

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CHARLES M. NATHAN

:

DECISION

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York :
City Personal Income Tax under Chapter 46,
Title T of the Administrative Code of the City :
of New York for the Year 1979.

Petitioner, Charles M. Nathan, 925 President Street, Brooklyn, New York 11215, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1979 (File No. 46553).

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 June 20, 1985 at 9:15 A.M., with all briefs to be submitted by August 9, 1985. Petitioner appeared by Edwin B. Mishkin, Esq. The Audit Division appeared by John P. Dugan, **Esq.** (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether petitioner, Charles M. Nathan, was domiciled **in** and a resident of the State and City of New York during the latter part of taxable year 1979.

II. Whether the notice **of** deficiency was timely issued.

FINDINGS OF FACT

1. For taxable year 1979, Charles M. Nathan (hereinafter "petitioner")
timely filed a New York State Income Tax Return for the year 1979.

York Nonresident Earnings Tax) for the period January 1 through November 9, 1979 and a New York State Income Tax Resident Return (with City of New York Personal Income Tax) for the period November 10, through December 31, 1979. In conjunction therewith, petitioner filed a New York State and City of New York Schedule for Change of Resident Status whereon he prorated his income (inclusive of New York partnership income) and deductions between his claimed resident and nonresident periods.

2. On April 14, 1983, the Audit Division issued a Statement of Audit Changes to petitioner wherein an adjustment was made holding his entire distributive share of New York partnership income subject to New York State and New York City personal income taxes based on the following explanation:

"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, and treatment of his distributive share for New York income tax purposes shall be determined by his status as a resident or nonresident at such time. Such distributive share of partnership income, gain, loss and deduction is not prorated between the separate resident and nonresident returns."

Since the New York law partnership Cleary, Gottlieb, Steen & Hamilton ended its taxable year on December 31, 1979, and petitioner reported that he was a resident of New York at the close of calendar year 1979, his entire distributive share of partnership income was held taxable for New York State and City purposes

3. Based on the aforementioned Statement of Audit Changes, the Audit Division issued a Notice of Deficiency against petitioner asserting additional New York State personal income tax of \$8,003.28, additional New York City personal income tax of \$6,686.83, plus interest of \$5,007.57, for a total due

of \$19,697.68. Said Notice of Deficiency bore two (2) dates: a typewritten date of May 12, 1983 and a stamped date of April 14, 1983.

4. Petitioner argued that the aforestated typewritten date was the date said notice was issued and accordingly, the Notice of Deficiency was barred by the expiration of the period of limitations on assessment.

5. Subsequent to petitioner's receipt of the Notice of Deficiency he filed a petition wherein he claimed that he incorrectly filed his 1979 returns. He argued that he was a domiciliary and resident of the State of New Jersey during the entire taxable year 1979 and that he did not become a New York resident until March or April 1980.

6. Cleary, Gottlieb, Steen & Hamilton allocated its 1979 partnership income to sources within and without the State and City of New York.

7. Petitioner, now age forty-three (43), was born in New Jersey and raised in the Maplewood - South Orange area of that state. He attended Yale Law School from 1962 through 1965. In 1963 he was married. After completing law school in 1965, he lived for approximately one year in the District of Columbia while clerking at the United States Court of Appeals for the District of Columbia Circuit. Subsequent to said clerkship, petitioner became an associate at the law firm of Cleary, Gottlieb, Steen & Hamilton in New York City. To meet the residency requirement for admission to the New York bar, he and his wife, Alice Nathan, resided for two years in an apartment in Westchester County, New York. In 1968, they purchased a home in West Orange, New Jersey. In 1972, they purchased a larger home in South Orange, New Jersey where they continued to live until July, 1979. In 1973 petitioner became a partner in said law firm.

8. As the result of marital difficulties petitioner removed himself to a friend's apartment in Manhattan in July, 1979. In August, 1979 he sublet a small furnished apartment in Manhattan until early November 1979 at which time he rented an unfurnished apartment in Manhattan under a "two or three year lease".

9. Petitioner argued that his intent from July, 1979 through approximately March or April 1980 was to reconcile with his wife and move back to his South Orange, New Jersey home. He testified that he furnished the leased apartment acquired in November 1979 with borrowed furniture and kept his clothes stored in cardboard boxes; that although he signed a lease for said apartment, he believed he would be able to terminate it without suffering any economic penalty because of the tight real estate rental market in Manhattan; that during the period of November 10, 1979 through March or April, 1980 he visited his wife and children on several occasions in an effort to effect a reconciliation; that in or about March or April, 1980 he concluded that there was **no** hope **of** preserving his marriage and he instructed his attorney to establish **a** settlement arrangement and pursue the question of a formal divorce proceeding; and that he took no steps to establish himself in any meaningful way in New York until March or April 1980 when he purchased new furniture and completely furnished his New York apartment.

10. Petitioner's leased apartment contained one bedroom and a small room which was used by his children, aged nine and thirteen at the time, when they visited.

11. No furniture receipts were submitted to establish that said leased apartment was furnished during the period stated by petitioner.

12. Petitioner's wife's attorney sought to advance negotiations during the period of initial separation.

13. In July, 1980, petitioner and his wife sold the jointly owned South Orange, New Jersey home. No evidence was submitted to establish when the house was put up for sale. In February, 1981 they were formally separated and in the Spring of 1981 they were divorced.

14. During the period petitioner was separated from his wife he continued to provide financial support to his family and maintain the New Jersey home.

15. Petitioner's former wife, Alice Nathan, submitted an affidavit, sworn to on June 3, 1985, wherein she deposed and said that:

"From August 18, 1963 until April 29, 1981, I was married to Charles M. Nathan.

In 1979 Mr. Nathan and I agreed, because of our marital difficulties, to undergo a trial separation. On or about August 1, 1979, Mr. Nathan moved out of our home in South Orange, New Jersey and began spending nights in an apartment he had sublet in Manhattan. He took no significant possessions with him other than clothing and toiletries. During this period, we also traveled together to visit our two children who were away at summer camp.

During the remainder of 1979 and into the Spring of 1980, Mr. Nathan often returned to our home to visit me and our children. On several occasions, Mr. Nathan raised with me the possibilities of a reconciliation. He at times attended services at our local synagogue. He continued to provide financial support for me and our children.

I, not Mr. Nathan, instigated the separation. Throughout the remainder of 1979 and into early 1980, Mr. Nathan, through his visits and telephone conversations, expressed his desire to work out our problems and resume our relationship. It is clear to me that during 1979, Mr. Nathan wanted to save our marriage and return to our home in New Jersey."

16. Petitioner believes he spent more than 183 days in New York during 1979.

17. Subsequent to the hearing held herein, the Audit Division submitted a notice of certified mailing which established that the Notice of Deficiency at issue was sent to petitioner by certified mail on April 14, 1983.

CONCLUSIONS OF LAW

A. That the Notice of Deficiency bearing two dates (see Finding of Fact "3", supra) was mailed to petitioner by certified mail on April 14, 1983. Accordingly, said notice was timely issued pursuant to section 683(a) of the Tax Law.

B. That the treatment of petitioner's distributive share of partnership income is based on his residency status at the close of the partnership's taxable year (20 NYCRR 148.6). If, as petitioner alleges, he was a nonresident of New York on December 31, 1979, his distributive share of partnership income would be taxable to New York at the ratio of the partnership's income or gain from sources outside New York to the partnership's income or gain from all sources. (20 NYCRR 134.2(b)) However, if as the Audit Division alleges, petitioner was a New York resident on December 31, 1979, his entire distributive share of partnership income is taxable to New York (20 NYCRR 119.2).

C. That domicile, in general, is the place which an individual intends to be his permanent home - the place to which he intends to return whenever he may be absent. (20 NYCRR 102.2(d)(1))

D. That other than the affidavit of his former wife, petitioner has submitted virtually no documentation to support his contention that he changed his domicile to New York in March or April 1980 rather than in November, 1979, as stated on the 1979 returns which he filed. Therefore, petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law and Section 746-189.0(c) of the Administrative Code of the City of New York.

York, to show that he was a nondomiciliary of New York during the last two months of 1979. Accordingly, it must be held that petitioner was domiciled in New York State and City from November 10, 1979 through December 31, 1979, as was stated on his 1979 New York return.

E. That section 605(a) of the Tax Law provides that:

"A resident individual means an individual:

(1) Who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in the state..."

Section T46-105.0(a)(1) of the Administrative Code of the City of New York provides a substantially similar definition for a City resident individual.


F. That petitioner has failed to sustain his burden of proof to show that he had met all three exceptions provided in sections 605(a)(1) of the Tax Law and T46-105.0(a)(1) of the Administrative Code of the City of New York for the period he was domiciled in New York during 1979. Accordingly, petitioner is deemed to be a resident individual of the State and City of New York for the period November 10, 1979 through December 31, 1979.

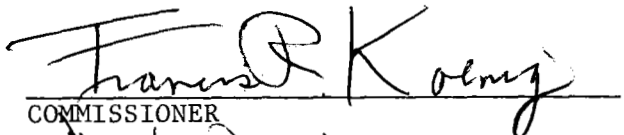
G. That the petition of Charles M. Nathan is denied and the Notice of Deficiency issued April 14, 1983 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER