. (Harvey v. CIR, 283 F.2d 491 and STIDGER v. CIR, 355 F.2d 298).

C. That petition of Earl and Columba Kostuk is granted and the Audit Division is hereby directed to refund petitioners' claim in amount of \$300.84 together with such additional interest that may be lawfully owing.

DATED: Albany, New York

JUN 18 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER