

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

HARRY F. KERN

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Unincorporated Business :  
Taxes under Article(s) 23 of the :  
Tax Law for the Year(s) ~~xxx Period(s)~~ 1965, :  
1966, 1967, 1968 and 1969.

State of New York  
County of Albany

John Huhn, 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 14th day of February, 1979, he served the within  
Notice of Decision by (certified) mail upon Harry F. Kern  
~~(representative of)~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows:

Harry F. Kern  
Lloyd Lane, Lloyds Neck  
Huntington, New York 11743

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 ~~(representative of)~~  
~~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

14th day of February, 1979

Marilyn J. Papineau

John Huhn

STATE OF NEW YORK  
STATE TAX COMMISSION

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Tax Law for the Year(s) ~~or Period(s)~~ 1965, :  
1966, 1967, 1968 and 1969.

State of New York  
County of Albany

John Huhn , being duly sworn, deposes and says that  
~~she~~ is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 14th day of February , 1979, ~~she~~ served the within  
Notice of Decision by (certified) mail upon Norton Kern, Esq.

(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Norton Kern, Esq.  
Reid and Priest, Esqs.  
40 Wall Street  
New York, NY 10005

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 (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

14th day of February , 1979

Marilyn J. Papineau

John Huhn



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

February 14, 1979

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

Harry F. Kern  
Lloyd Lane, Lloyds Neck  
Huntington, New York 11743

Dear Mr. Kern:

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 **(a) 722** 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

Joseph Chyrywaty  
Hearing Examiner

cc: Petitioner's Representative

Taxing Bureau's Representative

## STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
HARRY F. KERN : DECISION  
for Redetermination of a Deficiency or :  
for Refund of Unincorporated Business :  
Tax under Article 23 of the Tax Law for :  
the Years 1965, 1966, 1967, 1968 and :  
1969. :

Petitioner, Harry F. Kern, Lloyd Lane, Lloyds Neck, Huntington, New York 11743, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1965, 1966, 1967, 1968 and 1969 (File No. 00449).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 15, 1977 at 9:15 A.M. Petitioner appeared by Reid and Priest, Esqs. (Norton Kern, Esq., of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

Whether petitioner maintained a regular place of business outside New York State, thereby entitling him to allocate his income and deductions on the basis of the statutory formula method.

FINDINGS OF FACT

1. Petitioner, Harry F. Kern, and his wife, Janet C. M. Kern, timely filed New York State income tax resident returns for the years 1965 through 1969. Petitioner also filed unincorporated business tax returns for said years and allocated his net business income on the basis of the three factor formula provided for in section 707(c) of the Tax Law. The business allocation schedules attached to the unincorporated business tax returns allocated his net business income for the respective years on the basis of the following percentages:

	<u>1965</u>	<u>1966</u>	<u>1967</u>	<u>1968</u>	<u>1969</u>
Property	82%	84%	84%	86.86%	70.11%
Salaries	36%	32%	32%	31.69%	42.11%
Receipts	<u>50%</u>	<u>50%</u>	<u>50%</u>	<u>50.00%</u>	<u>50.00%</u>
Totals	168%	166%	166%	168.55%	162.21%
Business Allocation Percentage	56%	55%	55%	56.18%	54.07%

2. The 1965 Federal tax return filed by petitioner and his wife was audited by the Internal Revenue Service. As a result, petitioner and his wife filed a "Notice of Change In Taxable Income by United States Treasury Department Pursuant to Section 659 of the New York State Tax Law." Among the changes reported was the disallowance of a promotional expense which resulted in an increase in income subject to unincorporated business tax of \$3,922.00 and additional unincorporated business tax due of \$87.86.

3. The Income Tax Bureau conducted a field audit in connection with petitioner's unincorporated business tax returns for the years

1965 through 1969. As a result of the audit, the allocation factors for salaries and receipts were increased from the percentages reported (See Finding of Fact "1", above) to 75% for each of the years involved. This proposed adjustment was a tentative agreement reached between the auditor and petitioner's representative. However, petitioner rejected the proposal and a Statement of Audit Changes was issued on February 28, 1972. On the same date, the Income Tax Bureau issued a Notice of Deficiency against petitioner, asserting unincorporated business tax of \$3,963.92, plus interest of \$757.02, for a total of \$4,720.94. At the hearing, the Income Tax Bureau moved to increase the deficiency in accordance with 689(d)(1) of the Tax Law. The increased deficiency would have disallowed any allocation whatsoever, on the grounds that the petitioner did not have a bona fide office outside New York State. Petitioner countered by submitting computations of business allocation percentages more favorable to him than those originally shown on the returns filed.

4. For many years prior to 1956, petitioner was a foreign editor of Newsweek Magazine. In 1956 he started a business which he called "Foreign Reports" and operated this business during the years at issue. Petitioner traveled throughout the world gathering economic and political information and orally reported his findings to top executives of large corporations. The business was, in essence, advising and consulting with these executives on foreign developments, with particular emphasis on the petroleum industry.

5. Petitioner maintained an office in New York City during the years at issue. He also owned 100% of the stock of a Japanese corporation, Foreign Reports Tokyo Limited. He does not contend that the office in Tokyo was an office for business allocation purposes. Petitioner contended that he maintained an office in Beirut, Lebanon, and paid a resident of Lebanon to act as his representative in Beirut. The representative was paid a lump-sum which was to cover his salary, his secretary's salary, rent for an office, an automobile, postage, etc. During the years at issue, the representative worked exclusively for petitioner. Petitioner frequently used the office in Beirut when he was in the Middle East. He held meetings at the office and wrote reports, made phone calls and sent and received cables at and from said office. The directory of the building of the Beirut office indicated both "Foreign Reports" and "Harry Kern."

6. The unincorporated business tax returns for 1965 and 1966 stated that the business name used by petitioner was "Foreign Reports."

7. The office in Beirut was used for the gathering of information. This information was usually disseminated to the executives of petitioner's corporate clients at the headquarters of the various corporations. The meeting with the executives took place in cities such as Tokyo, London, Paris, New York, Pittsburgh, Amsterdam, Eindhoven (The Netherlands), San Francisco and in Findlay, Ohio.

#### CONCLUSIONS OF LAW

A. That the office in Beirut, Lebanon, constituted a regular place of business outside New York State within the meaning and

intent of section 707(a) of the Tax Law; therefore, petitioner is entitled to allocate his income and deductions on the basis of the three factor formula provided for in section 707(c) of the Tax Law.

B. That since the income producing aspect of petitioner's services was not performed by or through the Beirut office, all gross income (for purposes of the allocation formula) constituted a New York State factor.

C. That the Income Tax Bureau is hereby directed to modify the Notice of Deficiency issued February 28, 1972 by changing the gross income factor to 100% and by retaining the factors for property and salaries as reported by petitioner on his business allocation schedule.

D. That the petition of Harry F. Kern is granted to the extent that his original factors for property and salaries are deemed correct; except as so granted, however, the petition is in all other respects denied.

DATED: Albany, New York

February 14, 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER