

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LAWRENCE M. ROSENTHAL

DECISION

for Redetermination of a Deficiency or for
Refund of New York State and New York City
Personal Income Tax under Article 22 of the
Tax Law and Chapter 46, Title T of the
Administrative Code of the City of New York
for the Year 1981.

Petitioner, Lawrence M. Rosenthal, 1200 102nd Avenue North, St. Petersburg, Florida **33702**, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article **22** of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1981 (File No. 61117).

On November 19, 1986, petitioner waived a hearing and submitted his case for decision based on the entire file, together with briefs and supporting documents to be submitted by petitioner's representatives, Roberts and Holland, Esqs. (Richard A. Levine and Steven J. Gombinski, Esqs., of counsel) and by the Audit Division's representative, John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel) on or before April 28, 1987. After due consideration, the Tax Commission renders the following decision.

ISSUE

Whether petitioner was a resident individual of New York State during the year 1981 within the meaning and intent of section 605 of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Lawrence M. Rosenthal, timely filed a New York State Nonresident Income Tax Return with City of New York Nonresident Earnings Tax for 1981 (Form **IT-203**). This return reflected the choice of filing status "4" (married filing separately on separate forms), and reported an aggregate New York State and New York City tax liability of \$242.00.

2. On August 20, 1984, following an audit of petitioner's 1980, 1981 and 1982 New York State and New York City income tax returns, the Audit Division issued to petitioner a Statement of Personal Income Tax Audit Changes reflecting a proposed deficiency for 1981 in the amounts of \$20,081.00 (New York State) and \$7,557.00 (New York City), plus interest.

3. On February 26, 1985, the Audit Division issued to petitioner a Notice of Deficiency asserting additional New York State and New York City personal income tax due for 1981 in the aggregate amount of \$27,396.00, plus interest. This deficiency is premised upon the assertion that petitioner was properly taxable as a resident of New York State and New York City for 1981.

4. For years prior to 1981 it is undisputed that petitioner was a domiciliary and resident of New York State and, more specifically, New York City, residing in an apartment owned by his wife, Marjorie Rosenthal, located at 998 Fifth Avenue, New York, New York.

5. In late 1980, petitioner desired to relocate permanently to the State of Florida and to make Florida his home.

6. During late 1980, petitioner left the apartment at 998 Fifth Avenue, New York, New York, and moved to Florida, specifically moving into a condominium located at 1200 102nd Avenue North, St. Petersburg, Florida.

7. At the time of his move to Florida in late 1980, petitioner was the general partner of a partnership which owned significant amounts of real estate in Florida. A significant portion of petitioner's time during 1981 was spent managing this Florida real estate.

8. Subsequent to his move to St. Petersburg, Florida in late 1980, petitioner expanded his business activities in Florida. These activities included the business of three Florida corporations, headquartered in that State, which were formed by and of which petitioner is the chief executive and operating officer, as follows: Link to Life-Hospital/Line, Inc. (which offers a medical emergency response service), Botanicus Laboratories, Inc. (which develops, manufactures and distributes health foods) and Melodian Systems, Inc. (which creates and produces computer interactive musical software). Petitioner also has significant interests in a day care center in St. Petersburg, Florida and in several other ventures which own significant amounts of real estate in Florida.

9. In 1981, petitioner received a Florida driver's license, filed a Florida Declaration of Domicile and established a Florida bank account, which he still maintains.

10. Petitioner has filed Florida tax returns (Florida Individual and Fiduciary Intangible Tax Returns) for each year commencing with 1981 and continuing to the present.

11. From 1980 to the present, petitioner has continuously maintained as his home and has physically resided at 1200 102nd Avenue North, St. Petersburg, Florida. Petitioner did not have any ownership or leasehold interest in any New York residence from 1980 through 1983.

12. Petitioner was in the State of New York during the year 1981 fewer than 20 days or any part thereof.

13. At the time petitioner moved to Florida in 1980, his wife, Marjorie Rosenthal, strongly objected to moving to Florida. The resulting conflict regarding where petitioner and his wife would live greatly strained their marital relationship.

14. After petitioner moved to Florida in late 1980, his wife remained in the cooperative apartment that she owned at 998 Fifth Avenue, New York, New York. She has continuously lived there from 1980 to the present.

15. By his move to Florida in 1980, petitioner totally separated from his wife. This total separation lasted until 1983.

16. Petitioner's wife never moved to Florida, nor did petitioner's wife visit petitioner in Florida in 1981. During the year 1981, petitioner met with his wife, in total, no more than three times.

17. In 1981, the social activities of petitioner's wife were in the New York metropolitan area, and excluded petitioner. Friends of petitioner's wife, who first met her in 1981, did not meet petitioner until 1983.

18. Petitioner executed a new will in Florida in 1981, in which he left no part of his property to his wife. In fact, such will specifically excluded petitioner's wife.

19. Petitioner's wife executed a new will in New York in 1981, in which she left no part of her property to petitioner.

20. In 1981, petitioner's wife sought counsel from the New York City law firm of Phillips, Nizer, Benjamin, Krim & Ballon, concerning initiation of divorce proceedings against petitioner.

21. In 1981, petitioner obtained advice from his Florida attorney, Alan J. Werksman, concerning the initiation of divorce proceedings against his wife.

22. Commencing in 1983, and continuing thereafter, petitioner has attempted to reconcile with his wife, but has been only partly successful. Petitioner has, since his move to Florida, always returned to his St. Petersburg home after any of his business or non-business travels. He has maintained the same St. Petersburg home address from the time of his move there in late 1980 through the present.

23. Petitioner's Florida home is a condominium located in a garden apartment complex owned by a partnership of which petitioner is the general partner. Petitioner actively manages the operation of the complex in which he lives.

24. Petitioner continues to physically reside in St. Petersburg, Florida and his wife continues to maintain her residence in New York. Petitioner is still trying to convince his wife to join him in Florida.

25. Petitioner and his wife, though physically separated, filed joint Federal income tax returns for each of the years 1980, 1981 and 1982. Petitioner and his wife elected to file a joint New York State Resident Income Tax Return for 1982, the effect of which was to reduce their ultimate New York tax liability (as compared to their liabilities under the various other filing options available).

26. Petitioner has three children. Each was claimed as a dependent on the joint Federal income tax returns filed for petitioner and his wife for 1981. **All** three of petitioner's children remained living with petitioner's wife in New York when petitioner moved to Florida.

27. In accordance with section 307(1) of the New York State Administrative Procedure Act, petitioner submitted proposed Findings of Fact, numbered "1" through "26", which have been accepted and are incorporated herein.

CONCLUSIONS OF LAW

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

"(a) Resident individual. A resident individual means an individual:

(1) who is domiciled in this state, unless (A) 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 this state..., or

(2) who is not domiciled in this state but maintains 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..."

B. That "to effect a change of domicile, there must be an actual change of residence, coupled with an intention to abandon the former domicile and to acquire another." (Aetna Nat'l. Bank v. Kramer, 142 App Div 444 [1st Dept 1911].)

C. That "[t]he test of intent with respect to a purported new domicile has been stated as 'whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it' (Matter of Bourne, 181 Misc 238, 246, affd 267 App Div 876, affd 293 NY 785)."

(Matter of Bodfish v. Gallman, 50 AD2d 457.)

D. That Regulations of the State Tax Commission provide:

"A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time..." (20 NYCRR 102.2[d1][21].)

E. That the Regulations of the State Tax Commission provide:

"[a] permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by him,..." (20 NYCRR 102.2[e]).

F. That petitioner, by his actions, evinced his clear intention to abandon New York as his domicile and establish his new domicile in St. Petersburg Florida. Not only did petitioner physically move to Florida, but his statements and actions, including the increase in his business activities in Florida, coupled with the very limited time he spent in New York in 1981, **all** reflect his desire and intent to relocate permanently to Florida. While petitioner and his wife, although in fact separated, did file a joint New York State Income Tax Return for 1982, the election to file in such fashion was clearly available (Tax Law § 651[b][3]; 20 NYCRR 145.10[c][1]) and the effect thereof was beneficial to both petitioner and his wife. Further buttressing petitioner's showing of intent **is** the fact that he was willing to separate permanently from his wife and children, and physically did so by his move to Florida, which separation has continued to the present (see Matter of Lewis Weiss, State Tax Comn., May 2, 1984). Finally, it is not insignificant that petitioner not only executed a new will upon moving to Florida, but in doing so he specifically excluded his wife from sharing in his estate.

G. That even assuming petitioner had not effected a change of domicile, the evidence supports a conclusion that he maintained no permanent place of abode in New York, maintained a permanent place of abode in Florida and spent less than thirty days in New York during 1981. Accordingly, petitioner was not properly subject to tax as a resident individual for 1981.

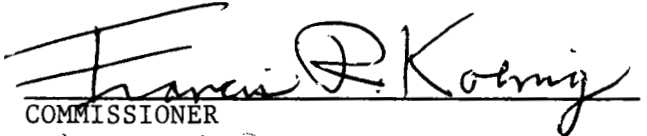
H. That the petition of Lawrence M. Rosenthal is hereby granted and the Notice of Deficiency dated February 26, 1985 is cancelled.

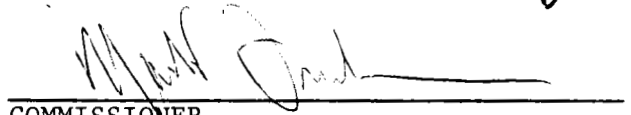
DATED: Albany, New York

STATE TAX COMMISSION

AUG 2 11 1987


PRESIDENT


COMMISSIONER


COMMISSIONER