

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rosalie L. Goldblatt :
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 Year :
1973. :
:

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 16th day of July, 1985, he served the within notice of Decision by certified mail upon Rosalie L. Goldblatt, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rosalie L. Goldblatt
1010 Diplomat Pkwy.
Hallandale, FL 33009

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
16th day of July, 1985.

David Parchuck

Bruce A. Haglund

Authorized to administer oaths
pursuant to Tax Law section 174

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

July 16, 1985

Rosalie L. Goldblatt
1010 Diplomat Pkwy.
Hallandale, FL 33009

Dear Ms. Goldblatt:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROSALIE L. GOLDBLATT	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1973.	:	

Petitioner, Rosalie L. Goldblatt, 1010 Diplomat Parkway, Hallandale, Florida 33009, 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 1973 (File No. 31125).

On September 8, 1984, petitioner advised the State Tax Commission, in writing, that she desired to waive a formal hearing and to submit the case to the State Tax Commission for decision, with all briefs to be submitted by November 13, 1984. After due consideration of the entire file, the State Tax Commission renders the following decision.

ISSUES

I. Whether certain funds received from a New York partnership were taxable by New York and, if so, whether petitioner may allocate her share of partnership income to sources without New York State, when the partnership did not utilize an allocation percentage.

II. Whether there is reasonable cause warranting the cancellation of penalties.

FINDINGS OF FACT

1. On May 21, 1980, the Audit Division issued a Notice of Deficiency to petitioner, Rosalie L. Goldblatt, asserting a deficiency of personal income tax

in the amount of \$1,673.79, plus penalties and interest of \$1,558.12, for a total amount due of \$3,231.91.

2. The Statement of Audit Adjustment, which had been issued September 26, 1978, explained, in substance, that as a nonresident partner of the firm of Schweickart & Co., she was required to include as New York income her distributive share of all items of partnership income, gain, loss and deduction entering into her Federal adjusted gross income to the extent that such items were connected with or derived from New York sources. In addition, the Statement explained that the penalties were imposed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for, respectively, late filing of a tax return and late payment of the amount shown as tax on a return required to be filed.

3. During the year in issue, petitioner was a limited partner of Schweickart & Co. (the "partnership"). The partnership was a limited partnership engaged in buying and selling stocks, bonds, mutual funds and other securities for its customers. The partnership's income was derived from the commissions it charged to perform such transactions. Some of these customers resided outside of New York State. The partnership also received underwriting fees for underwriting new issues of securities by corporations and governmental entities located outside of New York State.

4. The partnership filed a New York State Partnership Return for the year 1973. On this return, the partnership reported total income of \$5,344,996.00 and total deductions of \$6,356,799.00 resulting in a loss of \$1,011,803.00. The partnership also reported that it maintained an office in Los Angeles, California. However, income was not allocated within and without New York State.

5. The partnership's return for the year 1973 contained a schedule K-1, encaptioned "Partner's Share of Income, Credits, Deductions, etc. - 1973", pertaining to petitioner. The schedule reported that petitioner received salary, interest and ordinary income of \$24,333.00. It also reported that the net earnings from self-employment were \$24,333.00. The schedule further reported that petitioner's capital account at the beginning of the year was \$300,000.00 and that both income and withdrawals during the year were \$24,333.00, resulting in a capital account at the end of the year of \$300,000.00. Lastly, the schedule reported that petitioner received no percentage of profit-sharing and that petitioner devoted no time to the business.

6. On December 31, 1972, petitioner entered into an agreement encaptioned "Secured Demand Note", whereby petitioner agreed to provide the partnership with \$300,000.00 on demand. The partnership agreed by this document that it would make a demand for payment only if a "financial restriction" had occurred. In general, a "financial restriction" was defined as any of the following events: (1) whenever additional cash was required; (2) whenever the partnership required additional capital under the rules and regulations of the New York Stock Exchange; and (3) the insolvency, liquidation or bankruptcy of the partnership. The note was secured by bonds in the principal amount of \$300,000.00. She pledged 1,000 shares of Canal Randolph stock and \$300,000.00 principal amount of Federal National Mortgage Association bonds.

7. The terms of the Secured Demand Note incorporated a Secured Demand Note Collateral Agreement ("Collateral Agreement") which provided that the partnership would pay petitioner an amount equal to eight percent of the unpaid principal balance of the note. With certain reservations, the Collateral Agreement also provided that petitioner would have full legal and beneficial

ownership and bear the benefit of any increases as well as bear the risk of any decreases in the value of the collateral. In addition, with certain reservations, petitioner could direct the sale of the collateral, as well as direct the purchase of securities with cash held as collateral. Moreover, petitioner had the right to withdraw or substitute collateral. Lastly, subject to certain restrictions, petitioner had the right to withdraw the note and collateral on December 31, 1974, or earlier on six months' notice.

8. In accordance with the provisions of the Secured Demand Note, petitioner received a monthly check from the partnership during 1973. Each of the checks stated on its face that it represented interest on the Secured Demand Note for the respective month and further that interest was computed at a rate of eight percent.¹ The total of all of the checks received by petitioner during 1973 representing interest on the secured demand note corresponds with the amount attributed to petitioner on the partnership's 1973 tax return.

9. The partnership never demanded that petitioner make payment of the Secured Demand Note.

10. In a letter dated May 22, 1979, petitioner explained that:

"It is equally true that the \$24,333.00 I received was not a distributive share of partnership income, but was in fact the sum of monthly payments of interest made by me on the secured demand note loan of \$300,000.00 which I had made to Schweickart & Co. as my limited partnership contribution to the capital of said firm."
(emphasis in original).

11. Petitioner acted under the impression that the income in issue was not subject to New York State personal income tax.

1 Since the partnership was computing interest on the basis of a banking year of 360 days, the actual interest rate was 8.1111 percent.

CONCLUSIONS OF LAW

A. That a nonresident partner is required to include in his New York adjusted gross income "...only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income..." [Tax Law §637(a)(1)].

B. That the interest received by a nonresident partner from a New York partnership based upon that partner's capital account in the partnership is taxable by New York (Matter of Rosenthal v. State Tax Comm., 102 A.D.2d 325, 329). On the other hand, interest income from an intangible which is not used in a business, trade, profession or occupation carried on in New York is not subject to New York State personal income tax (Tax Law §632(b)(2); Matter of Delmhorst v. State Tax Comm., 92 A.D.2d 981, aff'd. 60 N.Y.2d 628).

C. That since the income in issue was based upon petitioner's capital account in the partnership, the Audit Division properly concluded that the income was taxable by New York (Matter of Rosenthal v. State Tax Comm., 102 A.D.2d 325, 329).

D. That in view of the fact that the partnership did not allocate its income to sources within and without New York State, and in the absence of evidence of what the allocation would have been had the partnership allocated its net income, the Audit Division properly concluded that petitioner was not entitled to an allocation of income to sources outside of New York (see Matter of Burton H. Finkelstein, State Tax Commission, March 13, 1981).


E. That since petitioner acted with reasonable cause and not willful neglect, the penalties imposed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are cancelled.

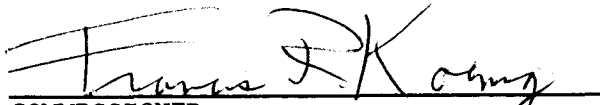
F. That the petition of Rosalie L. Goldblatt is granted only to the extent of Conclusion of Law "E" and the Audit Division is directed to modify the Notice of Deficiency accordingly; except as so modified, the Notice of Deficiency issued May 21, 1980 is sustained.

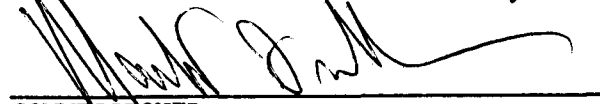
DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER