

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Aaron & Tillie Rosenberg : 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 Year :
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 6th day of April, 1983, he served the within notice of Decision by certified mail upon Aaron & Tillie Rosenberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Aaron & Tillie Rosenberg
7171 N. Kedzie Ave.
Chicago, IL 60645

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 April, 1983.

David Parchuck

Annice A. Hagedorn
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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State of New York
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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 6th day of April, 1983, he served the within notice of Decision by certified mail upon Kenneth R. Parker the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

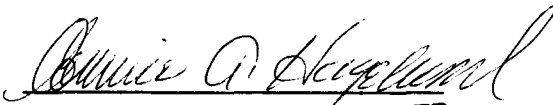
Kenneth R. Parker
Urback, Kahn & Werlin, P.C.
Sixty-Six State St.
Albany, NY 12207

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 April, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 6, 1983

Aaron & Tillie Rosenberg
7171 N. Kedzie Ave.
Chicago, IL 60645

Dear Mr. & Mrs. Rosenberg:

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 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
Kenneth R. Parker
Urback, Kahn & Werlin, P.C.
Sixty-Six State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
AARON A. ROSENBERG and TILLIE ROSENBERG	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1974.	:	

Petitioners, Aaron A. Rosenberg and Tillie Rosenberg, 7171 North Kedzie Avenue, Chicago, Illinois 60645, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1974 (File No. 26034).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 16, 1981 at 1:30 P.M. Petitioner appeared by Urbach, Kahn & Werlin, P.C. (Kenneth R. Parker, C.P.A.) The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUES

I. Whether the amounts received by petitioner Aaron A. Rosenberg pursuant to a partnership agreement represent proceeds from a sale of his accounting practice or guaranteed payments pursuant to sections 707(c) and 736(a)(2) of the Internal Revenue Code.

II. Whether the amounts received by petitioner Aaron A. Rosenberg pursuant to a partnership agreement are properly included in petitioner's New York adjusted gross income as his distributive share of partnership income.

FINDINGS OF FACT

1. On July 25, 1978, the Audit Division issued a Statement of Audit Changes against petitioners wherein their tax liability for 1974 was recomputed based upon the fact that "a retired partner continues to be a partner for income tax purposes until his interest in the partnership has been completely liquidated pursuant to Internal Revenue Regulations Section 1.736-1(a)(6)(a)." Accordingly, retirement payments from a partnership of which Aaron A. Rosenberg was a member were deemed to constitute a distribution of ordinary income and thus held to be allocable to New York State on the basis of the partnership allocation percentage. Therefore, on March 5, 1979, the Audit Division issued a Notice of Deficiency in the amount of \$7,064.72.

2. Ninety-three equal monthly payments received by petitioner Aaron A. Rosenberg (hereinafter referred to as "petitioner") constituted "guaranteed payments pursuant to sections 707 and 736(a)(2) of the Internal Revenue Code" as outlined in an agreement with the national accounting firm of S. D. Leidesdorf & Co. ("SDL"). In addition, the sum of \$60,526.44 from the partnership distribution in 1974 constituted a distribution of ordinary income and as such was allocable to New York State on the basis of partnership allocation percentage.

3. Aaron A. Rosenberg was engaged in the practice of public accounting in Illinois. In November 1969, his firm merged with SDL which conducts portions of its practice in New York State. It was agreed that petitioner's clients would be absorbed into SDL's practice and petitioner would become a general partner. Thirteen months thereafter, petitioner and SDL negotiated his withdrawal from the firm.

4. In the first agreement between petitioner and SDL, petitioner was to receive \$65,000.00 if he retired prior to age 65 and if he retired after age 65, an additional \$200,000.00. His pay for the first year as per contract was \$23,000.00. After thirteen months, petitioner "wanted out" of the firm. It was agreed that petitioner receive \$368,330.00. There were procedures for possible retainment of clients, cross-billings for services on departing and remaining clients, and the relinquishing of the right to compete for those clients left behind for some eight years.

5. Payments by SDL to petitioner for his withdrawal were guaranteed payments regardless of profit, and the amount was based upon a formula utilizing annual gross billings of certain of petitioner's clients which he brought into SDL. All of these clients were outside New York State.

6. Petitioner claims that the agreement to separate from SDL is in the nature of a sale. He claimed that he received cash and deferred payments and that SDL received his practice, his name, his clients, and covenant not to compete. It is contended that since the gain on the sale was derived from non-New York sources, i.e. clients, it was not subject to State income tax and that the transfer was due to the pre-association efforts of petitioner and thus was non-New York source income. The gain, it is claimed, was generated by the sale of a non-New York asset.

CONCLUSIONS OF LAW

A. That as practicing public accountants, petitioner and SDL were fully aware that the tax consequences to each would depend upon how the withdrawal agreement was structured. Since the parties structured the transaction (withdrawal) under section 736(a)(2) of the Internal Revenue Code, payments were

made to petitioner so that certain tax benefits would flow to SDL accordingly. Under section 736, liquidation with payments denominated as "guaranteed payments", SDL was able to deduct from partnership income payments made; therefore, petitioner must report those payments as ordinary income. Spector v. Commissioner, 641 F.2d 376, cert. denied., ___ U.S. ___, 102 S. Ct. 334 (1981).

B. That petitioner was free to organize his affairs as he may elect. Nevertheless, once having done so, he must accept the consequences of his choice and may not enjoy the benefit of some other route he might have chosen to follow but did not. Commissioner of Internal Revenue v. National Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 94 S. Ct. 2129, 40 L. Ed.2d 717 (1974).

C. That section 632(a)(1)(A) of the Tax Law provides that the New York adjusted gross income of a nonresident individual includes his distributive share of partnership income as determined under section 637 of the Tax Law.

D. That section 637(a)(1) of the Tax Law provides that in determining the New York adjusted gross income of a non-resident partner of any partnership, only that portion of the distributive share of partnership income which is derived from New York sources is to be included. Therefore, the amount received by petitioner, a guaranteed payment derived from a New York partnership considered to be a distributive share of partnership income as per section 736 of the Internal Revenue Code, is properly allocated to New York State in the same proportion as the partnership allocates partnership income to sources within and without New York State.


E. That the petition of Aaron A. Rosenberg and Tillie Rosenberg is granted to the extent that the penalty imposed pursuant to section 685(a) is cancelled; that the Audit Division is hereby directed to modify the Notice

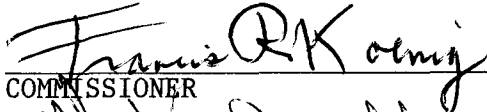
of Deficiency issued on March 5, 1979 accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER