

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Estate of Simone Behr :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax
Law for the Years 1976 through 1978 and Nonresident :
Earnings Tax under Chapter 46, Title U of the
Administrative Code of the City of New York for the :
Year 1976.

State of New York }
ss.:
County of Albany }

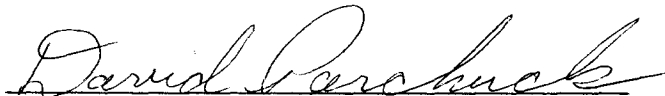
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of November, 1984, he served the within notice of Decision by certified mail upon Michael Emont, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Michael Emont
Rubin, Baum, Levin, Constant & Friedman
645 Fifth Ave.
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
9th day of November, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Estate of Simone Behr :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Years 1976 through 1978 and Nonresident :
Earnings Tax under Chapter 46, Title U of the :
Administrative Code of the City of New York for the :
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AFFIDAVIT OF MAILING

State of New York }
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David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of November, 1984, he served the within notice of Decision by certified mail upon Estate of Simone Behr, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Simone Behr
c/o Rubin, Baum, Levin, Constant & Friedman
645 Fifth Ave.
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
9th day of November, 1984.

David Parchuck

William P. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 9, 1984

Estate of Simone Behr
c/o Rubin, Baum, Levin, Constant & Friedman
645 Fifth Ave.
New York, NY 10022

Gentlemen:

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 & 1312 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Michael Emont
Rubin, Baum, Levin, Constant & Friedman
645 Fifth Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ESTATE OF SIMONE BEHR	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the years 1976 through 1978	:	
and Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Year 1976.	:	

Petitioner, Estate of Simone Behr, Claus Behr and Marius Decker, Executors, c/o Claus Behr, 1713 Cobalt Drive, P.O. Box 99605, Louisville, Kentucky 40299, 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 1976 through 1978 and nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1976 (File No. 33795).

On December 12, 1983, petitioner waived a small claims hearing and consented to submission of this matter to the State Tax Commission, with all briefs to be submitted by April 26, 1984. The following decision is rendered upon the file as presently constituted.

ISSUES

I. Whether Simone Behr was required to report as New York source income her distributive share of capital gains and dividends derived from a separate investment account maintained by a New York partnership.

II. Whether a partnership guaranteed payment equal to 8 percent of Simone Behr's capital contribution constituted New York source income.

III. Whether there was a deficiency in tax with respect to Simone Behr's 1978 personal income tax return.

FINDINGS OF FACT

1. Simone Behr died on December 3, 1978. On or about May 29, 1980, the executor of the Estate of Simone Behr, Mr. Claus Behr, filed New York State income tax nonresident returns for the years 1976 through 1978 on which he reported ordinary income/loss derived from S.M. Finkle & Co. ("Finkle"), a New York limited partnership.

2. Simone Behr was at all times a resident and domiciliary of the State of Kentucky.

3. On November 17, 1980, the Audit Division issued to petitioner a Statement of Audit Changes imposing New York State personal income tax for the years 1976 through 1978 of \$3,296.44, New York City income tax for 1976 of \$62.63, plus interest of \$598.46, for a total due of \$3,957.53. Said statement was issued on the grounds that "[a] nonresident partner is taxed on all of his distributive shares of partnership income under Section 632 of Article 22 of the New York State Personal Income Tax Law. Your distributive share is (sic) from S.M. Finkle is as follows:

	<u>1976</u>	<u>1977</u>	<u>1978</u>
Guaranteed payments	\$ 7,019.00 ¹	\$12,000.00 ²	\$12,000.00 ³
Ordinary gain or loss	4,617.00	(7,496.00)	(20,691.00)
Dividend after exclusion	523.00	2,053.00	994.00
Short term capital gains	-0-	7,513.00	42,170.00
NYS/NYC Unincorporated			
Business Tax modification	597.00	606.00	291.00
Share of NYS Stock Transfer			
tax refund	-0-	(3,242.00)	(3,734.00)
New York Income	<u>\$12,756.00</u>	<u>\$11,434.00</u>	<u>\$31,030.00"</u>

Accordingly, a Notice of Deficiency was issued to the Estate of Simone Behr on February 20, 1981.

1-3 The amounts received as partnership ordinary gain/loss for years 1976 through 1978 were reported in both the New York State and Federal columns on the New York State income tax nonresident returns filed. Apparently, the other items of partnership income, gain, loss and deduction were reported in the Federal columns of said returns.

4. During 1976, 1977 and part of 1978, Finkle, a limited partnership doing business solely in New York State, was engaged as a specialist⁴ on the New York Stock Exchange where it purchased and sold securities as a dealer. During each of the years in issue, Finkle also maintained a separate investment account⁵ in which it purchased and sold securities and which was not in any way connected to its specialist activities. The gains and losses derived from said account were reported by Finkle as capital gains and losses rather than ordinary income or loss (from acting as a dealer). The Estate of Simone Behr asserted that its share of the capital gains and dividend income it received from said investment account did not constitute income from New York sources since it was not realized in connection with a New York trade or business, but rather was realized in connection with the purchase and sale of property solely for Finkle's own account.

5. During each of the years in issue, Simone Behr and/or the Estate of Simone Behr received dividend income from Finkle, which derived said income from its dealer activities and from its investment activities as follows:

	<u>Dealer Activities</u>	<u>Investment Activities</u>	<u>Total</u> ⁶
1976	\$ 438.00	\$185.00	\$ 623.00
1977	1,638.00	515.00	2,153.00
1978	458.00	636.00	1,094.00

⁴ A specialist is considered a dealer pursuant to Treas. Reg. §1.471-5.

⁵ Treas. Reg. §1.1236-1(a)(1) provided that gain realized by a dealer in securities from the sale or exchange of a security shall not be considered as gain from the sale or exchange of a capital asset unless the security is, before the expiration of the thirtieth day after the date of its acquisition, clearly identified in the dealer's records as a security held for investment.

⁶ The amount of dividends shown in Finding of Fact "3" for each year is equal to the total dividends received for each year from dealer and investment activities less the dividend exclusion.

6. Finkle recognized a loss from its dealer activities in both 1977 and 1978 and reported income from its specialist activities in an amount less than the guaranteed payments in 1976. The Estate of Simone Behr asserted in its timely petition that the partnership agreement provided for a guaranteed payment equal to 8 percent of each limited partner's capital contribution and that (1) these guaranteed payments were actually interest income derived from a non-New York source; (2) the income from which Finkle was able to make these payments did not come from the partnership's activities as a specialist; and (3) the revenue from which said payments were made was derived from its investment activities and not its dealer activities.

7. Petitioner asserted that the determination made by the Audit Division for 1978 was erroneous in that "Simone Behr was not required to include any amount of partnership income on her last return (Form IT-203). ... The distribute (sic) share for the entire year is includible in the return of the estate or other successor in interest." Petitioner did not submit any evidence to show that the amounts received from S. M. Finkle & Co. were reported on a U.S. Fiduciary Income Tax Return or a New York State Income Tax Fiduciary Return.

CONCLUSIONS OF LAW

A. That Treas. Reg. §1.471-5 defines a dealer in securities as "a merchant of securities, whether an individual, partnership, or corporation, with an established place of business, regularly engaged in the purchase of securities and their resale to customers...". A person who buys and sells securities on his own account, whether or not the buying or selling constitutes a trade or business, is not a dealer (George R. Kemon, 16 T.C. 1026, 1032-33 (1951), acq. 1951-2 C.B.3).

B. That although S.M. Finkle & Co. segregated the securities which it held for investment (see footnote #5), thereby creating capital gains/losses

when sold, it was not a trader in securities but rather a dealer in securities; therefore, all income derived by said partnership constituted income from New York State sources.

C. That the New York adjusted gross income of a nonresident partner shall include his distributive share of all items of partnership income, gain, loss and deduction entering into his federal adjusted gross income to the extent such items are derived from or connected with New York State sources (20 NYCRR 134.1). Therefore, the interest income received by Simone Behr on her capital contribution, and the dividends and capital gains received from the partnership of S.M. Finkle & Co., constituted income from New York sources within the meaning and intent of section 637(a)(1) of the Tax Law and section U46-2.0 of the Administrative Code of the City of New York (see Matter of Robert and Reva Sidel, New York State Tax Commission, July 31, 1981).

D. That during the year 1978, Treas. Reg. §1.706-1(c)(3)(ii) provided:

"The last return of a decedent partner shall include only his share of partnership taxable income for any partnership taxable year or years ending within or with the last taxable year for such decedent partner (i.e., the year ending with the date of his death). The distributive share of partnership taxable income for a partnership taxable year ending after the decedent's last taxable year is includible in the return of his estate..."

E. That section 637(a)(1) of the Tax Law provides:

"In determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income (emphasis added)..."

As the amount of partnership income from S. M. Finkle & Co. was included in Simone Behr's federal adjusted gross income for 1978 (see footnote on page 2), it must be included in her New York adjusted gross income for said year.


F. That the petition of the Estate of Simone Behr is denied and the Notice of Deficiency issued on February 20, 1981 is sustained together with such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER