

STATE OF NEW YORK
STATE TAX COMMISSION

Markowitz
P.I. - 1970

In the Matter of the Petition

of

Estate of Louis Markowitz

For a Redetermination of a Deficiency or
a Refund of Personal Income Taxes :
Taxes under Article(s) 22 of the
Tax Law for the (Year(s) 1963, 1964 :
& 1965

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

Louis Markowitz
cc H-99-323

State of New York
County of Albany

Claire A. Draves, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 20th day of November, 1970, she served the within Notice of Decision (or Determination) by (certified) mail upon Isaac C. Donner, Esq.

(representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Isaac C. Donner, Esq.
30 Vesey Street
New York, New York 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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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

20th day of November, 1970.

Conrad Wright

Claire A. Draves

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

Estate of Louis Markowitz

For a Redetermination of a Deficiency or
a Refund of Personal Income Taxes :
Taxes under Article(s) 22 of the
Tax Law for the (Year(s) 1963, 1964 & :
1965

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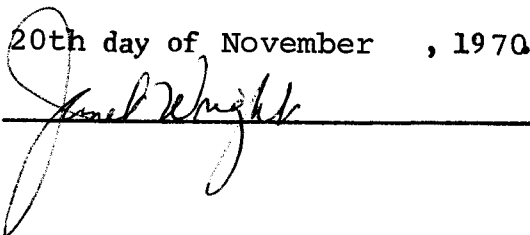
State of New York
County of Albany

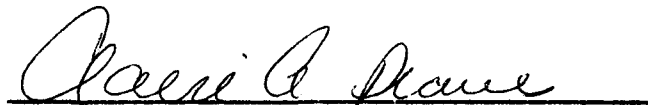
Claire A. Draves, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 20th day of November, 1970, she served the within Notice of Decision (or Determination) by (certified) mail upon The Est. of Louis Markowitz c/o Mollie Markowitz (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: The Est. of Louis Markowitz c/o Mollie Markowitz 68 West 238th Street New York, New York 10463 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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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

20th day of November, 1970





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
The Estate of Louis Markowitz	:	
and Mollie Markowitz	:	DECISION
for a Redetermination of a Deficiency or	:	
for Refund of Personal Income Taxes under	:	
Article 22 of the Tax Law for the years	:	
1963, 1964 and 1965	:	

Taxpayers having filed a petition pursuant to Section 689 of the Tax Law for a redetermination of deficiencies of personal income taxes for the years 1963, 1964 and 1965 and a hearing having been duly held before Nigel G. Wright, Hearing Officer, and the record having been duly examined and considered,

The State Tax Commission hereby

FINDS:

(1) The sole issue herein is the application of Article 22 of the Tax Law to the undistributed income of a corporation taxable for Federal purposes under Subchapter S (Sections 1371 et. seq.) of the Internal Revenue Code.

(2) The deficiencies asserted are \$156.88 for 1963, \$280.91 for 1964 and \$1,232.71 for 1965 all with interest.

(3) Trio Press Inc. is a New York corporation incorporated in 1923. Its two shareholders are Louis Markowitz, now deceased, and his wife Mollie Markowitz. It earned net income during the years in question but paid no dividends.

(4) During the taxable years here involved Trio Press Inc. had elected to be taxed as a "Subchapter S" corporation. It did not pay any Federal income tax.

(5) Trio Press Inc. paid New York Franchise taxes under Article 9-A of the Tax Law for all taxable years involved herein. It computed its tax on a net income base.

(6) The taxpayers included the undistributed income of Trio Press Inc. in their Federal taxable income.

(7) The taxpayers computed their New York State income tax on the amount of income reported to the Federal authorities as reduced by the income of Trio Press included in the Federal return.

Upon the foregoing findings and all the evidence in the case
The State Tax Commission hereby

DECIDES:

(a) Article 22 of the Tax Law is properly construed to include in the taxpayers income the "undistributed profits" of a Subchapter S corporation. The federal adjusted gross income referred to by Tax Law Section 612(a) is based upon gross income as computed under both Sections 61 and 1373 of the Internal Revenue Code. Section 1373 which provides explicitly that undistributed profits are to be included in the gross income of the shareholders refers not merely to the amounts required to be reported on Federal Form 1040 but also to the meaning of gross income in Section 61 of the Code. That such undistributed profits might not be income "derived" by the shareholder within the meaning of Section 61, without reference to Section 1373, is immaterial. That the legislature intended to include such "undistributed profits" in the taxpayers income is shown by Chapter 783 of the Laws of 1962 which amended Section 672(b) of the Tax Law to define the source of such income and exclude such income from the tax base of a non-resident.

B. The imposition of the Article 22 tax on the undistributed profits of a Subchapter S corporation does not violate due process of law or the equal protection of the Law. Insofar as the shareholders of Subchapter S corporations are treated differently from the shareholders of other corporations this difference is reasonable. The shareholders have elected a special status under the Federal law which allows them to be taxed in a way similar to the Federal treatment of

partnerships with the knowledge that the same election is construed by New York to mandate that the taxpayers be taxed for New York purposes in a way similar to the New York treatment of partnerships and other unincorporated businesses. This treatment is necessary to achieve equality of treatment with partnerships and other unincorporated businesses which are subject to the unincorporated business tax under Article 23 of the Tax Law at the same time their members are subject to the Article 22 tax on the profits of the business.

C. The inclusion of the undistributed profits of a "Subchapter S" corporation in the taxable income of the shareholders under Article 22 does not violate Article 16, Section 3 of the New York State Constitution providing that undistributed profits shall not be taxed. The New York Supreme Court has so held in *Garlin v. Murphy* 51 Misc 2d 477 and the State Tax Commission is bound by that decision.

D. The petition is denied and the deficiencies are affirmed together with such interest, if any, as may be due pursuant to Section 684 of the Tax Law.

DATED: Albany, New York
November 18, 1970

STATE TAX COMMISSION


COMMISSIONER

COMMISSIONER


COMMISSIONER