

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
David Kestenbaum :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1969 - 1974. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon Bernard Lippert, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard Lippert
David Kestenbaum & Co.
10 East 40th St.
New York, NY 10016

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
20th day of December, 1983.

David Parchuck

James A. Hays
pursuant to Tax Law section 174

Authorized to administer oaths

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

December 20, 1983

David Kestenbaum
5151 Collins Ave.
Miami Beach, FL 33140

Dear Mr. Kestenbaum:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Bernard Lippert
David Kestenbaum & Co.
10 East 40th St.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DAVID KESTENBAUM	:	DECISION
for Redetermination of Deficiencies or for	:	
Refunds of Personal Income Taxes under Article	:	
22 of the Tax Law for the Years 1969 through	:	
1974.	:	

Petitioner, David Kestenbaum, 5151 Collins Avenue, Miami Beach, Florida 33140, filed a petition for redetermination of deficiencies or for refunds of personal income taxes under Article 22 of the Tax Law for the years 1969 through 1974 (File Nos. 35490 and 35491).

A small claims hearing was held before Anthony J. Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 13, 1983 at 9:00 A.M. Petitioner appeared by Bernard Lippert, C.P.A. and Avron Brog, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the money that the nonresident petitioner received from David Kestenbaum & Company was a pension qualifying as an annuity and therefore not taxable to New York State or a partnership distribution and therefore taxable to New York State.

FINDINGS OF FACT

1. On July 27, 1976, the Audit Division issued a Statement of Audit Changes to petitioner, David Kestenbaum, imposing personal income tax for 1969 through 1974 on the grounds that the payments he received from the New York partnership of David Kestenbaum & Company as a retired partner are distributions

of partnership profits, and are deemed to represent payments for services rendered in the past in New York, and subject to New York tax pursuant to section 637 of the Tax Law. Accordingly, on September 25, 1981, the Audit Division issued two notices of deficiency to petitioner, one notice for 1969 through 1972 imposing personal income tax of \$2,286.20, penalty pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law of \$972.82, interest of \$1,455.13, for a balance due of \$4,714.15, and the other notice for 1973 and 1974 imposing personal income tax of \$1,027.96, penalty pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law of \$344.45, interest of \$573.40, for a balance due of \$1,945.81. The Audit Division imposed penalties because it was alleged that petitioner did not file New York income tax returns and pay the tax due for the years at issue.

2. Petitioner, David Kestenbaum, was a partner of the firm of David Kestenbaum & Company, Certified Public Accountants (hereinafter the partnership). During the years at issue, Mr. Kestenbaum was retired from the partnership and, pursuant to an agreement dated February 26, 1965, he was to receive a pension of \$250.00 per week for life in recognition of past services to the partnership. Mr. Kestenbaum was a nonresident of New York State for every year at issue except 1969.

3. The Audit Division submitted at the hearing copies of page 3 of Form IT-204 (New York State Partnership Return) for 1968 through 1970¹ and pages 2 and 3 of said form for 1971 through 1973¹ which contain Schedule K - Partner's Share of Income and Deductions. Petitioner, David Kestenbaum, was listed on the schedule as follows: percentage of interest in the partnership "0" and

¹ Since the personal income tax imposed is for 1969 through 1974 and the copies of pages 2 and 3 of Form IT-204 are for 1968 through 1973, it has been determined that the partnership filed on a fiscal year basis and petitioner filed on a calendar year basis.

percentage of time devoted to business "nil" except for 1972 and 1973 which listed "part". The schedule also indicated Mr. Kestenbaum received from the partnership ordinary income as follows:

<u>Fiscal Year Ending</u>	<u>Amount</u>
1969	\$13,820.00
1970	13,699.00
1971	13,647.00
1972	13,616.00
1973	13,584.00
1974	13,544.00

No explanation was given as to why the above amounts exceeded the \$250.00 per week noted in Finding of Fact "2", supra.

4. Petitioner claimed that the pension he received from the partnership qualified as an annuity and was not taxable to New York State since he was a nonresident during 1970 through 1974.

5. The Audit Division, in computing petitioner's New York taxable income, deducted the standard deduction and one exemption for each of the years at issue.

6. After the hearing, a copy of a 1969 New York State Income Tax Resident Return was submitted which indicated petitioner filed jointly with his wife showing a New York address, itemized deductions of \$5,447.45, exemptions of \$2,400.00 and a refund of \$267.52. The return was signed on April 10, 1970. A U.S. Individual Income Tax Return for 1970 was also submitted which indicated petitioner filed jointly with his wife showing a Florida address, itemized deductions of \$3,006.61 and five exemptions, two each for regular and over 65 and one for blindness (Mrs. Kestenbaum became legally blind in 1970). A schedule for miscellaneous income was attached to the return which among other items listed "Refund NY State Income Tax \$267.52". The return was essentially a complete federal return with all required schedules except for Schedule E

which lists income from pensions and annuities, rents and royalties, partnership, estate or trusts, etc. Petitioner reported \$12,932.26 as income from one of these sources but did not submit Schedule E to indicate the source. No Federal or State income tax returns were submitted for the other years at issue.

7. No issue was raised with respect to the abatement of the penalties imposed by the Audit Division.

CONCLUSIONS OF LAW

A. That where an individual formerly employed in New York is retired from service and thereafter receives a pension or other retirement benefit attributable to his former services, the pension or retirement is not taxable if the individual receiving it is a nonresident and if it constitutes an annuity [20 NYCRR 131.4(d)(1)].

B. That to qualify as an annuity, a pension or other retirement benefit must meet the following requirements:

(A) It must be paid in money only, not in securities of the employer or other property;

(B) It must be payable at regular intervals at least annually, for the life of the individual receiving it, or over a period not less than half his life expectancy, as of the date payments begin;

(C) It must be payable at a rate which remains uniform during such life or period; and

(D) The individual's right to receive it must be evidenced by a written instrument executed by his employer, or by a plan established and maintained by the employer in the form of a definite written program communicated to his employees. [20 NYCRR 131.4(d)(2)]

C. That petitioner, David Kestenbaum, was a retired partner during the years at issue. The annuity rule of 20 NYCRR 131.4(d) applies to employees only and Mr. Kestenbaum was not an employee of the partnership. The money received by him arose from business activities in New York and is taxable to New York in accordance with sections 632(a)(1)(A) and 637 of the Tax Law.

(Petition of Louis Lacher (Deceased) and Bessie Lacher, State Tax Commission, dated October 30, 1974 and Petition of James K. Polk, State Tax Commission, dated January 11, 1980.)

D. That in any case before the tax commission, the burden of proof shall be upon the petitioner except in three instances which are not present herein (section 689(e) of the Tax Law).

E. That petitioner, David Kestenbaum, has sustained his burden of proof to show that he filed a New York State income tax return for 1969. Accordingly, the Audit Division is directed to cancel that portion of the Notice of Deficiency which relates to 1969. Mr. Kestenbaum has sustained his burden of proof to show that he claimed itemized deductions and five exemptions for Federal tax purposes for 1970. Therefore, the Audit Division is directed to recompute that portion of the Notice of Deficiency for 1970 allowing the Federal itemized deductions and exemptions which are appropriate for a nonresident filing a joint New York State nonresident income tax return. Mr. Kestenbaum submitted no evidence for 1971 through 1974. However, the Audit Division is directed to recompute the deficiencies for these years allowing two exemptions, since Mr. Kestenbaum was over 65 years old during these years.


F. That the petition of David Kestenbaum is granted to the extent indicated in Conclusion of Law "E", supra and in all other respects denied and the

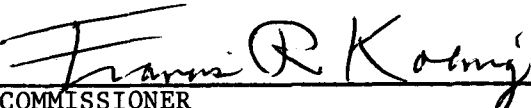
notices of deficiency dated September 25, 1981 are sustained as modified in accordance with this decision.


DATED: Albany, New York

DEC 20 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER