

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Eugene G. & Jane E. Fubini :
: AFFIDAVIT OF MAILING
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 1969, 1970

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 10th day of April, 1981, he served the within notice of Decision by certified mail upon Eugene G. & Jane E. Fubini, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eugene G. & Jane E. Fubini
2300 Hunter Mill Rd.
Vienna, VA 22180

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
10th day of April, 1981.

Annie A. O'Connell

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Eugene G. & Jane E. Fubini :
: AFFIDAVIT OF MAILING
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 1969, 1970 :

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 10th day of April, 1981, he served the within notice of Decision by certified mail upon Richard D. Kuhn the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Richard D. Kuhn
Holzka, Donahue & Kuhn
358 St. Marks Place
Staten Island, NY 10301

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 representative of the 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 April, 1981.

Annice A. Hagelend

J. Vredenburg

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

April 10, 1981

Eugene G. & Jane E. Fubini
2300 Hunter Mill Rd.
Vienna, VA 22180

Dear Mr. & Mrs. Fubini:

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
Richard D. Kuhn
Holzka, Donahue & Kuhn
358 St. Marks Place
Staten Island, NY 10301
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
EUGENE G. FUBINI and JANE E. FUBINI : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Years :
1969 and 1970.

Petitioners, Eugene G. Fubini and Jane E. Fubini, 2300 Hunter Mill Road, Vienna, Virginia 22180, 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 1969 and 1970 (File No. 13190).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on Friday, July 21, 1978 at 1:30 P.M. Petitioner Eugene G. Fubini appeared by Holzka, Donahue, Kuhn & Howard, PC (Steven Howard and Richard D. Kuhn, Esqs., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the income earned by petitioner Eugene G. Fubini from International Business Machines Corp. after February 28, 1969 is subject to personal income tax.

FINDINGS OF FACT

1. Petitioners, Eugene G. Fubini and Jane E. Fubini, filed New York State income tax nonresident returns for the years 1969 and 1970 on April 12, 1970 and August 15, 1971, respectively. On said returns, petitioners reported

wage income received from International Business Machines Corp. (hereinafter "IBM") and business income from Eugene G. Fubini's activities as a consultant.

2. On March 31, 1975, the Audit Division issued a Notice of Deficiency against petitioners asserting that additional personal income tax of \$5,377.13 was due for the years 1969 and 1970, together with interest. The additional tax due as found in the Notice of Deficiency is based on the following grounds:

- (a) That petitioners incorrectly allocated to sources within and without New York State salary income earned by Eugene G. Fubini from IBM during the period January 1, 1969 to February 28, 1969. This issue was conceded by petitioners at the hearing held herein and, for this reason, will not be discussed hereafter.
- (b) That the income received by Eugene G. Fubini from IBM for the balance of 1969 and for all of 1970, pursuant to a written agreement, constituted a pension or other retirement benefit and was taxable to New York State in the same proportion as IBM wages earned from New York sources bear to total IBM wages received for the years 1967, 1968 and 1969 (20 NYCRR 131.18).

3. Petitioner Eugene G. Fubini was employed by IBM from July, 1965 until February 28, 1969, first as a vice-president and later as a vice-president and group executive. In the discharge of his duties as an employee of IBM, Mr. Fubini, an electronic engineering expert, had become less involved in matters concerning his chosen field and more involved in areas which he considered not particularly interesting. Accordingly, he voluntarily tendered his resignation effective February 28, 1969.

4. From March 1, 1969 until May 31, 1969, Mr. Fubini continued to receive his entire weekly salary, although he had "cleaned out" his office and was no longer rendering services as an employee. During this three month period, Mr. Fubini was providing consulting services to IBM on a continuing basis.

5. Effective June 1, 1969, Mr. Fubini and IBM entered into a written agreement for a period of 36 months, which provided that Mr. Fubini would make himself available for the purpose of consultation and that IBM would pay him \$190,000.00 over the span of the agreement at a rate of \$5,278.00 per month.

