

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

THE ESTATE OF WENDELL SWEETING  
and

DECISION

MARY SWEETING, Individually and as  
Executrix of the Estate of Wendell Sweeting

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Year 1976.

---

Petitioners, Estate of Wendell Sweeting and Mary Sweeting, individually and as executrix of the Estate of Wendell Sweeting, 504 West Hogle Avenue, Deland, Florida 32720 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 1976 (File No. 45570).

A hearing was held before Arthur S. Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York on June 7, 1985 at 9:10 A.M. with all briefs to be submitted by July 29, 1985. Petitioners appeared by Coapman, Klafehn, Heise & Riley (Edgar A. Coapman, Jr., Esq., of counsel) and by Arthur J. Spezio, C.P.A.

#### ISSUE

Whether petitioners, who changed residence from New York to Florida in 1976, should be permitted in 1985 to file a bond and report income which accrued to them prior to their change of residence.

#### FINDINGS OF FACT

1. Petitioners were residents of the State of New York prior to the year

at issue

2, In 1971 petitioners sold 380 shares of stock in Monarch Materials, Inc. As consideration, petitioners received a note providing for installment payments of principal and interest.

3, On June 2, 1976 petitioners sold their personal residence which was located in Brockport, New York. As consideration, the purchasers gave petitioners a mortgage requiring monthly payments of principal and interest until June 1, 1991.

4. Petitioners filed a joint New York State Income Tax Resident Return for the year 1976. On this return, they reported that they were residents of New York State until June 30, 1976. Petitioners did not file a bond as authorized by Tax Law §654(c)(4) or accrue any items of income, gain, loss or deduction prior to their change of residence.

5. On July 1, 1976 Wendell and Mary Sweeting changed their residence to Florida.

6. During the years 1976, 1977 and until the time of his death on November 3, 1978, Wendell Sweeting was in poor health and periodically required hospitalization.

7. On September 20, 1979 the Transfer and Estate Tax Section of the Audit Division advised petitioners' accountant that it had been determined that Wendell Sweeting was a domiciliary of New York at the time of his death.

8. On October 22, 1979 the Income Tax Section of the Audit Division sent petitioners a letter requesting information on the installment sales. The letter also alerted petitioners to the provisions of the New York State Tax Law pertaining to a change of residence. The letter concluded by asking petitioners to file returns for the years 1977 and 1978 **if** they elected to avoid the accrual of income.

9. On February 11, 1980 the Audit Division requested that petitioners to consent to an extension of time to issue a Notice of Deficiency. On March 10, 1980 the petitioners executed a consent to extend the time for issuing a Notice of Deficiency until April 15, 1981.

10. On April 16, 1980, the Audit Division again requested information since there had been no response to the letter of October 22, 1979.

11. On April 29, 1980 an attorney representing petitioners advised the Audit Division that the requested information was being compiled.

12. On June 17, 1980 a judge of the Surrogate's Court of the State of New York, County of Monroe signed an order providing that Wendell Sweeting was a resident of Deland, Florida at the time of his death.

13. On July 23, 1980, the Audit Division again advised petitioners' representative that that it had not received the requested information and that if a reply was not received within fifteen days the Audit Division would be required to include on petitioner's final resident return any items of income, gain, loss or deduction occurring prior to the change of residence.

14. On August 28, 1980 and again on September 12, 1980, petitioners supplied the Audit Division with the information requested.

15. On December 2, 1980 the Audit Division requested that petitioners supply information which had been previously requested in a letter dated September 24, 1980. The Audit Division also requested petitioners to consent to an extension of time to issue a Notice of Deficiency to April 15, 1982. On December 10, 1982 petitioners' accountant mailed to the Audit Division an executed form consenting to the requested extension of time to issue a Notice of Deficiency.

16. In 1982, petitioners' accountant unexpectedly retired. Petitioners were required at this juncture to retain the services of a new accountant who, in turn, had to familiarize himself with the matter.

17. On February 10, 1983 the Audit Division issued a Statement of Audit Changes to petitioners explaining that they had a deficiency of personal income tax for the year 1976 because they had not submitted a surety bond or collateral security pursuant to section 654(c) of the Tax Law. Accordingly, the Audit Division accrued the balance of the installment gain receivable on petitioners' final resident tax return for 1976.

18. On April 18, 1983 petitioners responded to a letter of the Audit Division dated June 10, 1982 by providing certain information. In the letter petitioners' accountant stated that petitioners had elected and still elect to defer gain under the installment method.

19. On April 8, 1983 the Audit Division issued a Notice of Deficiency of personal income tax to Wendell C. and Mary Sweeting in the amount of \$27,359.87 plus interest of \$16,070.91 for a total amount due of \$43,430.78. The Notice of Deficiency was premised upon the explanation provided in the previously issued Statement of Audit changes.

20. Petitioners have not filed any New York State income tax returns for any years since 1976.

21. At the hearing, petitioners maintained that they should be permitted to file a bond together with non-resident returns reporting the gains on the installment basis from 1976 to present plus tax and interest due thereon. Petitioners maintained this **is** warranted, among other reasons, because of: the conflicting positions taken **by** the Audit Division as **to** whether petitioners

were residents of New York, petitioners' execution of consent extending the period of assessment, correspondence from the Audit Division that led petitioners to believe that they could have additional time to file a bond, the death of Wendell Sweeting, and the retirement of petitioners' accountant in 1982 which caused petitioners difficulty in electing to file a bond and report gain on an installment basis.

#### CONCLUSIONS OF LAW

A. That Tax Law §654(c)(1) provides:

"If an individual changes his status from resident to nonresident, he shall, regardless of his method of accounting, accrue for the portion of the taxable year prior to such change of status any items of income, gain, loss or deduction accruing prior to the change of status, if not otherwise properly includible (whether or not because of an election to report on an installment basis) or allowable for New York income tax purposes for such portion of the taxable year or for a prior taxable year. The amounts of such accrued items shall be determined with the applicable modifications described in sections six hundred twelve and six hundred fifteen as if such accrued items were includible or allowable for federal income tax purposes."

B. That in order to avoid the accruals mandated by Tax Law §654(c)(1) one must comply with Tax Law §654(c)(4). This section provides:

"The accruals under this subsection shall not be required if the individual files with the tax commission a bond or other security acceptable to the tax commission, conditioned upon the inclusion of amounts accruable under this subsection in New York adjusted gross income for one or more subsequent taxable years as if the individual had not changed his resident status."

C. That 20 NYCRR 148.11 provides that the "...surety bond must be filed with the return prior to the change of residence." (Emphasis supplied). Accordingly, petitioners' offer in 1985 to file the surety bond which should have been filed in 1976 is untimely and therefore, must be rejected. It is noted that the apparent divergent position of the Audit Division in 1979 does not justify the failure to file the bond which was required in 1976. Further, the

regard it is noted that there is no provision in the Tax Law which provides that **an** agreement to extend time for assessment also extends the time to file a surety bond. Further, there **is** no evidence that the executed agreement to extend the time for assessment contained **any** agreement with respect to petitioners' time to **file a surety bond**.

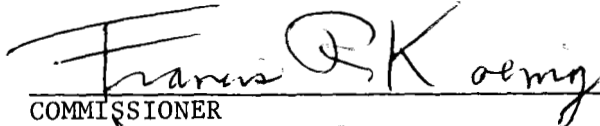
D. That the petition of the Estate of Wendell Sweeting and Mary Sweeting is denied and the Notice of Deficiency **is** sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1966

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER