STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Robert A. & Amelia L. Spicher	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

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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Robert A. & Amelia L. Spicher, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert A. & Amelia L. Spicher
36 Webster Rd.
Ridgefield, CT 06877

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.

J. Vredenburg

Sworn to before me this
14th day of December, 1982.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Robert A. & Amelia L. Spicher	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

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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Stephen 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 Richards
Price, Waterhouse & Co.
530 Fifth Ave.
New York, NY 10036

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
14th day of December, 1982.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

December 14, 1982

Robert A. & Amelia L. Spicher
36 Webster Rd.
Ridgefield, CT 06877

Dear Mr. & Mrs. Spicher:

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 Richards
Price, Waterhouse & Co.
530 Fifth Ave.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of ROBERT A. SPICHER and AMELIA L. SPICHER for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1975.	DECISION

Petitioners, Robert A. Spicher and Amelia L. Spicher, 36 Webster Road, Ridgefield, Connecticut 06877, 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. 27158).

On February 11, 1982, petitioners advised the State Tax Commission, in writing, that they desired to waive a small claims hearing and to submit the case to the State Tax Commission based on the entire record contained in the file. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether a moving expense reimbursement, which was attributable to petitioner Robert A. Spicher's move from Brazil to Connecticut, constitutes New York source income.

FINDINGS OF FACT

1. Petitioners, Robert A. Spicher and Amelia L. Spicher, timely filed a joint New York State Income Tax Nonresident Return for the year 1975 whereon Robert A. Spicher (hereinafter petitioner) excluded $23,504.00 received as a moving expense reimbursement from his reported New York State income. Additionally, he claimed an adjustment for moving expenses of $16,983.00.

2. On August 1, 1978, the Audit Division issued a Statement of Audit Changes to petitioners wherein it held that "moving expense reimbursement is incidental to the commencement of work at the new location" and "is allocable on the same basis as wage and salary income". Said statement further held that petitioner's claimed adjustment to income of $16,983.00 for moving expenses is also allocable. However, since the Audit Division's adjustment to this item was uncontested by petitioners it is therefore deemed not to be at issue herein. Accordingly, a Notice of Deficiency was issued against petitioners on April 11, 1979 asserting personal income tax due of $1,963.93, plus interest of $498.51, for a total due of $2,462.44.

3. On his tax return, petitioner allocated his salary income derived from New York sources as follows:

days worked in NY after return to US / total days worked after return to US	$\frac{113}{118}$ X $18,839.00[1]	= $18,041.00
plus: New York source salary income earned while living in Brazil		3,451.00
Total New York salary income reported		$21,492.00

The above allocation was used by the Audit Division in computing the allocable portion of the moving expense and the moving expense reimbursement attributable to New York sources.

4. In May, 1971, petitioner's New York employer, IBM World Trade Americas/FAR East Corporation (IBM), transferred his duty assignment to IBM Latin America Headquarters, (IBM LAHQ) located in Brazil. Said assignment was temporary in nature and terminated on or about June 26, 1975, at which time petitioner returned to the United States and resumed his employment with IBM in New York.

5. Petitioner pointed out that according to Revenue Ruling 75-84, a moving expense reimbursement resulting from expenses incurred in connection with the

---

[1] Applicable portion of base salary

commencement of work at a new principal place of work in the United States will generally be attributable to the performance of services at the new principal place of work "in the absence of evidence to the contrary".

6. Petitioner contended that the reimbursement of moving expenses received by him formed part of his compensation package for undertaking the foreign assignment. Accordingly, he argued that the reimbursement was effectively connected with his foreign service, and as such, constitutes "evidence to the contrary" which would except his situation from Revenue Ruling 75-84.

7. Alternatively, petitioner argued that the moving expense reimbursement of $23,504.00, 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. 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.

8. The moving expense reimbursement at issue was included as income on petitioners wage and tax statement issued by his New York employer.

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, petitioner has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that the IBM reimbursement policy, as interpreted by petitioner, (Finding of Fact "6" supra) constituted "evidence to the contrary", as contemplated under Revenue Ruling 75-84.

D. 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."

E. 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."

F. 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.

G. 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 LAHQ) 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, Matter of John E. Brink and Elizabeth S. Brink, State Tax Commission decision, April 2, 1982.

H. 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.

I. That the petition of Robert A. Spicher and Amelia L. Spicher is denied and the Notice of Deficiency, dated April 11, 1979, is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER