

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harry J. & L. Georgia Kangieser :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1971 - 1974. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Harry J. & L. Georgia Kangieser, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry J. & L. Georgia Kangieser
1839 S. Ocean Blvd., #2A
Delray Beach, FL

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
27th day of May, 1983.

David Parchuck

James A. Hagelmark

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harry J. & L. Georgia Kangieser :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1971 - 1974. :

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Ira Zager the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ira Zager
Horwich & Zager, Suite 302
Coral Gables Federal Bldg., 1541 Sunset Dr.
Coral Gables, FL 33143

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
27th day of May, 1983.

David Parchuck

James D. Highland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Harry J. & L. Georgia Kangieser
1839 S. Ocean Blvd., #2A
Delray Beach, FL

Dear Mr. & Mrs. Kangieser:

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 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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Ira Zager
Horwich & Zager, Suite 302
Coral Gables Federal Bldg., 1541 Sunset Dr.
Coral Gables, FL 33143
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HARRY J. KANGIESER AND L. GEORGIA KANGIESER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1971 through 1974.	:	

Petitioners, Harry J. Kangieser and L. Georgia Kangieser, 1839 South Ocean Boulevard, #2A, Delray Beach, Florida, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1971 through 1974 (File Nos. 12151, 12152 and 15053).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 3, 1982 at 9:15 A.M., with all briefs to be submitted by January 21, 1983. Petitioners appeared by Horwich & Zager, Esqs. (Ira Zager, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (James F. Morris, Esq., of counsel).

ISSUES

I. Whether petitioners substantiated that certain interest income was derived from Florida sources.

II. Whether petitioners' interest income derived from notes secured by mortgages on New York real property sold by petitioners prior to the taxable years at issue is income derived from New York sources taxable to nonresidents of New York.

FINDINGS OF FACT

1. Petitioners timely filed a New York State personal income tax nonresident return for the 1971 taxable year. They filed separately on the same return reporting New York taxable income of \$146,858.00 for petitioner Harry J. Kangieser and of \$23,139.00 for petitioner L. Georgia Kangieser. Petitioners also timely filed joint New York State income tax nonresident returns for 1972, 1973 and 1974 reporting New York taxable income of \$25,524.00, \$24,812.00 and \$20,386.00, respectively.

2. On April 11, 1975, the Audit Division issued a Notice of Deficiency against Harry J. Kangieser showing a personal income tax deficiency of \$1,330.10 plus interest for the 1971 taxable year. A Statement of Audit Changes also dated April 11, 1975 provided the following explanation for the alleged tax deficiency:

"Interest income from the installment sale of a business carried on in New York State including the rental of New York real property is subject to tax to a nonresident.

Interest income received on condemnation award of New York real property is subject to tax to a nonresident."

3. On April 11, 1975, the Audit Division issued a Notice of Deficiency against L. Georgia Kangieser showing a personal income tax deficiency of \$1,563.82 plus interest for the 1971 taxable year. A Statement of Audit Changes also dated April 11, 1975 provided the following explanation for the alleged tax deficiency:

"Interest income from the installment sale of a business carried on in New York State including the rental of New York real property is subject to tax to a nonresident."

4. On April 12, 1976, the Audit Division issued a Notice of Deficiency against petitioners showing personal income tax deficiencies for the 1972, 1973 and 1974 taxable years of \$4,214.46 plus interest, \$4,599.31 plus interest and

\$6,659.58 plus interest, respectively. A Statement of Audit Changes also dated April 12, 1976 provided the following explanation for the tax deficiencies:

"Interest income from installment sales contract which involves the sale of assets of a business carried on in New York, including rental of any New York rental property, is taxable income to a nonresident. The unearned interest income as of the date of change of residence is not accruable but is to be reported annually on the nonresident return in the future."

5. Petitioners besides contesting the alleged tax deficiencies for the 1971 taxable year described in Findings of Fact "1" and "2", supra, in their petition dated July 8, 1975 also sought a refund of personal income taxes for the 1971 taxable year in the amount of \$897.00 and attached to their petition an amended 1971 nonresident personal income tax return for the period January 2, 1971 through December 31, 1971. They filed jointly on such return and showed New York taxable income of \$17,561.00. They also attached two 1971 resident personal income tax returns for January 1, 1971 and filing separately on such separate returns showed New York taxable income of \$122,563.00 for petitioner Harry J. Kangieser and \$32,565.00 for petitioner L. Georgia Kangieser. According to petitioners, they "inadvertently filed one New York State Non-Resident Return for 1971 but, should have filed a Resident Return for the first day of January 1971 accruing all of their installment gains in that return and a Non-Resident Return for the balance of the year reporting the balance of the income subject to New York State Income Tax."

6. Petitioners changed domicile from New York to Florida on January 2, 1971.

7. The interest reflected on the Statement of Audit Changes for 1971 is an amount less than what was reported on petitioners' federal income tax forms and did not include interest income derived by petitioners from Florida sources. However, for the 1972 through 1974 taxable years, the Statement of Audit

Changes described in Finding of Fact "4", herein, includes the total amount of interest reflected on the petitioners' federal income tax returns, and petitioners have introduced evidence to show that interest income was derived from various accounts with financial institutions located in Florida of \$11,813.66, \$12,077.67 and \$29,861.46 for the 1972, 1973 and 1974 taxable years, respectively.

8. Petitioners also alleged that they derived "miscellaneous interest" from Florida sources of \$26.00, \$316.00 and \$568.00 for the 1972, 1973 and 1974 taxable years, respectively.

9. Petitioners derived interest income of \$7,500.00 and \$6,000.00 for the 1973 and 1974 taxable years, respectively, from Myron G. Mader pursuant to a note taken back by petitioners upon the sale of real property in Marion County, Florida to Mr. Mader.

10. Petitioners, during the tax years at issue, derived interest income from notes secured by mortgages on New York real property sold by petitioners prior to the years at issue while they were New York residents as follows:

	<u>1971</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>
Krinsky Associates Note	\$ 815.00	--	--	--
America On Wheels Note (Bay Shore Roller Rink - 1850 Sunrise Highway)	\$10,272.00	\$ 8,508.00	\$6,607.00	\$4,558.00
Cochrane & Craven Note	\$ 4,682.00	\$ 679.00	--	--
Bay Shore Bowl Note (Walnut Lanes-1840 Sunrise Highway)	\$12,608.00	\$11,034.00	\$7,525.00	\$1,405.00
Siben Note (90 E. Main Street)	\$ 2,917.00	\$ 2,333.00	\$1,750.00	\$1,168.00

11. The mortgage between Sidney R. Siben and petitioner Harry J. Kangieser concerning real property located at 90 East Main Street, Bay Shore, New York was made on July 15, 1969. The mortgage between Bay Shore Roller Rink, Inc.

and petitioner Harry J. Kangieser concerning real property located at 1850 Sunrise Highway, Bayshore, New York was made on December 24, 1969. The mortgage between Walnut Lanes, Inc. and petitioner Harry J. Kangieser concerning real property located at 1840 Sunrise Highway, Bayshore, New York was made on April 22, 1970 and the mortgage between John C. Cochrane and William P. Craven and petitioner L. Georgia Kangieser was made prior to 1971.¹ These mortgages, which were taken back by petitioners at the time they sold the properties, secured the notes described in Finding of Fact "10", supra. The petitioners did not have any ownership interest in such properties during the years at issue.

12. Petitioners were not engaged in any business, trade, profession or occupation in New York during 1971 through 1974 and, in particular, the notes described in Finding of Fact "10", supra, were not employed by petitioners in any business, trade, profession or occupation in New York during the years at issue.

CONCLUSIONS OF LAW

A. Tax Law §632(a) provides, in part, as follows:

"The New York adjusted gross income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income...entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources..."

¹ The copy of the Cochrane and Craven mortgage submitted into evidence by petitioners was not a copy of an executed mortgage; therefore, the record is unclear concerning the specific date of its execution, although it appears that it was probably executed in May, 1970.

B. Tax Law §632(b)(1) provides, in part, as follows:

"Items of income...derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this State; or

(B) a business, trade, profession or occupation carried on in this State."

C. That pursuant to Tax Law §632, the Audit Division improperly included the interest income described in Findings of Fact "7" and "8", supra, in petitioners' New York adjusted gross income since such interest was derived from petitioners' accounts with Florida financial institutions. In addition, the interest income described in Finding of Fact "9", supra, was improperly included in petitioners' New York adjusted gross income since such income was derived from a note held by petitioners as the result of the sale of Florida real property.

D. That the notes described in Finding of Fact "12", supra, are income-producing, intangible personal property. Interest income derived from such notes is not taxable to a nonresident of New York unless pursuant to Tax Law §632(b)(2) such notes are "employed in a business, trade, profession or occupation carried on in this State". Epstein v. State Tax Comm., 456 N.Y.S.2d 454, 89 A.D.2d 256. Therefore, pursuant to Finding of Fact "11", supra, the Audit Division may not tax the interest income from such notes.

E. That the petition of Harry J. Kangieser and L. Georgia Kangieser is granted to the extent provided for herein; and the Audit Division is directed

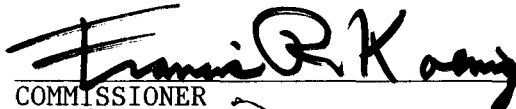
to recompute petitioners' tax liability for 1971 pursuant to section 654(d) of the Tax Law and 20 NYCRR 148.15.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER