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BUREAU OF LAW
MEMORANDUM*Income Tax Determinations*
A-2
Denby, Arnold M. and
Leona Z.

TO: Commissioners Murphy, Macduff and Conlon

FROM: Francis V. Dow, Hearing Officer

SUBJECT: In the Matter of the Petition of
ARNOLD M. & LEONA Z. DENBY for a
Redetermination of a Deficiency or
for Refund of Personal Income Taxes
Under Article 22 of the Tax Law for
the Year 1963

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, New York on June 23, 1967. The taxpayer is deceased. His accountant testified at the hearing. The appearances and exhibits produced were as shown in the stenographic minutes submitted herewith.

The issue involved herein is whether the income received by the taxpayer for writing a weekly market letter in his New Jersey home was exempt from New York State income tax.

The taxpayer filed a nonresident income tax return in which he reported his salary as a "customer's man" for Hirsch and Co., a New York City stock brokerage firm. He claimed that that \$3,232 salary which he received from the same employer by a separate check for writing a weekly market letter was not taxable by New York since he wrote the letter at home. A notice of deficiency and statement of audit changes were issued on October 11, 1963 finding additional income tax and interest due in the amount of \$260.58 (File No. 3-5840726) on the basis that work performed at home was done so for the taxpayer's personal convenience and that his income of \$3,232 from Hirsch and Co. was New York income.

That although there was no restriction imposed on writing the weekly market letter during the taxpayer's working hours the taxpayer contends that his duties as a "customer's man" prevented him from writing during ordinary working hours. However, the taxpayer was provided a desk at his employer's place of business which was available for his use after regular working hours. Research materials for the preparation of the weekly market letter were available to the taxpayer at his employer's New York City office. He was not required by his employer to work at home.

I am of the opinion that the preparation of the weekly market letter could have been done at the New York office of the taxpayer's employer but was performed at the taxpayer's home because of greater convenience. In accordance with the cases of Burke v. Bregalini, 10 A D 2d 654 and Marchessault v. Murphy, 10 A D 2d 764, the income received for preparing the weekly market letter constitutes income from sources within New York.

For the reasons stated above, I recommend that the determination of the State Tax Commission denying the taxpayer's petition in the above matter be substantially in the form submitted herewith.

/s/

FRANCIS V. DOW

Hearing Officer

FVD:ac

Enc. *ms*

July 18, 1967

7-19-67

**STATE OF NEW YORK
STATE TAX COMMISSION**

**IN THE MATTER OF THE PETITION
OF**

ARNOLD M. & LEONA E. BERRY

**FOR A REDETERMINATION OF A DEFICIENCY OR
FOR REFUND OF PERSONAL INCOME TAXES UNDER
ARTICLE 22 OF THE TAX LAW FOR THE YEAR 1963**

The taxpayer having filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the year 1963 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on June 23, 1967 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) The taxpayer filed a nonresident income tax return for the year 1963 in which he reported his salary of \$12,127 as a "customer's man" for Hirsch and Co., a New York City stock brokerage firm; that the taxpayer allocated \$3,232 received as salary earned outside of New York which additional income he received from the same employer for writing a weekly market letter, which he prepared in his home.

(2) That a notice of deficiency and statement of audit changes (File No. 3-5840726) were issued on October 11, 1963 determining that additional personal income tax and interest were due in the amount of \$260.58 on the basis that the work performed by the taxpayer in his New Jersey home was performed and for the taxpayer's personal convenience and that his income of \$3,232 from Hirsch and Co.

was subject to New York income tax.

(3) That the taxpayer contended that his duties as a "customer's man" prevented him from writing the weekly market letter during the normal working day; that the taxpayer was provided a desk at his employer's place of business in New York City which was available for his use after regular working hours for preparation of the weekly market letter was available to the taxpayer at the New York City office; that the taxpayer prepared the weekly market letter at his home; that the taxpayer was not required by his employer to prepare the weekly market letter at home.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DECIDES:

(A) That there was no necessary ingredient required by the contract of employment and by the nature of the services performed which necessitated the State of New Jersey or the home of the taxpayer as the locus for performance for the preparation of the weekly market letter; that the preparation of the weekly market letter could have been performed at the New York office of the taxpayer's employer but was performed by the taxpayer at his home because of greater convenience.

(B) That the State Tax Commission properly disallowed the allocation of income outside of the State for services performed by the taxpayer at his New Jersey home during the year 1963; that the notice of deficiency and statement of audit changes (File No. 3-5840726) for the year 1963 is affirmed; that such notice of deficiency and statement of audit changes are correct and do not include any taxes or other charges which are not lawfully due and

owing and that the taxpayer's petition for redetermination of a deficiency or for refund with respect thereto be and the same is hereby denied.

DATED: Albany, New York on this 9th day of August, 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
~~COMMISSIONER~~

/s/

JAMES R. MACDUFF
~~COMMISSIONER~~

/s/

WALTER MACLYN CONLON
~~COMMISSIONER~~