

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

ROGER and CECIL JOSPE

For a Redetermination of a Deficiency or
a Refund of Personal Income
Taxes under Article ~~(*)~~ 22 of the
Tax Law for the Year(s) 1964 and 1965.

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY ~~(CERTIFIED)~~ MAIL

State of New York
County of Albany

MARY GROFF, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 10th day of February, 1976, she served the within
Notice of Decision ~~(on Redetermination)~~ by ~~(certified)~~ mail upon ROGER and CECIL JOSPE

~~(representative of)~~ the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid

wrapper addressed as follows: Mr. & Mrs. Roger Jospe
110 Avenue Houzeau
Brussels, Belgium

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the ~~(representative of)~~
~~(a)~~ petitioner herein and that the address set forth on said wrapper is the last
known address of the ~~(representative of the)~~ petitioner.

Sworn to before me this
10th day of February, 1976.

Janet Mack

Mary Groff

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

ROGER and CECIL JOSPE

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY ~~CERTIFIED~~ MAIL

For a Redetermination of a Deficiency or
a Refund of Personal Income
Taxes under Article ~~(*)~~ 22 of the
Tax Law for the Year(s) 1964 and 1965.:

State of New York
County of Albany

MARY GROFF, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 10th day of February, 1976, she served the within Notice of Decision ~~(or Determination)~~ by ~~(certified)~~ mail upon W.R. BONTHRON, C.P.A. & J.D. COUGHLAN, C.P.A. (representative of) the petitioner in the within

proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: W.R. Bonthron, C.P.A. & J.D. Coughlan, C.P.A. c/o Price Waterhouse & Co. 60 Broad Street New York, New York 10004

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) petitioner herein and that the address set forth on said wrapper is the last known address of the (representative of the) petitioner.

Sworn to before me this

10th day of February, 1976.

Janet Mack

Mary Groff



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

BUILDING 9, ROOM 107
STATE CAMPUS
ALBANY, N.Y. 12227

AREA CODE 518

STATE TAX COMMISSION
HEARING UNIT

PAUL GREENBERG
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

MR. WRIGHT
MR. COBURN
MR. LEISNER
(518) 457-3850

DATED: Albany, New York
February 10, 1976

Mr. & Mrs. Roger Jospe
110 Avenue Houzeau
Brussels, Belgium

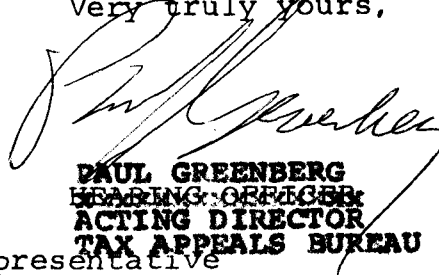
Dear Mr. & Mrs. Jospe:

Please take notice of the **DECISION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section(s) **690** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Any inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned.
These will be referred to the proper party for
reply.

Very truly yours,



PAUL GREENBERG
HEARING OFFICER
ACTING DIRECTOR
TAX APPEALS BUREAU

Enc.

cc: Petitioner's Representative
Law Bureau

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ROGER and CECIL JOSPE : DECISION
for a Redetermination of a Deficiency :
or for Refund of Personal Income Taxes :
under Article 22 of the Tax Law for :
the Years 1964 and 1965. :

Roger and Cecil Jospe, 110 Avenue Houzeau, Brussels, Belgium, filed a petition for redetermination of a deficiency dated August 30, 1971, in personal income tax under Article 22 of the Tax Law for the years 1964 and 1965.

A hearing was held at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on April 20, 1972, before Nigel G. Wright, Hearing Officer. The petitioners were represented by J. D. Coughlan and W. R. Bonthron, C.P.A.'s of Price, Waterhouse & Co. The Income Tax Bureau was represented by Saul Heckelman, Esq., appearing by Francis X. Boylan, Esq.

The record of said hearing has been duly examined and considered.

ISSUE

The issue in this case is the proper method of computing a nonresident's share of New York income from a New York partnership when the nonresident has claimed an exclusion from Federal gross income under section 911 of the Internal Revenue Code for foreign

source income and, in particular, the method of such computation when foreign source income is interpreted by Federal authorities to include any "guaranteed payment" irrespective of the source of the partnership's income. (See e.g. - Miller 52 U.S. Tax Court 752).

FINDINGS OF FACT

1. Petitioners, Mr. and Mrs. Jospe, were United States citizens and residents of Brussels, Belgium.

2. Mr. Jospe was a partner in Burnham & Company, a stock brokerage firm doing business in New York City, Belgium and elsewhere.

3. Mr. Jospe filed Federal returns for both years. For 1964, he reported his distributive share of partnership income items as follows: Ordinary income, \$18,018.95; "salaries and interest" of \$40,307.64; qualifying dividends of \$160.21; short term gains of \$22.83; long term gains of \$193.32, for a total of \$58,702.95. He reported partnership deductions of depreciation of \$24.67 and contributions of \$97.00 for a net amount of all items of \$58,581.28.

In 1965, the income items were as follows: Ordinary income of \$24,177.13; "salaries and interest" of \$55,974.24; qualifying dividends of \$653.37; short term gains of \$6.00; long term gains of \$220.00, for a total of \$81,030.74. The deduction items were depreciation of \$13.24 and contributions of \$58.50. The net amount of all such items was \$80,959.00.

4. On each Federal return, Mr. Jospe claimed the benefits of the section 911 foreign income exclusion by excluding \$25,000.00 in each year from gross income reporting as foreign source income the sum of his "ordinary income" and "salaries and interest income". He reported these amounts less the \$25,000.00 exclusion on page 2, line 4 of his Federal return and on Schedule "C-3" for purposes of his self-employment tax.

5. Petitioners did not file a New York State return for either year until September 11, 1968. The returns, as filed, show the above stated Federal amounts (as reduced by the section 911 exclusion), and then further reduced these amounts by multiplying them by the firm's New York allocation ratio of 92.2606% in 1964 and 92.59% in 1965. The petitioner in this case reaffirms this claim but uses allocation ratios for the firm of 97.485% in 1964 and 96.058% in 1965. Because of this change in allocation ratios, petitioner would admit a deficiency of \$158.47 for 1964 and \$185.10 for 1965, according to schedules attached to his petition.

6. The deficiency in issue was computed as follows:

The books of Burnham & Company were audited to change their allocation method from formula apportionment to separate office accounting. This method showed profits from New York sources, losses from offices in other states and profits from offices outside of the United States. Such profits from offices outside of the United States amounted to 7.618% of total profits for 1964 and 10.495% of total profits for 1965. The petitioner's distributive share was computed. The exclusion of foreign income under section 911 was then allowed by allocating the \$25,000.00 allowed by the Federal authorities first to the profits from offices outside of the United States

until such profits were exhausted. Petitioner's share of such profits from offices outside of the United States was \$4,441.44 in 1964 and \$8,412.00 in 1965. The remainder was then applied to reduce the income from New York profits. This reduction amounted to \$20,558.56 for 1964 and \$16,588.00 for 1965.

7. As stated at the hearing, the partnership agreement provided, "As compensation for their respective services to the partnership the general partners hereinafter named shall be entitled to receive each year the amount of the compensation set forth opposite their respective names..." "Such sums shall be treated as an expense of the partnership for the purpose of determining its profits or losses..." The petitioner did not, however, produce a copy of the agreement itself.

8. The deficiency was issued under date of August 30, 1971, and is in the amount of \$1,357.26 plus interest of \$464.18 for a total of \$1,807.86. Petitioner filed an amended return for 1964 thereafter.

CONCLUSIONS OF LAW

The petitioner is incorrect in his assertions and in fact, the deficiency against him must be increased.

The petitioner's computation of his Federal adjusted gross income and his exclusion for foreign earned income under section 911 of the Internal Revenue Code were correctly computed so far as his Federal return is concerned. Petitioner was a member of a partnership and was stationed overseas. He may therefore exclude up to \$25,000.00 from his Federal gross income not only for his distributive share of the partnerships earned income from foreign sources, but also for any amount received by him as a "guaranteed

payment" irrespective of such distributive share or whether or not the partnership itself has any earned income from foreign sources at all. Such guaranteed payments have been held to qualify for the exclusion of "earned income from sources without the United States" provided for in section 911 of the Internal Revenue Code since that section defines "earned income" as "compensation for personal services" and guaranteed payments to a partner for services are considered under section 707(c) of the Internal Revenue Code to have been made "to one who is not a member of the partnership..." and so are not in the nature of a distributive share of profits but are rather similar to wages paid to an employee. (Andrew O. Miller, 1969, 52 U.S. Tax Court 752).

However, with respect to the New York tax return, the computation of the section 911 exclusion can be made only for amounts received as a distributive share of the firm's foreign source income and not for any amounts received as a "guaranteed payment". This is so because section 637(b)(1) of the New York Tax Law must first be applied so that no effect is given to "a provision in the partnership agreement which characterizes payments to the partner as being for services..." Thus any such payments which have reduced a partner's distributive share must be added back to it. (This provision thus has the same effect as section 706(3) of Article 23 for the unincorporated business tax of the partnership.)

Furthermore, with respect to the New York tax return, any computation of the section 911 exclusion which is made with respect

to a partner's distributive share of the foreign earned income of the partnership should have no effect on the tax. This must be the proper result since New York does not purport to include any foreign income in the tax base of a nonresident so there is no foreign income there to exclude under section 911. Of course, it may be that the computation on the Federal return of the precise amount of a partner's distributive share of foreign income may not be acceptable to New York. This would happen most usually because of New York's policy to apportion the source of the income of a partnership by separate accounting methods and also its policy to assign to each partner an identical ratio of foreign income to total income. The recomputation of the amount of foreign income for New York purposes is required by section 637 of the Tax Law dealing with New York sources. The method of computation is made by multiplying the income of each partner by the same ratio of foreign income to total income. (See e.g. Regulation 134.2(b).) Unless by special application to the Commission under section 637(d) of the Tax Law an alternate method of computation is used.

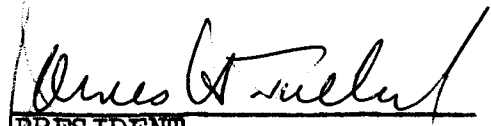
Finally, the provision of Article III, section 22 of the New York Constitution is not decisive of these issues. Those provisions do not require an identity between income as measured under New York rules with income as measured under Federal rules and in any event, they permit modifications to any Federal rules which are adopted. The statutory provisions with respect to allocation are valid under this constitutional provision as such a modification.

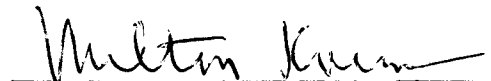
DECISION

The State Tax Commission on its own motion increased the deficiency to \$6,233.74 plus interest of \$1,810.26 to August 30, 1971, for a total of \$8,044.00. (This takes into account the amended return filed by petitioner.) This amount is due together with such additional interest as shall be due pursuant to section 684 of the Tax Law.

DATED: Albany, New York
February 10, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION
HEARING UNIT

PAUL GREENBERG
SECRETARY TO
COMMISSION

STATE TAX COMMISSION

BUILDING 9, ROOM 107
STATE CAMPUS
ALBANY, N.Y. 12227

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ADDRESS YOUR REPLY TO

MR. WRIGHT
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(518) 457-3850

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proceeding in court to review an adverse deci-
sion must be commenced within 4 months
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These will be referred to the proper party for
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Very truly yours,

PAUL GREENBERG
~~HEARING OFFICER~~
ACTING DIRECTOR
TAX APPEALS BUREAU

Enc.

cc: Petitioner's Representative
Law Bureau

STATE OF NEW YORK
Department of Taxation and Finance

STATE CAMPUS
ALBANY, N. Y. 12227

SS# - *None*
081-24-562
Cecil
CO 154-220917

~~THE STATE OF NEW YORK~~
~~Department of Taxation and Finance~~

J. B. Coughlin
W. R. Benthon
90 Pine Waterhouse
60 Broad St

N.Y.
10004

Income	Ontkenn
1180	

Mr. & Mrs. Roger Jospe
110 Avenue Houzeau
~~Brussels, Belgium~~

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not of USA

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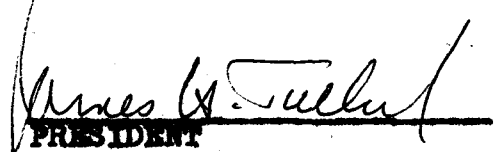
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DECISION

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