

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:
of	:
HERMAN WOLF	: DETERMINATION
for Redetermination of a Deficiency or for	DTA NO. 812738
Refund of Personal Income Tax under Article 22	:
of the Tax Law for the Year 1990.	:

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Petitioner, Herman Wolf, 3939 Conshohocken Avenue, Apt. 1017, Philadelphia, Pennsylvania 19131, 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 1990.

On August 4, 1994 and September 23, 1994, respectively, petitioner, by his representative, Frederick L. Myers, CPA,<sup>1</sup> and the Division of Taxation by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel) waived a hearing and agreed to submit this case for determination. All documents and briefs to be submitted were due by March 17, 1995, which date began the six-month period for the issuance of this determination. The Division of Taxation submitted its documents on December 14, 1994. Petitioner's letter brief was received on December 16, 1994, and the Division of Taxation's letter brief was received on February 27, 1995. No reply brief was filed by petitioner. After due consideration of the record,

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<sup>1</sup>Mr. Myers, a certified public accountant licensed in Pennsylvania, obtained special permission from the Tax Appeals Tribunal to represent Mr. Wolf in this matter.

Frank W. Barrie, Administrative Law Judge, renders the following determination.

### ISSUES

I. Whether the lump-sum distribution from an Individual Retirement Account ("IRA") to petitioner, who was a nonresident of New York at the time of the distribution, was properly subject to New York personal income tax because petitioner was a New York resident and was employed in New York when he made his contributions to the IRA, and therefore such distribution was properly treated as New York source income.

II. Whether treating the lump-sum distribution from an IRA to a nonresident as New York source income subject to New York income tax violates the United States Constitution by permitting the Division of Taxation to cross state lines to tax funds of a nonresident of New York.

### FINDINGS OF FACT

The factual record on submission is extremely bare. Petitioner's representative, Frederick L. Myers, in a letter dated September 7, 1994 (Division of Taxation's ["Division"] Exhibit "H") to William F. Collins, the Division's former Deputy Commissioner and Counsel, wrote "please find listed below the stipulation of facts concerning Herman Wolf." However, no stipulation of facts was actually introduced into the record. Rather, a letter dated September 23, 1994 of the Division's representative, Michael J. Glannon, which transmitted "a copy of the signed submission agreement" (Division's Exhibit "A") to Mr. Myers merely noted that Mr. Myers's letter of September 7,

1994 "contains sufficient information to allow us to proceed by submission."

It is further observed that a review of the pleadings does not reveal the establishment of any facts. The petition (Division's Exhibit "F") alleged only the following "facts":

"The taxpayer, while a resident of Pennsylvania, received an IRA distribution from a New York State Payor [and New York State income tax of \$4,038.00 was paid on such distribution]."

The Division's answer (Division's Exhibit "G") denied this allegation.

Consequently, although petitioner has failed to substantiate the facts set forth in Mr. Myers's letter dated September 7, 1994, in order to have a factual context for what the parties appear to agree is basically a legal issue, the "facts" (although they can be properly viewed as allegations only) set forth in Mr. Myers's letter will be recited herein.

Mr. Myers's letter of September 7, 1994 (Division's Exhibit "H") to the Division's former counsel, William F. Collins, stated the following "facts":

"1. The petitioner worked for 30 years in the same firm. During that time he performed all kind [sic] of duties -- from sweeping the floor to shipping and receiving merchandise. First they were located in [the] Bronx, NY and the name of the firm was Baras Textile. Later the firm moved to New York [Manhattan] and the name was Baras Jersey. The location was 37 W. 20th Street, New York, NY, 10011.

"2. The IRA distributions [sic, since petitioner apparently means 'contributions'] were monies put away during petitioners [sic] employment.

"3. Work performed was done so in the State of New York.

"4. The petitioner opened up the account on his

own behalf.

"5. On April 15 [presumably of 1990] the petitioner moved from Yonkers, New York to his current address in Philadelphia, PA. Prior to that time the petitioner lived in Yonkers, NY for at least twenty years.

"6. The taxpayer received a full distribution from the IRA on 12/17/90 while a full [sic] resident of the State of Pennsylvania.

"7. Mr. Wolf's last New York tax return was for the year 1990."

Petitioner filed a 1990 nonresident and part-year resident New York income tax return (Form IT-203) dated April 12, 1991 on which he reported that he moved out of New York State on April 30, 1990 and received no income from New York State sources during the nonresident period. Nonetheless, Mr. Wolf's former accountant included in petitioner's New York adjusted gross income an IRA distribution of \$69,770.00 apparently received by Mr. Wolf in late December of 1990.<sup>2</sup>

Subsequently, by his current representative, petitioner filed a refund request dated March 6, 1992 (included in Division's Exhibit "C") noting as follows:

"Please be advised that the taxpayers [sic] enclosed return was incorrectly prepared. The taxpayer moved to Pennsylvania on April 30, 1990. In December 1990 the taxpayer received a distribution from his pension plan [sic] in the amount [of] \$69,770.

"The distribution was erroneously included on the New York tax return. We have enclosed a copy of the New York return, the Pennsylvania return, and the request the taxpayer filed to receive the distribution.

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<sup>2</sup>An "IRA Distribution Request" (included in Division's Exhibit "C") to The Bowery bank, requesting that all of petitioner's IRA accounts were to be closed, was dated December 17, 1990. This document also revealed petitioner's date of birth as July 19, 1912 so that, as of the date of the IRA distribution of \$69,770.00 in December of 1990, petitioner was 78 years old.

That request was dated November 27, 1990 [sic].<sup>3</sup>

"We would appreciate a full refund of the taxes paid in error . . . ."

Petitioner then filed an amended 1990 nonresident and part-year resident New York income tax return (Form IT-203) dated July 14, 1992 on which he allocated none of his IRA distribution of \$69,770.00 to New York and claimed a refund due of \$4,038.00.

The Division, by a letter dated December 22, 1992 (Division's Exhibit "E"), designated a Notice of Disallowance by the Division, denied petitioner's refund claim for \$4,038.00 for the following reason:

"Since your IRA distribution does not qualify as a pension or annuity, it is taxable as compensation for services rendered. Your refund is limited to the tax paid with the amended return."<sup>4</sup>

Attached to petitioner's refund request dated March 6, 1992 is a photocopy of his 1990 Pennsylvania individual income tax return. Petitioner did not report his IRA distribution of \$69,770.00 as income subject to Pennsylvania income tax.

SUMMARY OF THE PARTIES' POSITIONS

In his petition (Division's Exhibit "F"), Mr. Wolf

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See footnote "2", which indicates that such request was dated December 17, 1990.

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The letter references a refund claim totalling \$8,427.00, of which \$4,038.00 was disallowed. A review of the amended return (Division's Exhibit "D") does not disclose that petitioner paid tax with the amended return, nor does the record include any additional information concerning the remaining portion of the refund claim of \$4,389.00 (\$8,427.00 - \$4,038.00 = \$4,389.00), which apparently was allowed by the Division.

contended that he was entitled to a refund for the following reason:

"As a resident of Pennsylvania, the State of New York had no authorization or jurisdiction to tax any of the taxpayer's funds. Full faith and credit and the Constitution of the United States prohibits crossing state lines to tax funds who's [sic] domicile is Pennsylvania."

In his submission received on December 16, 1994, petitioner did not elaborate any further on his position but merely restated the "facts in this

case" by repeating verbatim the "facts" set forth by Mr. Myers in his letter of September 7, 1994, as detailed in Finding of Fact "2".

The Division's representative contends in his letter brief that petitioner has not asserted any "legal arguments to which I can respond" so that a presumption of correctness "should therefore attach to the Division of Taxation's denial of the refund." Nonetheless, the Division suggests that there are "additional arguments for treating the concerned \$69,700.00 IRA distribution as New York source income." According to the Division, petitioner funded his IRA account with income from his New York employment and "were it not for the tax deferred benefit of the IRA account", petitioner's contributions to his IRA account "would have been taxable to New York in the year earned." The Division also points out that:

"petitioner is apparently treating the IRA distribution as tax exempt income since he claims it is not taxable in New York while at the same time he failed to report it as taxable income in Pennsylvania."

CONCLUSIONS OF LAW

A. Tax Law former § 631(a), as in effect for the year at issue, provided that the New York source income of a nonresident individual shall include the sum of the net amount of the items of income, gain, loss and deduction entering into the individual's Federal adjusted gross income which are derived from or connected with New York sources.

B. Tax Law § 631(b)(1)(B) specifies that items of income attributable to "a business, trade, profession or occupation carried on in this state" are derived from or connected with New York sources.

C. To determine whether petitioner's IRA distribution of \$69,770.00, received in late 1990 when he was no longer a resident of New York, but rather had established residency in Pennsylvania a few months earlier, is New York source income, it is first necessary to address the nature of an IRA.

D. Pursuant to Internal Revenue Code ("IRC") § 408, an individual who receives compensation that is includible in gross income may establish and make contributions to an IRA. Under IRC § 408(e)(1), amounts earned by the contributions are not taxed until a distribution is made. Further, IRC § 219, with certain limitations, allows the deduction for contributions to an IRA. Although the factual record in the matter at hand is extremely bare, it appears that petitioner's contributions to his IRA were contingent upon his compensation from his New York employment. Consequently, it is reasonable to conclude that petitioner's IRA distribution of \$69,770.00 was attributable to

his former employment or occupation carried on in New York and therefore was "derived from or connected with New York sources" (cf., Matter of Hoffman, Tax Appeals Tribunal, November 23, 1994). In Hoffman, the Tribunal decided that a lump-sum retirement benefit was directly connected to the performance of past services, and a nonresident of New York must pay income tax on such amounts based upon the proportionate level of services historically performed in New York. As noted in Finding of Fact "2", petitioner concedes that his IRA contributions were monies put away during his New York employment. Consequently, there is no issue in the matter at hand concerning the allocation of the IRA distribution between New York and other states since no services were performed by petitioner outside New York.

In addition, in Matter of Halloran (Tax Appeals Tribunal, August 2, 1990), the Tribunal determined that it was the period of employment during which a sick leave benefit at issue therein was actually secured, not the period when the benefit was received, which was determinative. The Tribunal observed:

"It is reasonable to infer from the record that but for extensive prior services rendered for his employer, petitioner would not have been afforded this significant [sick leave] benefit . . . . We . . . conclude that attributing this benefit received in the year at issue [when Mr. Halloran was a nonresident] to the proportionate level of services historically performed in New York in prior years is a natural and obvious interpretation of Tax Law § 632(a)(1)."<sup>5</sup>

Similarly, it is reasonable to conclude that Mr. Wolf's IRA

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Tax Law former § 632(a)(1) as in effect during 1986, the year at issue in Halloran, is the same statutory provision designated Tax Law former § 631(a) as in effect in 1990, the year at issue herein.



account was derived from his prior services rendered in New York for his New York-based employer.

E. Turning to petitioner's constitutional argument, as described in paragraph "8", it first must be noted that given the failure of petitioner to articulate his argument, it is difficult to respond to his opaque contention. It does appear that petitioner is not challenging the constitutionality of the statutory provisions cited in Conclusions of Law "A" and "B" on their face, but rather their application to him, so that the Division of Tax Appeals would have jurisdiction to review his constitutional argument (see, e.g., Matter of Waste Conversion, Tax Appeals Tribunal, August 25, 1994, confirmed 185 AD2d 479, 585 NYS2d 883, lv denied 80 NY2d 762). Nonetheless, the burden of proof was upon petitioner to establish that the Division's disallowance of his refund claim was erroneous. Since he has based his allegation of error on a constitutional argument, it was his obligation to articulate the constitutional argument.

Consequently, it is concluded that petitioner, by his failure to present an intelligible constitutional argument, has not shouldered his burden of proving error on the part of the Division, which rejected his refund claim based upon a reasonable interpretation of the statutory provisions at issue (cf., Matter of Hoffman, supra).

F. Finally, a word is in order concerning the Division's argument that petitioner's failure to report the IRA distribution to Pennsylvania is relevant. The Division has

incorrectly assumed that Pennsylvania taxes IRA distributions. Rather, Pennsylvania apparently does not permit a tax deduction for money going into retirement accounts and does not tax withdrawals either (see, "Taxing I.R.A.'s Across State Lines",<sup>6</sup> New York Times, December 11, 1994 [which reviews the varying state laws concerning the taxing of withdrawals from IRAs and, in particular, notes that there are only 12 states, including New York, which tax withdrawals from IRAs for retirees who have become nonresidents]).

G. The petition of Herman Wolf is denied and the Division's Notice of Disallowance dated December 22, 1992 is sustained.

DATED: Troy, New York  
August 17, 1995

/s/ Frank W. Barrie

ADMINISTRATIVE LAW JUDGE

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<sup>6</sup>This particular article, written by Mary Rowland, appeared in the business section of the Sunday New York Times in a special column entitled "Your Own Account".