

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert & Patricia Bohn :
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 Years 1972, 1973. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

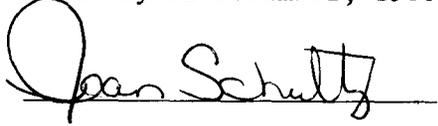
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Robert & Patricia Bohn, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

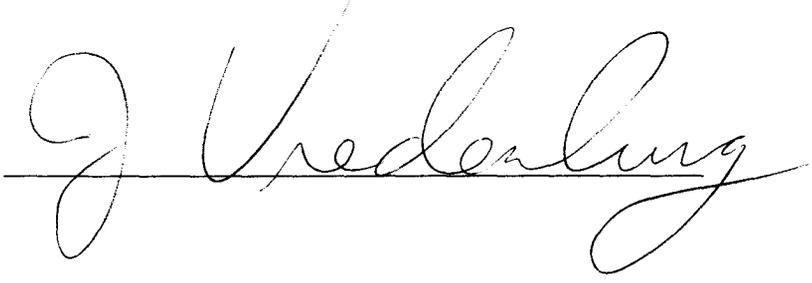
Robert & Patricia Bohn
39 Hiawatha Dr.
Guilderland, NY 12084

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
12th day of December, 1980.


Joan Schultz


Jay Vredenburg

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

December 12, 1980

Robert & Patricia Bohn
39 Hiawatha Dr.
Guilderland, NY 12084

Dear Mr. & Mrs. Bohn:

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 :
ROBERT BOHN and PATRICIA BOHN : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Years :
1972 and 1973. :

Petitioners, Robert Bohn and Patricia Bohn, 39 Hiawatha Drive, Guilderland, New York 12084, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1972 and 1973 (File No. 21513).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Albany, New York, on January 14, 1980 at 1:15 P.M. Petitioner Robert Bohn appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUE

Whether days worked at petitioners' home in New Jersey constituted days worked outside New York State for purposes of allocating salary income received from Toga Group, Inc. and Walter Motor Truck Company.

FINDINGS OF FACT

1. Petitioners, Robert Bohn and Patricia Bohn, filed New York State income tax nonresident returns for 1972 and 1973. They allocated the salary income received by Robert Bohn for each year on the basis of the ratio that the number of days he reported as being worked within New York State, bore to the total number of days that he worked in each year.

2. A consent fixing the period of limitation upon assessment for 1972 and 1973 was executed in September of 1975, in accordance with section 683(c)(2) of the Tax Law. This consent extended the period for assessment to one year following the close of proceedings that were pending for the tax years 1969 and 1970.

3. On September 12, 1975, petitioners submitted three Questionnaires - Allocation of Personal Service Compensation (IT-2332) to the Income Tax Bureau in which Robert Bohn reported 32 of his total 112 working days for Toga Group Inc. as being days worked outside New York in 1972. The 32 days worked outside New York State included 28 days worked at home. He also reported 61 of his total 115 working days for Walter Motor Truck Company as being days worked outside New York in 1972. These 61 days worked outside New York State included 59 days worked at home. For 1973, Mr. Bohn reported 56 days of his total 229 working days for Walter Motor Truck Company as being days worked outside New York. Of the 56 days worked outside New York State, 49 days were worked at home.

4. On December 19, 1977, the Audit Division issued a Notice of Deficiency against petitioners for 1972 and 1973, asserting personal income tax of \$996.55, plus interest of \$324.49, for a total due of \$1,321.04, with the explanation that days worked at home were considered to be for petitioner's own convenience and were to be counted as days worked in New York State.

5. During the first part of 1972, petitioner Robert Bohn was employed by Toga Group, Inc. at 530 Fifth Avenue, New York City. On January 31, 1972, Toga Group, Inc. closed its office. After that date Mr. Bohn performed his consulting service either at the client's office or at his home in New Jersey. The books, records, files, etc. of Toga Group, Inc. were maintained at the home of Mr. Bohn. The 80 days worked in New York State, were either worked at

the New York office prior to January 31, 1972 or, subsequently, at client's offices in New York State. Petitioners contended since the corporation had no office in New York, he had to work in his home.

6. During the latter part of 1972 and all of 1973, petitioner Robert Bohn was employed by Walter Motor Truck Company of Voorheesville, New York. Petitioner Robert Bohn contended that his employer wanted him to work at home because of the expense of traveling from New Jersey to Voorheesville, New York.

7. Petitioners further argued that the courts have changed their stand on an employee's out-of-state services where the services could have been performed at his employer's office. (Matter of Hayes v. State Tax Commission, 61 A.D.2d 62; and Matter of Fass v. State Tax Commission, 68 A.D.2d 977).

CONCLUSIONS OF LAW

A. That "place of performance" test advocated by the petitioners is applicable when facilities are not made available in New York State by an employer. In the Matter of Fass v. State Tax Commission, 50 N.Y.2d 932; aff'g 68 A.D.2d 977, the work petitioners performed at the New Jersey locations could not have been performed at his employers' New York City office. The rationale is that work performed at an out-of-state home, which just as easily could have been performed at the employer's New York office, is work performed for the employee's convenience and not for the employer's necessity. Therefore, since petitioner Robert Bohn's employer (Toga Group, Inc.) did not maintain an office within or without New York State subsequent to January 31, 1972, the days spent at his home in New Jersey after said date were days worked outside New York State for the necessity of the employer.

B. That the days worked at home in New Jersey by petitioner Robert Bohn for Walter Motor Truck Company were not based on the performance of services

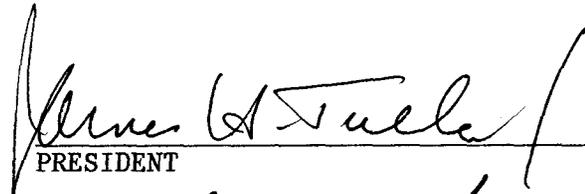
which of necessity, as distinguished from convenience, obligated him to out-of-state duties in the service of his employer. Therefore, the days worked at home during 1972 and 1973 constituted days worked within New York State for income allocation purposes, within the meaning and intent of section 632 of the Tax Law and 20 NYCRR 131.16.

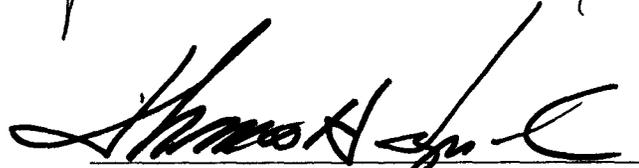
C. That the petition of Robert Bohn and Patricia Bohn is granted to the extent shown in Conclusion of Law "A" supra; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

DEC 12 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER