

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Mary E. Rosencrans :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for the :
Years 1971 - 1974. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Mary E. Rosencrans, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

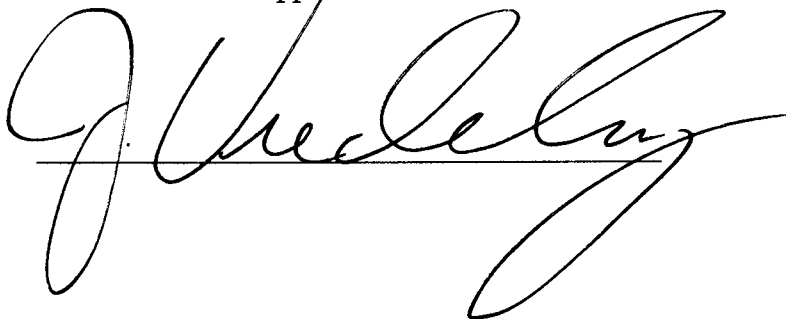
Mary E. Rosencrans
c/o Leslie Rosencrans
10 Brower Ave.
Woodmere, NY 11598

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
6th day of October, 1982.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Mary E. Rosencrans :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for :
the Years 1971 - 1974. :
_____:

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Jerome R. Rosenberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

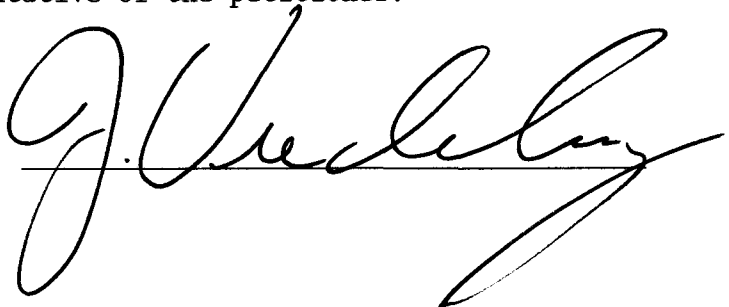
Jerome R. Rosenberg
50 Park Ave.
New York, NY 10016

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
6th day of October, 1982.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 6, 1982

Mary E. Rosencrans
c/o Leslie Rosencrans
10 Brower Ave.
Woodmere, NY 11598

Dear Ms. Rosencrans:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Jerome R. Rosenberg
50 Park Ave.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MARY E. ROSENCRANS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax and Unincorporated:	:	
Business Tax under Articles 22 and 23 of the	:	
Tax Law for the Years 1971 through 1974.	:	

Petitioner, Mary E. Rosencrans, c/o Leslie Rosencrans, 10 Brower Avenue, Woodmere, New York 11598, filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1971 through 1974 (File No. 25916).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 29, 1981 at 9:15 A.M. Petitioner appeared by Jerome R. Rosenberg, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether petitioner's activities with respect to real estate constituted the carrying on of an unincorporated business.

II. Whether petitioner was engaged in the performance of services as an employee which services are not to be deemed an unincorporated business.

FINDINGS OF FACT

1. Petitioner, Mary E. Rosencrans, filed New York State Income Tax Resident Returns for the years 1971 through 1974. On these returns, petitioner

listed her occupation as "Real Estate". Petitioner also listed her type of business income as "Real Estate".

2. On August 10, 1978 the Audit Division issued a Notice of Deficiency which asserted a deficiency of personal income tax for the years 1971 through 1974. The Audit Division also asserted a deficiency of unincorporated business tax due for the years 1971 through 1974, penalties pursuant to Tax Law §§685(a)(1), 685(a)(2) and 685(b), and interest. The deficiency of unincorporated business tax was premised on the basis that petitioner's activities as a real estate broker were subject to unincorporated business tax.

3. Petitioner's representative conceded at the hearing that the deficiency of personal income tax for the 1972 taxable year was correct and maintained that the deficiency of personal income tax for the 1973 taxable year had already been paid.

4. During the years in issue, petitioner was a shareholder and officer of five corporations: Glenbrook Apartments, Inc.; Cromwell Terrace, Inc.; Quentin Gardens, Inc.; Lafayette Apartments, Inc.; and Adelaide Gardens, Inc. Each corporation owned apartments and the land on which the apartments were located.

5. In the first four of the foregoing corporations, petitioner owned one-third of the outstanding shares directly and was the income beneficiary of another one-third of the outstanding shares that were held in trust. In Adelaide Gardens, Inc. petitioner owned twenty-five percent of the outstanding stock directly and was the income beneficiary of another twenty-five percent of the outstanding shares that were held in trust.

6. Petitioner was an officer of each of the corporations.

7. The properties owned by the foregoing corporations were located in various communities in New Jersey.

8. Petitioner acquired her shares of the foregoing corporations upon the death of her husband through a testamentary disposition in 1969.

9. Prior to 1969, petitioner's husband spent all of his time in the insurance business. Mr. Matthias Shalita, who was a real estate broker and actively engaged in the management of real estate, managed these properties pursuant to a stockholders' agreement. Upon the demise of petitioner's husband, Mr. Shalita continued the management of the properties.

10. Mr. Shalita owned one-third of the stock in four of the corporations and owned fifty percent of the stock in the remaining corporation. As the managing agent of the apartments, Mr. Shalita collected rents and dealt with suppliers, tenants and the public. Mr. Shalita also countersigned checks which were issued on behalf of the corporation.

11. During the periods in issue, petitioner countersigned checks issued on behalf of the corporation as a method of controlling expenditures. These checks would be brought to petitioner's residence for her signature by her son or by another stockholder. Petitioner would sign about one hundred checks a month.

12. In 1971 petitioner was about 76 years old. About the time of her husband's death in 1969, petitioner began to show signs of confusion or senility. During the periods in issue, petitioner did not leave her residence except to go to a doctor's office or to be hospitalized.

13. During the periods in issue, petitioner was not licensed to engage in real estate activities in New York, New Jersey or any other jurisdiction. She was not involved with the sale of real or personal property. Petitioner did not maintain a separate bank account for real estate activities or have any experience in real estate management. Petitioner did not deposit rents or

borrow money on behalf of the corporations. From 1971 through 1974 petitioner did not meet with members of the public, tenants or suppliers in connection with real estate activities. Petitioner was never consulted about repairs to the apartments. She never maintained an office facility or set aside space for files in her apartment. Petitioner did not have any employees during the years in issue, have a telephone listing involving a business activity, or incur expenses in connection with her real estate activity. She did not approve the expenses of the corporation other than cosign checks.

14. From 1971 through 1974 petitioner did not maintain a separate management company, provide professional services, or engage in any type of business other than her involvement with the five corporations.

15. The stockholders of the corporations received money from the corporations on an irregular basis in proportion to their stock ownership.

16. The Internal Revenue Service conducted an audit of Glenbrook Apartments, Inc., Cromwell Terrace, Inc. and Quentin Gardens, Inc. for the years 1974 through 1977. Following the audit, petitioner consented to an assessment for failure to pay social security tax. Lafayette Gardens, Inc. and Adelaide Gardens, Inc. were not audited. However, petitioner's activities with the latter two corporations were identical to her activities with the corporations that were audited. There was no change in petitioner's activities with the corporations from 1971 through 1974.

17. The corporations did not provide petitioner with any fringe benefits. Petitioner was never required to perform any functions for the corporations. Withholding taxes were not extracted from the funds which petitioner received from the corporations.

18. A certified public accountant prepared petitioner's tax returns during the years in issue.

CONCLUSIONS OF LAW

A. That petitioner's ownership of stock in corporations that operated apartment buildings and her activities of cosigning checks issued on behalf of the corporations did not constitute the carrying on of an unincorporated business within the meaning of Tax Law §703(a).

B. That in view of Conclusion of Law "A" it is unnecessary to determine whether petitioner was engaged in the performance of services as an employee thereby rendering the income in question exempt from unincorporated business tax.

C. That the petition of Mary E. Rosencrans is granted to the extent that the asserted deficiency of unincorporated business tax and the penalties attributable thereto are hereby cancelled.

DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER