

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John E. & Elizabeth S. Brink :

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 Year :
1975. :

State of New York
County of Albany

Connie Hagelund, 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 2nd day of April, 1982, she served the within notice of Decision by certified mail upon John E. & Elizabeth S. Brink, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John E. & Elizabeth S. Brink
10 Compo Pkwy.
Westport, CT 06880

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
2nd day of April, 1982.

Connie A. Hagelund

Kathy Pfaffenbach

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
John E. & Elizabeth S. Brink :
for Redetermination of a Deficiency or a Revision :
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Tax under Article 22 of the Tax Law for the Year :
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AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, 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 2nd day of April, 1982, she served the within notice of Decision by certified mail upon Stephen D. Richards the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen D. Richards
Price Waterhouse & Co.
153 E. 53rd St.
New York, NY 10022

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
2nd day of April, 1982.

Kathy Pfaffenbach

Connie A. Hagelund

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

April 2, 1982

John E. & Elizabeth S. Brink
10 Compo Pkwy.
Westport, CT 06880

Dear Mr. & Mrs. Brink:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Stephen D. Richards
Price Waterhouse & Co.
153 E. 53rd St.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOHN E. BRINK and ELIZABETH S. BRINK	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1975.	:	

Petitioners, John E. Brink and Elizabeth S. Brink, 10 Compo Parkway, Westport, Connecticut 06880, 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 1975 (File No. 22781).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 4, 1981 at 1:15 P.M. Petitioners appeared by Stephen D. Richards and V. Seth. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

Whether a moving expense reimbursement, which was attributable to petitioner, John E. Brink's move from France to Connecticut, constitutes New York source income.

FINDINGS OF FACT

1. Petitioners, John E. Brink and Elizabeth S. Brink, timely filed a joint New York State Income Tax Nonresident Return for the year 1975 whereon John E. Brink (hereinafter petitioner) excluded \$20,690.00 received as a "moving and living allowance" from his reported New York State income. Additionally he claimed an adjustment for moving expenses of \$17,760.00.

2. On April 3, 1978 the Audit Division issued a Statement of Audit Changes to petitioners wherein, based on the Wage and Tax Statement issued by petitioner's New York employer, it held that the "\$20,690.00 moving and living allowance is considered New York State income." Further, such statement held that the moving expense adjustment of \$17,760.00 "must be allocated to New York in the same proportion as New York wages". Accordingly, a Notice of Deficiency was issued against petitioners on June 19, 1978 asserting personal income tax of \$1,213.34, plus interest of 224.64, for a total due of \$1,437.98.

3. In September 1972 petitioner's New York employer, International Business Machines Corp. (IBM), transferred his duty assignment to IBM World Trade Europe (IBM Europe), located in France. Said assignment was temporary in nature and terminated on or about July 31, 1975, at which time petitioner returned to the United States and resumed his employment with IBM in New York.

4. Petitioner contended that the moving expense reimbursement (moving and living allowance) of \$20,690.00, which was paid in connection with his move back to the United States, should properly be treated as foreign source income pursuant to Situation 3 of Revenue Ruling 75-84, which would thus render it exempt from New York taxation. His position is that situation 3 is applicable based on Revenue Ruling 69-316, which holds that a subsidiary and its parent corporation are separate employers.

5. Although petitioner's Wage and Tax Statement indicates that the reimbursement at issue was paid by IBM in New York, he claims that it was ultimately charged to IBM Europe.

6. During the hearing petitioner conceded that the moving expense adjustment of \$17,760.00 is subject to allocation.

CONCLUSIONS OF LAW

- A. That the Internal Revenue Code section 82 provides that:

There shall be included in gross income (as compensation for services) any amount received or accrued, directly or indirectly, by an individual as a payment for or reimbursement of expenses of moving from one residence to another residence which is attributable to employment or self-employment.

- B. That the Revenue Ruling 75-84 states in pertinent part that:

When a taxpayer incurs moving expenses in connection with the commencement of work by him at a new principal place of work in the United States, such expenses are allocable to United States source income and not allocable to or chargeable against earned income under section 911 of the Code.

Since moving expenses are allocable to or chargeable against income to be derived from an employee's performance of services at a new principal place of work, a reimbursement received by an employee from his employer for such expenses will generally, in the absence of evidence to the contrary, also be attributable to such services.

- C. That Situation (2) under Revenue Ruling 75-84 deals with a United States Citizen who was employed by a domestic employer in a foreign country and was subsequently transferred to the United States to work for the domestic employer. In this situation the domestic employer reimbursed the taxpayer for his moving expenses. Said ruling concluded that under this situation "the moving expense reimbursement... is gross income under section 82 and is attributable to future services to be performed in the United States. Thus, such amount constitutes income from sources within the United States."

- D. That Situation (3) under Revenue Ruling 75-84 deals with a United States Citizen who was employed by a domestic employer, in a foreign country and subsequently, after completing his work in the foreign country, he returned to the United States to work for a different company. In this situation his previous employer reimbursed the taxpayer for his moving expenses. Said ruling

concluded that under this situation "the moving expense reimbursement... is gross income under section 82 and is attributable to past services performed in a foreign country. Thus, such amount constituted income from sources without the United States.

E. That Revenue Ruling 69-316 deals with the question of who is the employer for purposes of F.I.C.A., F.U.T.A. and collection of income tax at source on wages. This Ruling holds that individuals who are engaged by a subsidiary of a corporation to perform services solely for the subsidiary under its direction and control are employees of the subsidiary for which they render services.

F. That petitioner has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that he was engaged by a subsidiary (IBM Europe) to perform services solely for said subsidiary under its direction and control. Further, he has failed to show that Revenue Ruling 69-316 is properly applicable to place him within Situation (3) of Revenue Ruling 75-84. Accordingly, as provided by Revenue Ruling 75-84, Situation (2), petitioner's moving expense reimbursement is attributable to future services to be performed in the United States, and as such, it constitutes income from sources within the United States. Matter of George B. Dowell and Marjorie A. Dowell v. Commissioner, T.C. Memo 1977-101.

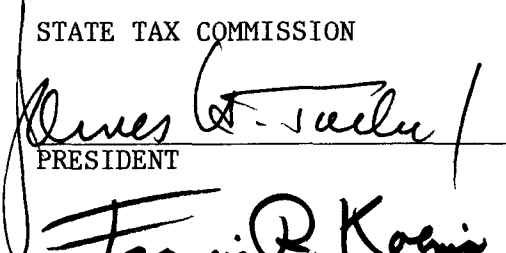
G. That since the moving expense reimbursement at issue constitutes United States source income, such reimbursement also constitutes New York source income within the meaning and intent of section 632(b)(1)(B) of the Tax Law.

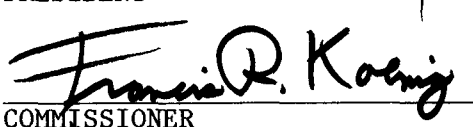
H. That the petition of John E. Brink and Elizabeth S. Brink is denied and the Notice of Deficiency, dated June 19, 1978 is sustained together with such additional interest as may be lawfully owing.

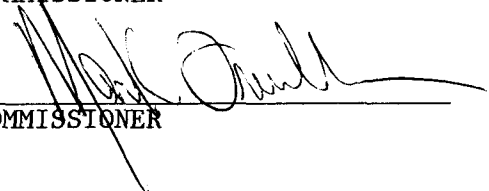
DATED: Albany, New York

APR 02 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER