

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Estate of Wilfred B. Ostrander :
and Adele M. Ostrander :

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 :
1972 - 1975. :

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 29th day of May, 1985, he served the within notice of Decision by certified mail upon Estate of Wilfred B. Ostrander and Adele M. Ostrander, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Wilfred B. Ostrander
and Adele M. Ostrander
1712 Ponce De Leon Prado
Fort Pierce, FL 33450

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
29th day of May, 1985.

David Parchuck

James A. Hayek

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Estate of Wilfred B. Ostrander	:	
and Adele M. Ostrander	:	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	:	
1972 - 1975.	:	

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 29th day of May, 1985, he served the within notice of Decision by certified mail upon John L. Juliano, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John L. Juliano
Hillside Bldg., 39 Doyle Court
E. Northport, NY 11731

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
29th day of May, 1985.

David Parchuck

Annunzio P. DeGennaro
Authorized to administer oaths
pursuant to Tax Law section 174

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

May 29, 1985

Estate of Wilfred B. Ostrander
and Adele M. Ostrander
1712 Ponce De Leon Prado
Fort Pierce, FL 33450

Dear Mrs. Ostrander:

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
John L. Juliano
Hillside Bldg., 39 Doyle Court
E. Northport, NY 11731
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of Petition	:	
of	:	
ESTATE OF WILFRED B. OSTRANDER	:	DECISION
AND ADELE M. OSTRANDER	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1972, 1973, 1974	:	
and 1975.	:	

Petitioners, Estate of Wilfred B. Ostrander and Adele M. Ostrander, 1712 Ponce DeLeon Prado, Fort Pierce, Florida 33450, 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 1972, 1973, 1974 and 1975, (File No. 18926).

On September 14, 1984, petitioners advised the State Tax Commission, in writing, that they desired to waive a formal hearing and to submit the case to the State Tax Commission upon the entire record contained in the file, together with a brief to be submitted by October 10, 1984. After due consideration, the Commission renders the following decision.

ISSUES

I. Whether Wilfred B. Ostrander and Adele M. Ostrander were required to accrue to their final 1973 resident return, all remaining capital gains flowing from the installment sales of two parcels of real property located within New York State.

II. Whether the interest income received by Wilfred B. Ostrander and Adele M. Ostrander from purchase money mortgages received with respect to the installment sales of New York real property, are taxable to New York State during their nonresident periods.

III. Whether certain income, characterized by petitioners as "annuities" is taxable to New York State during their nonresident periods.

FINDINGS OF FACT

1. Wilfred B. Ostrander and Adele M. Ostrander (hereinafter "petitioners") sold two parcels of real property prior to the years at issue herein. One parcel, which was situated in Commack, New York, was sold in April, 1967. The other parcel, which was situated in Huntington, New York, was sold in February, 1970. In each sale petitioners received a purchase money mortgage for the unpaid balance of the purchase price. The mortgage for the Commack property provided for interest at the rate of 6% per annum over a repayment term of 15 years. The mortgage for the Huntington property provided for interest at the rate of 7% over a repayment term of 20 years. Petitioners were New York State residents at the time the aforestated sales were made. For personal income tax purposes they elected to report the capital gain income derived from said sales on the installment basis.

2. In 1976, petitioners filed amended New York State personal income tax returns for the years 1972, 1973 and 1974, plus an original return for 1975. The amended 1972 return showed a refund due of \$143.63, which was accepted by the Audit Division. The amended 1973 and 1974 returns and the original 1975 return, as filed, were not accepted by the Audit Division.

3. Petitioners changed their residence from New York to Florida on or about July 9, 1973. On filing their amended 1973 final resident return for the period January 1, 1973 to July 8, 1973, they failed to accrue to such return the remaining capital gain income due them from the two aforestated installment sales of New York real property. Rather, they reported the taxable portions of each installment payment received during the subsequent years at issue on New

York State nonresident returns filed for such years. A bond or other security acceptable to the State Tax Commission, as required pursuant to section 654(c)(4) of the Tax Law, was not filed.

4. On March 28, 1977, the Audit Division issued a Statement of Audit Changes for the years 1972 through 1975 inclusive, wherein it held that "the installment gain receivable is accrued on your final resident return under section 654(c)(1) of the New York State Tax Law. The interest income from the installment sales and annuities are considered taxable to New York State." Pursuant to the recomputations incorporated into said statement, the adjusted New York incomes determined for taxable years 1974 and 1975 were reduced by the installment gains reported for each of said years. For 1972 and 1974, overpayments were computed of \$143.63 and \$161.35, respectively. For 1973 and 1975, balances due were computed of \$6,734.22 and \$13.62, respectively. Accordingly, a Notice of Deficiency was issued under the same date asserting additional personal income tax in the aforestated amounts shown as balances due for 1973 and 1975. A statement on said notice advised that if the "Consent To Findings" portion of said notice is properly executed, the overpayments determined for 1972 and 1974 would be applied against the deficiency. Interest of \$1,534.28 was also asserted on said notice.

5. In petitioner's brief received October 9, 1984, it appears that the decedent's representative concedes the accrual of the capital gain portion of the installment payments receivable to the 1973 final resident return. He states, inter alia, in said brief that:

"The capital gain portion of the installment payments received by the petitioners during these years (1974 and 1975) is not taxable because the petitioners are required to accrue the capital gain realized on the sale of their property on their 1973 final resident return."

6. Petitioner's representative alleges that the Audit Division improperly held as taxable for New York State purposes, the interest income on the unpaid balances of the purchase money mortgages received during petitioner's nonresident portion of 1973 and the years 1974 and 1975. He argues that such income is nontaxable within the meaning and intent of section 632(b)(2) of the Tax Law.

7. Although petitioner's representative claims that the "annuities" received by petitioners are not taxable during their nonresident periods, the file contains no documentation with respect to the nature of such payments. The only reference to such annuities was made in the brief, wherein it is stated, "the Petitioners should not be taxed on any income which was derived from their employer's contribution to a pension plan or annuity."

CONCLUSION OF LAW

A. That section 654(c)(1) of the Tax Law provides that:

"If an individual changes his status from resident to nonresident, he shall, regardless of his method of accounting, accrue for the portion of the taxable year prior to such change of status, any items of income, gain, loss or deduction accruing prior to the change of status, if not otherwise properly includible (whether or not because of an election to report on an installment basis) or allowable for New York income tax purposes for such portion of the taxable year or for a prior taxable year . . ."

B. That section 654(c)(4) of the Tax Law provides that:

"The accruals under this subsection shall not be required if the individual files with the tax commission a bond or other security acceptable to the tax commission, conditioned upon the inclusion of amounts accruable under this subsection in New York adjusted gross income for one or more subsequent taxable years, as if the individual had not changed his resident status."

C. That the surety bond or other security to be filed with the tax commission pursuant to section 654(c)(4) of the Tax Law, must be in an amount

not less than the amount of additional income tax which would be payable if no such bond or security were filed (20 NYCRR 148.11(a)).

D. That in order to avoid the accruals mandated by section 654(c)(1) of the Tax Law, one must comply with the requirements of section 654(c)(4) of the Tax Law and 20 NYCRR 148.11(a). Since petitioners did not meet said requirements, the remaining taxable gains flowing from the installment sales are fully taxable on their 1973 final resident return.

E. That section 632(b)(2) of the Tax Law provides that:

"Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession or occupation carried on in this state."

F. That the property which the statute requires to be employed in a business, trade, profession, or occupation carried on in this State is the very same intangible personal property, earlier referred to in section 632(b)(2), from which the income is derived. In the instant case, the income producing intangible personal property is the mortgage notes, upon which the interest was paid, and not the real property covered by the mortgages, even though operation of the real property may be the ultimate source of payment. Since the mortgage notes were never employed in a business, trade, etc., carried on in New York State, the interest income from the mortgage notes is nontaxable for New York State purposes on the petitioners' returns. (Matter of Edwin E. Epstein v. State Tax Commisison, 89 AD2d 256)

G. That petitioners have failed to sustain their burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that the income characterized as "annuities" was not subject to New York State taxation on their nonresident returns.

H. That the petition of the Estate of Wilfred B. Ostrander and Adele M. Ostrander is granted to the extent provided in Conclusion of Law "F", supra, and except as so granted, said petition is, in all other respects, denied.

I. That the Audit Division is hereby directed to adjust the Notice of Deficiency dated March 28, 1977 to be consistent with the decision rendered herein.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1985

Rodwin Avchen
President

Francis P. Kolny
Commissioner

[Signature]
Commissioner