

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BEATRICE GOLDMAN : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 824682
Personal Income Tax under Article 22 of the Tax Law :
for the Year 2007. :

Petitioner, Beatrice Goldman, 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 2007.

On June 28, 2013, petitioner, appearing by Hiscock & Barclay, LLP (David G. Burch, Jr., of counsel), and on August 20, 2013, the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by January 6, 2014, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to a resident credit pursuant to Tax Law § 620(a) for taxes paid to Massachusetts.

FINDINGS OF FACT

1. Petitioner is a resident of New York City.

2. In 1981, petitioner and her late husband invested approximately \$25,000.00 in Roselantic Associates, LP (Roselantic). Roselantic, along with an insurance company, built an office tower in Boston, Massachusetts, during the 1980s. The sole purpose of Roselantic was to build the building and hold it for appreciation.

3. Over the years, the entity distributed very little cash, and the Goldmans' objective on this investment was to help them finance their retirement. In 2002, Roselantic invested its accumulated cash into another entity called Bostrose Associates LLC (Bostrose). Bostrose owned a 50% interest in Dewey Square Tower Associates, a Massachusetts general partnership that owns several real properties in Massachusetts. Bostrose sold that investment in 2007.

4. Petitioner filed her 2006 and 2007 New York and Massachusetts income tax returns. A small amount of tax, approximately \$400.00, was paid to Massachusetts for 2006; a credit for the same amount was claimed on her New York State return.

5. In 2007, the year at issue in this proceeding, petitioner received a form K-1 from Roselantic, which reported her share of the capital gain, which was generated from a disposition of Bostrose's interest in Dewey Square Tower Associates. The form K-1 that petitioner received indicated that this gain was subject to tax in Massachusetts. Petitioner timely reported and paid \$49,578.00 in income tax to the Commonwealth of Massachusetts. Petitioner filed her New York State Resident Income Tax Return for 2007, and she claimed a credit against her state tax liability in the same amount.

6. The Division of Taxation (Division) audited petitioner's 2007 return and claimed that the sale was that of a partnership interest and, thus, the sale of an intangible asset. Therefore, the Division claimed that the tax paid to Massachusetts was not allowable as a credit. Petitioner then

filed an amended return in Massachusetts, seeking a refund, claiming that there was no provision in the statutes of Massachusetts where a nonresident could be taxed on the sale of a partnership interest. Petitioner's refund claim was denied because Massachusetts determined that nonresidents can be taxed on items of gross income derived from or connected with any trade or business in the Commonwealth. Massachusetts held that income from a trade or business included the sale of an interest in a business.

7. Petitioner presented the ruling from Massachusetts to the taxing authority in New York and argued that New York could not tax this same income as was taxed in Massachusetts because it would be a form of double taxation.

8. The Division issued to petitioner Notice of Deficiency L-035129341 in the amount of \$48,581.00 plus interest. The basis for the notice was that the partnership interest sold was not used in a trade or business since Bostrose merely held an interest in Dewey Square Tower Associates as an investment. According to the form K-1 issued to petitioner, the Division determined that the amount of capital gain reported was subject to New York State taxation as a result of the sale of an intangible asset. Based upon this determination by the Division, it disallowed petitioner's request for a resident tax credit since taxes paid to another state on income received from the sale of an intangible asset are not entitled to a resident tax credit.

CONCLUSIONS OF LAW

A. Tax Law § 620(a) allows for a tax credit to a New York resident against the tax otherwise due under this article for any income tax imposed for the taxable year by another state on income both derived therefrom and subject to tax under article 22.

B. The basis for the Division's denial of the credit claimed by petitioner is that the sale of a partnership interest is, for New York State Tax Law purposes, the sale of an intangible asset and thus, not taxable to a nonresident individual. Therefore, the Division states that the sale of a partnership interest by petitioner, a New York resident, is not properly subject to taxation in Massachusetts and, therefore, there is no tax credit allowable herein.

Petitioner argues that the Commonwealth of Massachusetts treated this sales transaction as income derived from a business, which resulted in petitioner being required to pay tax on the gain to Massachusetts. Petitioner asserts that although New York State deems the income realized on the sale as an intangible asset, such treatment by New York, in effect, results in the same income being taxed twice. Petitioner states that the creation of a tax credit prevents the double taxation of income and she would be taxed twice on the same income due to each jurisdiction characterizing the capital gain differently.

C. Both parties refer to the *Matter of Mallinckrodt* (Tax Appeals Tribunal, November 12, 1992) as setting forth the test to determine whether petitioner is entitled to a resident credit. In order to receive a credit for tax paid to Massachusetts, petitioner must prove that (1) Massachusetts imposed a tax on the subject income; (2) that the income was derived from Massachusetts; and (3) that the income was subject to tax under Article 22 of the Tax Law. In this case, it is clear that the income from the sale of intangibles was clearly subject to income tax as petitioner was a resident of New York at the time of the sale.

Moreover, petitioner has shown that Massachusetts imposed a tax on the same income. Therefore, it must be determined whether the income was derived from Massachusetts. In

reviewing the Tax Law, it is determined that the income was not derived from Massachusetts, but rather, was investment income.

It is a fact that Massachusetts treated the investment income as income derived from a business conducted in Massachusetts. However, to qualify for the credit, petitioner was required to establish that the tax imposed by Massachusetts was on income that resulted from the sale of an intangible asset. As the facts state, Massachusetts did not treat the income as that from the sale of an intangible. Therefore, petitioner is not entitled to a resident credit.

D. Petitioner argues that New York's refusal to grant a resident tax credit to her results in double taxation, which is impermissible under the United States Constitution. This argument is without merit.

As the Tribunal noted in *Mallinckrodt*:

our decision is not governed by constitutional principles, but rather, by statutory interpretation. The Due Process Clause does not prohibit the double taxation that can arise from the concurrent power possessed by the state of the taxpayer's residence and another state with which the taxpayer or his property has contact to tax the income of the taxpayer or his property (citations omitted). Thus, the granting of a credit in this instance is not constitutionally required, but simply a matter of legislative grace (*see Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193 [1975]).

E. Lastly, petitioner argues that subsequent statutory amendments were enacted in 2009 that would allow for the claimed resident credit under the facts herein. However, without the Legislature specifically stating that such amendments be applied retroactively, petitioner is unable to avail herself of the new statutory provisions.

F. The petition of Beatrice Goldman is denied and the Notice of Deficiency, L-035129341, dated December 13, 2010, is sustained.

DATED: Albany, New York
June 26, 2014

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE