

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MARTIN ROSEN AND SELMA ROSEN

:

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, Martin Rosen and Selma Rosen, 2000 South Ocean Boulevard, Palm Beach, Florida 33480, 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. 28963).

A 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 October 22, 1985 at 1:15 P.M. Petitioners appeared by Myron DiVittorio, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether petitioners changed their residence from New York to Connecticut during taxable year 1975.

11. Whether, if such change of residence was effected during 1975, petitioner would be entitled to claim losses from New York State partnerships operating on a calendar year basis, on their return filed for their resident period.

FINDINGS OF FACT

1. Petitioners, Martin Rosen and Selma Rosen, filed a resident New York State Combined Income Tax Return for the period January 1, 1975 to December 1,

1975. In conjunction therewith, petitioners filed a joint New York State Income Tax Nonresident Return for the period December 2, 1975 to December 31, 1975. On a Schedule for Change of Resident Status annexed thereto, petitioners attributed substantial partnership losses to their period of New York residence.

2. On May 2, 1979, the Audit Division issued a Statement of Audit Changes to petitioners wherein an adjustment was made attributing the bulk of their reported partnership losses to their nonresident period based on the following explanation:

"From the information available, it appears all partnerships are on a calendar year. Income from a partnership is considered distributed on the last day of the partnership year. Therefore, the partnership income should be reported on the non-resident New York Return."

Additionally, said statement incorporated certain computational and other adjustments which are not specifically at issue herein.

3. The additional tax determined to be due pursuant to the aforesaid Statement of Audit Changes was attributed solely to petitioner Martin Rosen.

4. On January 15, 1979, petitioners' representative executed a consent form extending the period of limitation upon assessment of personal income tax for the year ended December 31, 1975 to any time on or before April 15, 1980. Said consent form was validated by the Department of Taxation and Finance on January 17, 1979.

5. On November 12, 1979, the Audit Division issued a Notice of Deficiency against petitioner Martin Rosen asserting additional personal income tax of \$17,090.69, plus interest of \$5,197.93, for a total due of \$22,288.62.

6. In their petition, petitioners alleged that their partnership losses should be accrued to their resident period pursuant to section 654(c) of the Tax Law. Alternatively, they alleged that their partnership losses should be

prepared in that they were actually residents of New York State for the entire year 1975.

7. During the hearing held herein, petitioners limited their arguments to the issue of when their change of residence occurred.

8. In February, 1975, petitioners sold their Scarsdale, New York residence. On or about February 10, 1975, they rented an apartment in Rye, New York under a one-year lease. In July, 1975, they purchased a house in Greenwich, Connecticut. The date of closing of said house was not made available during the hearing. On or about December 1, 1975, Mrs. Rosen made her customary trip to Florida for the winter and resided in the "part-time" residence petitioners maintained in that state.

9. Petitioners contracted to have major renovations made to the Connecticut residence. Petitioner Martin Rosen testified that said renovations consisted of the remodeling of three bathrooms, the addition of a fourth bathroom, the addition of another room which required physical extension of the building structure, the addition of four picture windows, the remodeling of the kitchen and extensive electrical and plumbing work.

10. Petitioners alleged that due to the aforestated renovations, the Greenwich house was not habitable during 1975. They claimed that they did not move into the house until February, 1976 and therefore they were New York residents during the entire taxable year 1975.

11. Petitioner Martin Rosen contended that from February, 1975 to February, 1976, he resided at either the Rye, New York apartment, the Florida residence, or in the management suite of the Sheraton Hotel in New Rochelle, New York. Mr. Rosen was the principal owner of said hotel.

12. Petitioner Selma Rosen was issued a Building Permit on October 1, 1975 with respect to the alterations to be made to the Greenwich Connecticut

Said permit, which indicated the addition of only one new room, a bathroom, described the pending alterations as follows:

"Alteration -- Adding one bath, replacing three windows, remodeling of kitchen, remodeling of bathrooms (plumbing fixture)."

The valuation of work was listed on said permit as \$15,000.00.

13. Petitioners submitted copies of several checks to contractors which were dated either late 1975 or early 1976. An itemized statement and bill from the electrician dated December 29, 1975 indicated that the electrical work was completed on December 12, 1975. No documentation was submitted to show the dates during which the various contractors had actually rendered services.

14. No documentation was submitted to show the dates petitioners' furniture was moved to the Greenwich, Connecticut house. Petitioner Martin Rosen was a building contractor. He stated that he used his own employees and trucks to move the furniture and, therefore, no bills or receipts were available.

15. Petitioners submitted a sworn affidavit, dated November 29, 1983, from one Harry Molina wherein Mr. Molina stated that:

"I, Harry Molina, a carpentry contractor was engaged by Mr. Martin W. Rosen to do carpentry work and coordinate other tradesmen in the renovation of 29 Meadowcroft Lane, Greenwich, Connecticut in late 1975 and early 1976.

To the best of my recollection Mr. and Mrs. Rosen were not living in the house while most of the renovation work was being performed. The water was shut off until some time in February, 1976. The Rosens moved in after the water was put back on. They were not living in the house in 1975."

16. No documentation was submitted to evidence the dates that water service was terminated or reinstated to petitioners' Connecticut house.

CONCLUSIONS OF LAW

A. That "[t]o create a change of domicile, both the intention to make the new location a fixed and permanent home and actual residence at such location

animus et factum, must be present; residence without intention, or intention without residence, is of no avail" (17 N.Y. Jur., Domicil and Residence, §12; see Matter of Newcomb, 192 N.Y. 238, 84 N.E. 950).

B. That petitioners have failed to sustain their burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that it was in 1976, rather than 1975, that they actually commenced residing in their Connecticut home. Accordingly, it must be held that their 1975 returns properly reported their 1975 periods of New **York** residence and nonresidence.

C. That partnership income and losses are not accruable items with respect to a change of residence within the meaning and intent of section 654(c) of the Tax Law.

D. That 20 NYCRR 148.6 provides, in pertinent part, that:

"Where a member of a partnership changes his status from resident to nonresident or vice versa, his distributive share of partnership income, gain, loss and deduction shall be included in the computation of his taxable income for the portion of the taxable year in which or with which the taxable year of the partnership ends...".


E. That the partnership losses at issue are properly included in the computation of petitioners' taxable income for their 1975 nonresident period.

F. That the petition of Martin Rosen and Selma Rosen is denied and the Notice of Deficiency issued November 12, 1979 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

11/16/79