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## BUREAU OF LAW

## MEMORANDUM

*Income Tax Determination.*  
1968 A-2  
*Greenberg, Howard I. & Anita*

TO: **The State Tax Commission**

FROM: **Solomon Sies, Hearing Officer**

SUBJECT: **Howard I. & Anita Greenberg**

**Petition for Redetermination of a Deficiency  
or for Refund of Personal Income Taxes Under  
Article 22 of the Tax Law for the year 1960**

**File #6626094**

A formal hearing in the above-captioned matter was held before me at the New York City office on June 30, 1966.

The primary issue involved herein is whether the taxpayer is entitled to deduct traveling expenses including amounts expended for meals and lodgings while "away from home" in the pursuit of a trade or business in accordance with Section 162(a)(2) of the Internal Revenue Code. A secondary issue is whether the taxpayer was a New York resident for income tax purposes. Determinative of the primary issue is the location of the taxpayer's "home" for travel expense purposes.

The taxpayer Howard I. Greenberg was employed by Baumritter Corporation of New York City as a furniture salesman on a straight commission basis. His territory covered Rhode Island, Southern Massachusetts and Northern Connecticut. He was not reimbursed for any of his expenses. Prior to 1960, the aforementioned taxpayer would leave his home in Long Island by car either Monday or Tuesday morning covering his assigned territory, staying at hotels or motels and would return home Thursday or Friday evenings. In order to save expenses and to avoid spending time at home on weekends taking care of mail which had accumulated, he rented a furnished room in a private home in Providence, Rhode Island at a rental of \$50 per month where he received mail and to which he returned each day after making his appointed rounds, and returned home to East Norwich, New York on Thursday or Friday evenings as in the past. It is to be noted that the taxpayer does not contend that he used the furnished room to store samples or as a business office.

The taxpayers Howard I. and Anita Greenberg filed a joint resident return for the year 1960 in which they indicated their home address as Peachtree Drive, East Norwich, New York, a one-family home owned by the wife. During the year 1960 and prior thereto, the taxpayers were domiciliaries of the State of New York and spent more than 30 days therein. Howard I. Greenberg deducted sales expenses on both his Federal and State returns in the amount of \$6,563. The taxpayers maintained a permanent place of abode in the State of New York during the year 1960.

On June 22, 1962 the Internal Revenue Service made a final determination with respect to the taxpayers' Federal return for 1960 disallowing a portion of selling expenses as "not being proper and/or personal" in the amount of \$2,871.44 and adjusted the medical expenses of the taxpayers in the amount of \$98.86, thereby increasing their taxable income by \$2,570.30. The taxpayers did not file a protest with respect to the Federal audit. On August 3, 1964 the Income Tax Bureau issued a statement of audit changes adjusting the taxable income of the taxpayers for the year 1960 based on the Federal audit, and, accordingly, issued a notice of deficiency therefor in the amount of \$109.40, including interest. The Income Tax Bureau determined that the taxpayers were residents of the State for income tax purposes; that in view of the State's conformity with Federal Income Tax Law, the Federal determination was binding on the taxpayers with respect to their State return.

The taxpayer contends that the Internal Revenue Agent disallowed his living expenses consisting of rent for the furnished room, food while on the road, except entertainment expense, plus a portion of his automobile expense on the ground that his home was considered to be Providence, Rhode Island. He, therefore, claims that his home in East Norwich, New York was considered the equivalent of a summer home and that he was, in fact, deemed to have been a non-resident.

Section 162(a)(2) of the Internal Revenue Code allows as a deduction all the ordinary or necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including traveling expenses (including amounts expended for meals and lodging) while "away from home" in the pursuit of a trade or business.

In Commissioner v. J. E. Flowers, 325 U.S. 465, the Supreme Court declared that before a traveling expense may be deducted as a business expense, all three of the following conditions must be satisfied: (1) the expense must be a reasonable and necessary expense, (2) it must be incurred "while away from home", and (3) it must be incurred "in pursuit of business."

The location of a taxpayer's "home" for traveling expense purposes has generally been held to be at, or in the vicinity of his place of business or employment. Such location is frequently called his post of duty and is at times, referred to as his tax or business home. The great majority of Court decisions considering the meaning of "home" have sustained this interpretation. See Rev. Rul. 60-109, 1960-1 Cum. Bull.; Mort L. Bixler v. Commissioner, 5 NTA 1131.

See also Commissioner of Internal Revenue v. Egan A. Shidner, et ux., 386 U.S. 207, 18 L. Ed. 2d 53, 87 S. Ct. 1005.

The same conclusion was reached in the decision of the Tax Commission in the Matter of George A. Aronov (dated June 11, 1968) based on similar facts. (copy attached)

Cost of transportation, food and lodging away from home in pursuit of a trade or business is deductible only if directly related to the pursuit of a trade or business, and the exigencies of business rather than the personal conveniences and necessities of the taxpayer must be the motivating factors. Wright v. Bartlett, 305 F. 2d 221; Ford v. C. I. R., 227 F. 2d 297; Anderson v. C. I. R., 179 F. 2d 502; Barrett v. C. I. R., 165 F. 2d 521.

I am of the opinion that the taxpayers were residents, for income tax purposes, in accordance with Section 605 of the Tax Law; that the place of abode of the taxpayer Howard I. Greenberg in Providence, Rhode Island was his "home" for traveling expense purposes; that he was not entitled to travel expense deductions incurred or paid for transportation, food and lodging while "away from home" within the intent and meaning of Section 162(a)(2) of the Internal Revenue Code; that Section 162(a)(2) of the Internal Revenue Code is not in conflict with Section 605 of the Tax Law defining a resident for income tax purposes.

For the reasons stated above, I recommend that the decision of the Tax Commission in the above-captioned matter be substantially in the form submitted herewith.

/s/

SOLOMON SIES

HEARING OFFICER

SS:dv  
Enc.

September 17, 1968

10-10-68

**STATE OF NEW YORK**

**STATE TAX COMMISSION**

.....  
**IN THE MATTER OF THE PETITION**

**OF**

**HOWARD I. GREENBERG and ANITA GREENBERG,**  
**his wife**

**FOR A REDETERMINATION OF A DEFICIENCY OR**  
**FOR REFUND OF PERSONAL INCOME TAXES UNDER**  
**ARTICLE 22 OF THE TAX LAW FOR THE YEAR 1960 :**  
.....

The taxpayer, Howard I. Greenberg, 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 1960 (File No. 6626094) and a hearing having been held at the office of the State Tax Commission at 80 Centre Street, New York, N. Y. on June 30, 1966, before Solomon Sico, Hearing Officer of the Department of Taxation and Finance and the taxpayer having appeared personally and testified in connection therewith, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That during the year 1960 and prior thereto, the taxpayer Howard I. Greenberg was employed by Dunritter Corporation of New York City as a furniture salesman on a straight commission basis; that his territory covered Rhode Island, Southern Massachusetts and Northern Connecticut; that he was not reimbursed for any of his expenses; that the aforementioned taxpayer would leave his home in Long Island by car either Monday or Tuesday morning covering his assigned territory, staying at hotels or motels and would return home Thursday or

Friday evenings; that in the latter part of 1959, the aforementioned taxpayer rented a furnished room in Providence, R. I., where he received mail and to which he returned each day after making his appointed rounds; that he returned to East Norwich, N. Y. on Thursday or Friday evenings, as in the past.

(2) That the taxpayer, Edward I. Greenberg, rented the furnished room in order to save expense and to avoid spending time at his home in Long Island on weekends taking care of mail which had accumulated; that the aforementioned taxpayer's place of abode in Providence, R. I. was used by him for his personal convenience and to be near his business sites.

(3) That on June 22, 1962, the Internal Revenue Service made a final determination with respect to the taxpayers' Federal income tax return for 1960, disallowing a portion of selling expenses as "not being proper and/or personal" in the amount of \$2,471.44 and adjusted the medical expenses of the taxpayers in the amount of \$98.86 thereby increasing their taxable income by \$2,570.30; that the taxpayers did not file a protest with respect to the Federal audit; that on August 3, 1961, the Income Tax Bureau issued a statement of audit changes adjusting the taxable income of the taxpayers for the year 1960 based on the Federal audit, and, accordingly, issued a notice of deficiency therefor in the amount of \$109.40, including interest.

(4) That during the year 1960, the taxpayers were domiciliaries of the State of New York, maintained a place of abode in the State of New York and spent more than thirty days therein.

(5) That the taxpayer, Edward I. Greenberg, contends that the Internal Revenue Service disallowed his living expenses

consisting of rent for the furnished room, food while on the road, except entertainment expense, plus a portion of his automobile expense on the ground that his "home" was considered to be Providence, Rhode Island; that he, therefore, was deemed to have been a non-resident of the State of New York.

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

(A) That the taxpayers were residents of the State of New York during the year 1960, for income tax purposes, in accordance with the intent and meaning of Section 605 of the Tax Law.

(B) That the taxpayer Howard I. Greenberg maintained a place of abode in Providence, R. I., the situs of his employment; that such location in Providence, R. I. was the taxpayer's "home" for traveling expense purposes within the intent and meaning of Section 162(a)(2) of the Internal Revenue Code which allows as a deduction traveling expenses, including the entire amount expended for meals and lodging, paid or incurred in carrying on a trade or business while "away from home"; that such expenses were not incurred while "away from home" and were properly disallowed.

(C) That the statement of audit changes and notice of deficiency are correct; that the same do not include any tax or other charge which could not have been lawfully demanded and that the petition of the taxpayer Howard I. Greenberg for re-determination of said deficiency for the year 1960 be and the same is hereby denied.

DATED: Albany, New York, on the 14th day of October, 1961.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**PROSECUTOR**

/s/

A. BRUCE MANLEY

**COMMISSIONER**