

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Sidney N. Rosenthal (Deceased)	:	
and Emily Rosenthal	:	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	:	
1968 - 1970.	:	

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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Murray M. Weinstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray M. Weinstein
217 Broadway
New York, NY 10007

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
18th day of March, 1983.

David Parchuck

Samuel G. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

March 18, 1983

Sidney N. Rosenthal (Deceased)
and Emily Rosenthal
1 Grove Isle
Miami, FL 33133

Dear Mrs. Rosenthal:

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
Murray M. Weinstein
217 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
SIDNEY ROSENTHAL (DECEASED) and EMILY ROSENTHAL
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1968 through 1970.

DECISION

Petitioners, Sidney Rosenthal (Deceased) and Emily Rosenthal, 1 Grove Isle, Miami, Florida 33133, 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 1968 through 1970 (File No. 12005).

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 July 22, 1981 at 9:15 A.M. Petitioner appeared by Murray M. Weinstein, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Andrew Haber, Esq., of counsel).

ISSUES

I. Whether the Audit Division may continue to assert a deficiency of personal income tax for the year 1970 based upon a Notice of Deficiency dated April 13, 1973 when petitioners paid the amounts alleged to be due in an amended Statement of Audit Changes issued June 3, 1975.

II. Whether certain funds received by Sidney Rosenthal from a New York partnership are taxable by New York.

III. Whether petitioners have sustained their burden of proof of establishing that the amount of income attributed to them in 1970 was incorrect.

IV. Whether the deficiency currently asserted by the Audit Division for 1970 took into account tax paid by petitioners following the issuance of an amended Statement of Audit Changes.

V. Whether the deficiency currently asserted for the year 1970 takes into account petitioners' personal deductions.

VI. Whether the failure to file returns and pay the tax due on returns required to be filed for 1970 was due to reasonable cause and not willful neglect.

FINDINGS OF FACT

1. Petitioners, Sidney Rosenthal and Emily Rosenthal, did not file a New York State income tax return for the year 1968. Petitioners filed a New York State Income Tax Nonresident Return for the year 1969. On this return, petitioners listed their residence as Miami Beach, Florida. They did not file a New York State income tax return for the year 1970.

2. On April 13, 1973, the Audit Division issued a Notice of Deficiency accompanied by an explanatory Statement of Audit Changes which asserted a deficiency of personal income tax for the years 1968 through 1970 to reflect petitioners' purported distribution of New York partnership income from Emanuel Deetjen & Co. (the "Partnership"). A penalty pursuant to section 685(a) of the Tax Law was asserted for the year 1968, since petitioners did not file a return. Penalties were also asserted pursuant to sections 685(a)(1) and (a)(2) of the Tax Law for the year 1970 for, respectively, failure to file a return and failure to pay the amounts shown as tax on a return required to be filed. The deficiency asserted for the years 1968 through 1970 was \$8,101.81, plus penalties of \$767.03, and interest of \$1,366.28, for a total amount due of \$10,235.12.

3. On June 3, 1975, the Audit Division issued to petitioners an amended Statement of Audit Changes which showed personal income tax due for the year 1970, based, in part, upon income from Regbak Associates, as well as a distributive share of a loss sustained by the Partnership. This Statement of Audit Changes also gave petitioners the benefit of additional deductions. The total amount alleged to be due for the year 1970 was \$429.83 in tax, penalties pursuant to section 685(a)(1) and 685(a)(2) of the Tax Law of \$204.17, and interest of \$106.65, for a total amount due of \$740.65. Petitioners paid the full amount alleged to be due on this Statement of Audit Changes.

4. Following a conference, the asserted deficiency was reduced based upon a federal audit of the Partnership, federal adjustments, and an allocation percentage agreed to by the Partnership. As a result of these adjustments, no deficiency was asserted for the year 1968. Petitioners' basic tax liability alleged to be due for 1969 and 1970 was determined as follows:

1969

Tax Due \$776.38

1970

Regbak Associates partnership income	\$48,102.35		
Regbak Associates sales and exchanges	18,291.53		
Emanuel Deetjen & Co. partnership income			
\$1,081.00 x 122.37	1,322.82		
	<u>\$67,716.70</u>		
Less deductions	48,630.00		
Balance	<u>\$19,086.70</u>		
Exemptions	1,875.00		
New York Taxable Income	<u>\$17,211.70</u>		
 Tax on above	 \$ 1,083.29		
Statutory credit	25.00		
Balance	<u>\$ 1,058.29</u>		
Less amount paid	429.83	<u>628.46</u>	
Tax Due			\$1,404.84

5. The asserted deficiency for 1969 of \$776.38 of personal income tax, plus interest, represents the tax alleged to be due on Sidney Rosenthal's purported distributive share of New York partnership income from the Partnership. Inasmuch as Mr. Rosenthal paid the amount alleged to be due in the Statement of Audit Changes dated June 3, 1975, the additional personal income tax alleged to be due from petitioners for 1970 is based on Mr. Rosenthal's purported distributive share of New York partnership income from Regbak Associates and the Partnership. The attribution of \$1,081.00 as income to Sidney Rosenthal in 1970 was based upon a federal audit of the records of the Partnership, which disclosed that Sidney Rosenthal's distributive share of ordinary loss was reduced from \$38,867.00 to \$37,769.00, resulting in additional income of \$1,098.00. This amount was later reduced to \$1,081.00, upon administrative review within the Internal Revenue Service.

6. The foregoing computations were agreed to by the Audit Division and are the basis for the deficiency which is disputed by petitioners.

7. During the period 1969 through 1970, Mr. Rosenthal was a limited partner in the Partnership. The Partnership was engaged in general commission and brokerage business. The partners dealt "...as either principals or agents, in stocks, bonds, and other securities, and various commodities and other merchandise...".

8. The partnership agreement provided that each of the general and limited partners were to receive simple interest on their contribution to the capital of the Partnership at the rate of six percent per annum. In addition, the partnership agreement stated that the general partners and certain limited partners were to receive set, pre-determined salaries. Sidney Rosenthal was not one of the partners designated to receive a pre-determined salary. The

partnership agreement also provided that a certain percentage of earnings could be set aside by a majority of the general partners to be distributed as a bonus to those partners whom a majority of the general partners deemed entitled to a bonus.

9. On March 1, 1967, Sidney Rosenthal entered into an agreement with the Partnership, encaptioned "Agreement Subordinating Account". This contract, which referred to Sidney Rosenthal as a customer, provided that Sidney Rosenthal would agree to subordinate an account with the Partnership to the claims of all creditors of the partnership arising out of matters occurring prior to November 1, 1968. Sidney Rosenthal was to receive annual interest of seven percent per annum on the cash and market value of the securities held in this account to a maximum of \$14,000.00 per year. This contract also provided that Sidney Rosenthal would have a contract claim against the Partnership if the securities subject to the subordinated loan agreement were disposed of. A similar agreement was subsequently executed by Sidney Rosenthal and the Partnership on October 30, 1968.

10. Initially, Sidney Rosenthal advanced \$200,000.00 to the Partnership as the corpus of this subordinated account. In 1969, Mr. Rosenthal increased the value of the subordinated loan account to \$300,000.00. Petitioners submitted a statement of "Subordinate Loan Account" for the period ending August 31, 1970 showing a credit balance as of July 31, 1970 of \$61,157.99. The statement showed a description of each security held by Emanuel Deetjen & Co. in the name of Sidney N. Rosenthal. Said account did not show the amount of interest income earned or received by petitioner Sidney Rosenthal during the years at issue.

11. It was the understanding between the Partnership and Mr. Rosenthal that as a subordinate lender he had the right to substitute the securities in his account. In addition, Mr. Rosenthal had the right to periodically withdraw interest on bonds or withdraw dividends on stocks.

12. By a letter dated February 11, 1970 Mr. Rosenthal advised the Partnership that he was terminating the subordination agreement effective April 16, 1970. On the same day, Sidney Rosenthal also advised the Partnership that he was terminating his limited partnership agreement effective August 31, 1970.

13. In September, 1970, the Partnership's assets were acquired by the Havenfield Corporation.

14. On September 15, 1970, Mr. Rosenthal was paid \$62,157.00 by the Havenfield Corporation. This sum represented the balance in his subordinated loan account. No evidence was presented as to when the other portions of the loan account were withdrawn.

15. Sidney Rosenthal received the balance of his capital account from the partnership several years following the termination of his partnership agreement upon the successful conclusion of litigation.

16. Petitioners retained a certain accountant for a period of from twenty to twenty-five years. The accountant prepared all of petitioners' State and Federal tax returns, including petitioners' 1970 Federal tax return. The accountant did not prepare a New York State income tax return for petitioners in 1970. However, petitioners relied upon the accountant to prepare the necessary returns.

CONCLUSIONS OF LAW

A. That the deficiency currently asserted by the Audit Division is based upon the Notice of Deficiency issued April 13, 1973. Generally, Tax Law

§689(d)(4) prohibits the issuance of a Notice of Deficiency after a petition has been filed with the State Tax Commission. However, the document issued on June 3, 1975, for which payment was received, was a Statement of Audit Changes and not a Notice of Deficiency. Therefore, the payment of the amount shown in the amended Statement of Audit Changes dated June 3, 1975 does not prohibit the Audit Division from continuing to assert a deficiency based upon the Notice of Deficiency dated April 13, 1973.

B. That income from a New York partnership to a nonresident partner, derived from that partner's interest on a subordinated loan account, is not taxable by New York (Matter of Shearson, Hammill & Co. v. State Tax Commission, 19 A.D.2d 245, affd. 15 N.Y.2d 608). However, interest income received by a nonresident partner from a New York partnership based on his capital account in the partnership is taxable by New York (Matter of E. C. Sterling McKittrick and Sally A. McKittrick, State Tax Commission, December 13, 1978). The record does not establish that the amounts received by Sidney Rosenthal from the Partnership were derived from a subordinated loan account rather than his capital account. Accordingly, petitioners have failed to sustain their burden of proof of establishing that the income involved was not taxable (Tax Law §689(e)).

C. That, as noted in Finding of Fact "4", the income attributed to petitioners from the Partnership in 1970 was based upon an audit of the Partnership by the Internal Revenue Service. Petitioners have failed to establish that the amount of income so attributed by the Audit Division was incorrect.

D. That the deductions reflected on the Statement of Audit Changes dated June 3, 1975 have been taken into account in the revised computation shown in

Finding of Fact "4". However, said computation grants petitioners credit for a payment of \$429.83 rather than \$740.65, the amount actually paid. Accordingly, petitioners are entitled to a credit of \$310.82 plus any interest that may be due. It is noted that this credit takes into account the penalties that petitioners paid which were proposed in the Statement of Audit Changes dated June 3, 1975.

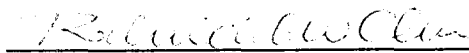
E. That petitioners acted with reasonable cause and not willful neglect, therefore the penalties under sections 685(a)(1) and 685(a)(2) of the Tax Law asserted in the Notice of Deficiency for 1970 are cancelled.

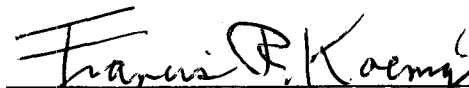
F. That the Audit Division is directed to modify the Notice of Deficiency dated April 13, 1973 by cancelling the tax, penalty and interest for 1968, by reducing the deficiencies for 1969 and 1970 in accordance with Finding of Fact "4", and by allowing credit for the amount paid as per Conclusion of Law "D", and by cancelling the penalties asserted for 1970 in the Notice of Deficiency in accordance with Conclusion of Law "E". The Notice of Deficiency, as modified, is sustained and the petition of Sidney Rosenthal (Deceased) and Emily Rosenthal is in all other respects denied.

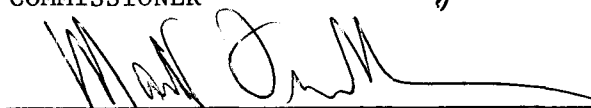
DATED: Albany, New York

STATE TAX COMMISSION

MAR 18 1983


PRESIDENT


COMMISSIONER


COMMISSIONER