

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Philip Rosen :

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 1972. :

State of New York
County of Albany

Jay Vredenburg, 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 14th day of March, 1980, he served the within notice of Decision by certified mail upon Philip Rosen, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

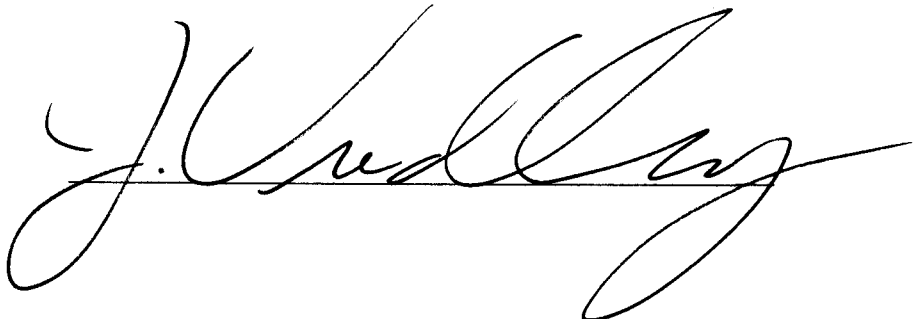
Philip Rosen
10 East Dr.
Larchmont, NY 10538

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
14th day of March, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Philip Rosen

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
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State of New York
County of Albany

Jay Vredenburg, 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 14th day of March, 1980, he served the within notice of Decision by certified mail upon Morris Back the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Morris Back
One Park Ave.
New York, NY 10016

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
14th day of March, 1980.

Joanne Knapp

J. Vredenburg

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

March 14, 1980

Philip Rosen
10 East Dr.
Larchmont, NY 10538

Dear Mr. Rosen:

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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Morris Back
One Park Ave.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PHILIP ROSEN	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1972.	:	

Petitioner, Philip Rosen, 10 East Drive, Larchmont, New York 10538, 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 1972 (File No. 12340).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 18, 1977 at 10:45 A.M. Petitioner appeared by Morris Back, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUE

Whether petitioner, Philip Rosen, was entitled to report the income received from the sale of stock in a corporation wholly-owned by the petitioner on the installment method prescribed by section 453 of the Internal Revenue Code, where the agreement for sale provided for the sale of 8-7/10 shares of stock (the consideration therefor being \$32,500.00 at closing and \$270,000.00 in a series of 100 monthly notes) and the subsequent redemption of 5-1/10 shares of stock by the corporation, (for \$185,343.00 in cash and other assets) there being only 13-8/10 shares of stock issued.

FINDINGS OF FACT

1. Petitioner, Philip Rosen, filed a New York State resident income tax return for 1972. The income reported included amounts from his Federal return, which represented cash received on a \$288,825.00 gain on the sale of 8-7/10 shares of stock and cash received on a \$173,762.68 gain on the sale of 5-1/10 shares of stock.

2. On May 19, 1975, the Income Tax Bureau issued a Statement of Audit Changes to petitioner, Philip Rosen, for the year 1972, stating additional personal income tax of \$29,013.07, plus \$4,554.76 in interest. The statement contained the explanation, "Gain on the sale of 13-8/10 shares of Abbey Chop House, Inc. does not qualify for reporting the gain on the installment basis since you have received more than 30% of the selling price in the year of sale". Accordingly, a Notice of Deficiency was issued on May 19, 1975, totalling \$33,567.83.

3. Petitioner was the lessee under a "master lease" of the restaurant in the Abbey Victoria Hotel in New York City. Petitioner was permitted to sub-lease that restaurant and did initially to Abbey Chop House, Inc. Petitioner owned 13-8/10 shares of the corporation, which represented 100 percent of its issued and outstanding stock.

4. On June 14, 1972, petitioner entered into an agreement with two individuals to sell 8-7/10 shares of stock of Abbey Chop House, Inc., which operated the restaurant in New York, New York, under a leasehold which terminated May 31, 1981. The agreement provided in pertinent part as follows:

- (a) The sales price for the 8-7/10 shares of Abbey Chop House, Inc. was \$315,000.00, which amount was later changed to \$302,500.00 (Article 1, page 1). Adjustments to the sales price for inventory, accounts receivable and prepaid items were offset by assumption of accounts payable, accrued salaries and other liabilities

(Article 3, page 5). The 8-7/10 shares were purchased for the purpose of acquiring the leasehold (Second "Whereas" clause, page 1). The price of the shares purchased was bargained for on the basis of the value of the leasehold (Article 2, page 2).

The purchaser did not buy any other assets than those mentioned.

- (b) The sales price of \$302,500.00 was payable \$32,500.00 on closing and \$270,000.00 by a series of 100 equal monthly promissory notes bearing interest at the rate of 4 percent per annum, commencing November 1, 1972 and continuing through March 1, 1981. Accordingly, petitioner received payment and notes at the closing as provided.
- (c) The third "Whereas" clause (page 1) stated that it was intended that, after the sale of 8-7/10 shares, the remaining 5-1/10 shares owned by the petitioner were to be redeemed by Abbey Chop House, Inc. The assets petitioner received on the redemption consisted of all cash and cash funds, stock in Genju Corp. (a wholly-owned subsidiary), notes receivable and automobiles (Article 4, page 6). Immediately after the closing, petitioner's remaining 5-1/10 shares were redeemed by Abbey Chop House, Inc. for \$185,343.00 in cash and other assets, no part of which came from the purchaser directly or indirectly. The redeemed shares were exchanged for assets which represented the accumulated earnings and profits of Abbey Chop House, Inc.

5. The two transactions (sale and subsequent redemption) were intended to enable petitioner to remove his accumulated earnings (while receiving capital gains treatment) and to allow the purchasers of the restaurant business

to buy only the leasehold right necessary to run the business but not the accumulated earnings and profits.

6. Petitioner was, at the time of the sale, losing money and faced serious labor problems. The purchasers had little cash. The notes for the second, third and fourth year were non-negotiable.

7. Petitioner, after the failure of the purchasers to pay on the notes and the restaurant, took possession of the restaurant in August of 1976 and attempted to run the restaurant. He incurred substantial losses.

8. A summary of receipts on the sale of stock of Abbey Chop House, Inc. for the years 1973 through 1976 indicates that petitioner received payments on the notes from the purchase which he reported 95.479 percent thereof as capital gain as follows:

	<u>Number of Notes at \$2,700.00</u>	<u>Amount Received</u>	<u>Gain Reported</u>
1973	11	\$29,700.00	\$28,357.00
1974	12	32,400.00	30,935.20
1975	12	32,400.00	30,935.20
1976	9	21,600.00	20,681.78

The balance uncollected was \$153,900.00

CONCLUSIONS OF LAW

A. That the sale of 8-7/10 shares of Abbey Chop House, Inc. and subsequent redemption of 5-1/10 shares were not shown to have an independent purpose sufficient to justify the brief retention of the 5-1/10 shares.

B. That the redemption of the 5-1/10 shares of stock and the consideration therefor was specifically provided for in the agreement and was a part thereof.

C. That although this redemption is entitled to capital gain treatment rather than treatment as a liquidating dividend, such treatment is not determinative of whether the payments received constitute 30 percent or less of the selling price for the purpose of the installment method provided by section 453 of the Internal Revenue Code.

D. That the payment of \$185,343.00 received for the 5-1/10 shares of Abbey Chop House, Inc. must be considered along with the \$32,500.00 in cash paid for the 8-7/10 shares at the closing in determining whether the amount paid exceeds 30 percent of the selling price.

E. That the selling price, even allowing full value to the face value of the one hundred monthly promissory notes, was \$487,843.00.

F. That the payments exceed 30 percent of the selling price and the installment method provided for by section 453 of the Internal Revenue Code is not available.

G. That the Notice of Deficiency issued May 19, 1975 is sustained, and that the Audit Division is directed to review returns subsequent to 1972 and make the necessary adjustments for income attributed to the receipt of payments by petitioner, Philip Rosen, on the 100 monthly notes.

DATED: Albany, New York

MAR 14 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK
STATE TAX COMMISSION

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State of New York
County of Albany

Jay Vredenburg, 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 4th day of April, 1980, he served the within notice of Decision by certified mail upon Philip Rosen, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip Rosen
Broad Brook Rd.
Bedford Hills, NY 10507

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
4th day of April, 1980.

Joanne Knapp

J. Vredenburg