

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LASZLO STERN AND ROCHELLE STERN

DECISION

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law, New York City :
Personal Income Tax under Chapter 46, Title T :
of the Administrative Code of the City of New :
York and Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1979
and 1980.

Petitioners, Laszlo Stern and Rochelle Stern, 20 Oak Road, New Milford, Connecticut 06776, 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, New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York and unincorporated business tax under Article 23 of the Tax Law for the years 1979 and 1980 (File No. 56904).

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 30, 1986 at 10:45 A.M., with all briefs to be submitted by December 30, 1986. Petitioners appeared by Randy B. Blaustein, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether the adjustments made by the Audit Division as the result of a field audit were proper.

11. Whether Laszlo Stern and Rochelle Stern were resident individuals of

New York State and City during the 1979 and 1980

FINDINGS OF FACT

1. Petitioners, Laszlo Stern and Rochelle Stern, timely filed a New York State Income Tax Nonresident Return with City of New York Nonresident Earnings Tax for each of the years 1979 and 1980 whereon Laszlo Stern (hereinafter "petitioner") reported business income derived from his activities as a photographer. On his 1979 return petitioner reported net profit of \$22,281.00, of which 55% or \$12,255.00 was allocated to New York State for personal income tax and unincorporated business tax purposes and to New York City for nonresident earnings tax purposes. On his 1980 return petitioner reported net profit of \$23,437.00, of which 60% or \$14,062.00 was allocated to New York State and City for the aforesated purposes.

2. (a) On July 19, 1984, the Audit Division issued two statements of audit changes to petitioner and his wife. One such statement, which was issued with respect to unincorporated business tax, incorporated the following adjustments, which were based on a field audit:

	<u>1979</u>	<u>1980</u>
"Additional Income per Cash Availability	\$13,140.00	\$ 7,593.00
Car expense - Car payments	1,149.00	574.00
Entertainment	2,099.00	1,305.00
Office Supplies - Cable TV	106.00	-0-
Rent expense - CT. Studio	500.00	500.00
Auto expense - personal use	422.00	416.00
Utilities - personal use		608.00
Ordinary gain on sale of equipment		600.00
	<hr/>	<hr/>
Total adjustments	\$17,416.00	\$11,596.00"

Said statement also increased petitioner's business allocation percentages from 55% to 93.23% for 1979 and from 60% to 93.47% for 1980.

(b) The other statement, which was issued with respect to New York State and City personal income taxes, held petitioner and his wife to be statutory

income was held to be taxable. The total business adjustments of \$17,416.00 (1979) and \$11,596.00 (1980) were added to Federal adjusted gross income of \$25,951.00 (1979) and \$18,642.00 (1980) to arrive at corrected New York income of \$43,367.00 (1979) and \$30,238.00 (1980).

3. Based on the aforesaid statements of audit changes, four notices of deficiency were issued against petitioner and his wife on September 27, 1984 as follows:

1 - Asserted tax deficiency of \$5,086.97 for 1979 and 1980 New York State personal income tax plus 1979 New York City personal income tax.

2 - Asserted tax deficiency of \$341.69 for 1980 New York City personal income tax.

3 - Asserted tax deficiency of \$1,082.45 for 1979 unincorporated business tax.

4 - Asserted tax deficiency of \$734.80 for 1980 unincorporated business tax.

All four notices of deficiency asserted negligence penalties and interest.

4. Petitioner and his wife executed two consent forms which served to extend the period of limitation upon assessment of the taxes at issue to any time on or before April 15, 1985.

5. During the audit it was discovered that petitioner's cash draw was less than amounts deposited into his various accounts. Accordingly, a cash availability audit was performed which resulted in the aforestated adjustments for additional income of \$13,140.00 for 1979 and \$7,593.00 for 1980.

6. Although petitioner and his wife were not domiciled in New York, they were held to be statutory New York residents for the years at issue based on a review of petitioner's personal checking account, which disclosed checks for a New York City apartment located at 99-15 66th Avenue, Forest Hills, New York

Milford, Connecticut residence and studio. It was further determined that his child attended school in Queens, New York and that petitioner had a listing at the aforesaid address in both the 1979-1980 and the 1980-1981 Queens telephone directories. It was also determined that petitioner spent more than **183** days of each year at issue in New York.

7. Petitioner's business allocation percentages used for 1979 and 1980 were estimated. He conducted business from two locations; a studio in his Connecticut home and a rented studio located at 157 West 44th Street, New York, New York.

8. Rochelle Stern was not involved in petitioner's unincorporated business.

9. No evidence, documentary or otherwise, was submitted to establish where the audit results were erroneous or improper.

10. Petitioner's representative's position was that the Audit Division failed to show specific business transactions where petitioner's income was omitted or understated. Although petitioner's representative was allowed a one month period subsequent to the hearing within which to submit additional information and a memorandum of law, he failed to do **so**.

CONCLUSIONS OF LAW

A. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of Article 22 of the Tax Law, former section **T46-189.0(e)** of the Administrative Code of the City of New York and section 722(a) of Article 23 of the Tax Law (which incorporates section 689[e] into Article 23), to show where any of the adjustments made by the Audit Division were erroneous or improper.

B. That section 605(a) of the **Tax** Law provides, in pertinent part that:

"A resident individual who is a taxpayer for the year in which the audit is conducted shall be liable for the tax determined by the audit if the audit shows that the taxpayer has failed to pay the tax determined by the audit."

* * *

(2) who is not domiciled in this state but maintain^{ing} a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state...."

C. That for New York City purposes, former section T46-105.0(a)(2) of the Administrative Code of the City of New York provides a definition for "city resident individual" which contains essentially the same requirements as section 605(a)(2) of the Tax Law.

D. That petitioner and his wife have failed to sustain their burden of proof to show that they were not resident individuals of New York State and City during the years 1979 and 1980.

E. That the two notices of deficiency for unincorporated business tax are cancelled with respect to Rochelle Stern.

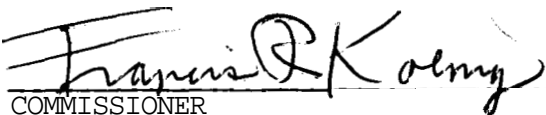
F. That the petition of Laszlo Stern and Rochelle Stern is denied and, except as provided in Conclusion of Law "E", supra, the four notices of deficiency issued September 27, 1984 are sustained, together with such additional penalty and interest as may be lawfully owing.

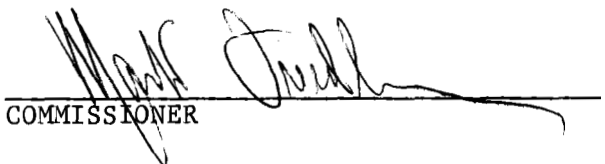
DATED: Albany, New York

STATE TAX COMMISSION

APR 23 1987


PRESIDENT


COMMISSIONER


COMMISSIONER