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BUREAU OF LAW
MEMORANDUM*Income Tax Determinations*
Frish, Norman & Myrna
A-2

TO: Commissioners Murphy, Maduff and Conlon
FROM: Francis V. Dow, Hearing Officer
SUBJECT: NORMAN & MYRNA FRISH

Petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the year 1961

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, New York on June 19, 1967. The appearances and exhibits produced were as shown in the stenographic minutes submitted herewith.

The issue involved herein is whether the nonresident taxpayer is entitled to an allocation of his salary income.

The taxpayer filed a nonresident tax return for the year 1961 in which he allocated his salary income on the basis that he worked 230 days during the year, of which 34 were worked outside of New York State. A notice of deficiency and a statement of audit changes were issued on April 13, 1965 finding additional tax and interest due in the sum of \$157.40 on the basis that work performed at the taxpayer's New Jersey residence was not done as a result of an express requirement of the taxpayer's employer and accordingly the taxpayer's salary was allocable to New York.

The taxpayer is a pattern maker and production manager of Dave Goldberg, Inc., a manufacturer of swimsuits and sportswear. The taxpayer contended that he performed work outside of New York, which work consisted of supervising the cutting operations at a factory in New Jersey of a subcontractor of his employer in the manufacture of swimsuits. However, a letter from the taxpayer's employer which was attached to the taxpayer's tax return stated that the nature of the taxpayer's "work is such that some of it may be done at his home. Mr. Frish spends at least 4 or 5 regular working days each month working at home. On those days he does not leave his home and therefore does not work in New York State."

After considering the testimony and exhibits, I find that the work performed by the taxpayer in New Jersey was done at the taxpayer's home and was not done at the factory of his employer's New Jersey subcontractor. The work

done at the taxpayer's home was performed for the taxpayer's convenience and was not required by his employer to be performed there. Accordingly, the income from such work was attributable to New York sources and the income from such work was not allocable as income earned without the State. (See Burke v. Braschini, 10 AD 2d 674; McFarlane v. Murphy, 10 AD 2d 704)

For the reasons stated above I recommend that the decision 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:nn

July 24, 1967

Enc.

9-5-67

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

NORMAN & MIRIAM FRISH

**FOR A REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF PERSONAL INCOME TAXES
UNDER ARTICLE 22 OF THE TAX LAW FOR THE
YEAR 1961**

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 1961, 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 19, 1967 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared and testified and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed a New York State nonresident income tax return for the year 1961 in which he allocated his salary income on the basis of 230 days worked during the year, of which days 34 days were worked outside of New York State.

(2) That a notice of deficiency and a statement of audit changes were issued on April 13, 1965 finding additional income tax and interest due in the sum of \$257.49 on the basis that allocation of compensation to sources within and without New York State claimed by the taxpayer was disallowed since work performed

in the taxpayer's residence was not done there as a result of an expressed requirement of the taxpayer's employer.

(3) That the taxpayer was employed as a pattern maker and a production manager of Dave Goldberg, Inc., a manufacturer of bathing suits and sportswear; that during 1961 the taxpayer spent 24 days working at home as a pattern maker; that the nature of the taxpayer's work as pattern work permitted him to do some of the work at home; that the taxpayer was not required to work any days outside New York State by his employer.

(4) That on January 9, 1963 the taxpayer submitted a signed statement (Tax Commission Exhibit #5) alleging that he spent at least five or six working days at home in New Jersey; that on May 24, 1963 he submitted a signed statement (taxpayer's Exhibit A) alleging that his work in New Jersey consisted of supervision of subcontracting factories in that State; that the taxpayer did not substantiate that he worked any days at the New Jersey plants of subcontractors which do business with his employer.

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

DECIDES:

(A) That the taxpayer did no work in New Jersey other than in his New Jersey home.

(B) 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 of services by his employer; that such services could have been performed at the New York place of business of the employer but were performed by the taxpayer at his home because of greater convenience.

(C) That the State Tax Commission properly disallowed any allocation of income outside of the State for services performed by the taxpayer at his New Jersey home during the year 1961.

(D) That the notice of deficiency and statement of audit changes (File No. 1-5036907) for the year 1961 are 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; that the taxpayer's petition for revision or refund of personal income taxes for the year 1961 be and the same is hereby denied.

Dated: Albany, New York this 27th day of September, 1967.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ JAMES R. MACDUFF
COMMISSIONER

/s/ WALTER MACLYN CONLON
COMMISSIONER