6. The aforementioned agreement also provided, in pertinent part, for the following:

- (a) That in the event of Mr. Fubini's death prior to the expiration of said agreement, a lump sum payment would be made to his estate for the unpaid balance of monthly payments.
- (b) That IBM would reimburse Mr. Fubini for reasonable out-of-pocket expenses incurred in connection with the rendering of consulting services.
- (c) That Mr. Fubini could not cooperate with any present or prospective competitor of IBM, engage in any activity which was in conflict with the interests of IBM, or disclose any knowledge or evidence of the confidential affairs, policies or operations of IBM or its subsidiaries.

7. For the period March 1, 1969 to December 31, 1969, Mr. Fubini spent a total of 38 days providing consulting services to IBM, seven of which days were spent within New York State. For the year 1970, he spent a total of 33 days providing consulting services to IBM, six of which were spent within New York State.

8. Upon his separation from IBM, effective February 28, 1969, Mr. Fubini commenced business as a sole proprietor, rendering services as a financial and technical consultant. His clients, in addition to IBM, included Grumman Corp., Baird Corp., Fairchild-Hiller Corp. and Itek Corp. The services performed for all of Mr. Fubini's clients were similar in nature; and the fee charged these clients, except IBM, was approximately the same rate Mr. Fubini was

receiving from IBM per the above mentioned agreement. He earned substantial fees from clients other than IBM.

9. Mr. Fubini's consulting activities were conducted from an office located on Connecticut Avenue in Washington, D.C. The office was later moved to 1411 Jefferson Davis Highway, Arlington, Virginia. At no time during the years in question did Mr. Fubini maintain an office or other place of business within New York State from which his consulting activities were carried on.

10. It is petitioners' contention that the income received as the result of the contract entered into with IBM was income earned in consideration for consulting services actually rendered; and since no office or place of business was maintained within New York State, said income was not taxable to a non-resident. The Audit Division argues that the contract between IBM and Mr. Fubini is a personal retirement arrangement and taxable to a nonresident under the allocation rules of 20 NYCRR 131.18. In support of its argument, the Audit Division points to the fact that Mr. Fubini was not eligible for retirement benefits under the IBM retirement plan and that the contract provides for a vested interest to be paid to his estate should he die prior to the expiration of said contract.

CONCLUSIONS OF LAW

A. That during the years 1969 and 1970, petitioner Eugene G. Fubini performed substantial consulting services for IBM pursuant to a written agreement. Accordingly, the income generated from said contract is deemed to be from services actually rendered and not from a personal retirement arrangement. The provisions in the contract which provided Mr. Fubini's estate with a vested interest in the unpaid balance of consulting fees, and the restrictions placed upon Mr. Fubini's outside business activities and actions, were merely ancillary and incidental to the agreement to perform services (Linsley v. Gallman, 38 A.D.2d 367, aff'd 33 N.Y.2d 863).

B. That petitioner Eugene G. Fubini changed his status from that of an employee to that of an independent contractor effective March 1, 1969 and maintained an office outside New York State from which his consulting activities were systemically and regularly carried on.

C. That petitioner Eugene G. Fubini's consulting activities with IBM were not systemically and regularly carried on within New York State within the meaning of 20 NYCRR 131.4(a). Accordingly, the income generated from such activities is not subject to personal income tax. (Section 632(b)(1)(B) of the Tax Law).

D. That the proper allocation of wage income earned during the period January 1, 1969 through February 28, 1969, as calculated by the Audit Division and conceded to by petitioners, results in total New York income for 1969 being increased from a reported \$2,597.44 to a corrected \$8,746.39. Total New York income for 1970 is correct as reported on petitioners' return and hence no additional tax is due for 1970.

E. That the petition of Eugene G. Fubini and Jane E. Fubini is granted to the extent indicated in Conclusions of Law "C" and "D"; and except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

APR 10 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER