

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
LUCIA K. CUNEO & IRENE GARBARINO
Executrixes of the Estate of
LAWRENCE A. CUNEO
For a Redetermination of a Deficiency or
a Refund of Personal Income
Taxes under Article(s) 22 of the
Tax Law for the (Year(s) 1961

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

State of New York
County of Albany

Lynn Wilson, 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 10th day of May, 1972, she served the within

Notice of Decision (or Determination) by (certified) mail upon LUCIA K. CUNEO & IRENE GARBARINO Executrixes of the Estate of LAWRENCE A. CUNEO (representative of) the petitioner in the within

proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Lucia K. Cuneo & Irene Garbarino Executrixes of the Estate of Lawrence A. Cuneo c/o Van M. Logan, Esq. 11 Park Place

and by depositing same enclosed in a postpaid properly addressed wrapper in a New York, New York (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

10th day of May, 1972

Bartha F. ...

Lynn Wilson

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

LUCIA K. CUNEO & IRENE GARBARINO
Executrixes of the Estate of
LAWRENCE A. CUNEO
For a Redetermination of a Deficiency or
a Refund of Personal Income
Taxes under Article(s) 22 of the
Tax Law for the (Year(s) 1961

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
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State of New York
County of Albany

Lynn Wilson , 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 10th day of May , 1972 , she served the within
Notice of Decision (or Determination) by (certified) mail upon VAN M. LOGAN, ESQ.

(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid

wrapper addressed as follows: Van M. Logan, Esq.
11 Park Place
New York, New York

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

10th day of May , 19 72

Martha Duane

Lynn Wilson

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
LUCIA K. CUNEO & IRENE GARBARINO
Executrixes of the Estate of
LAWRENCE A. CUNEO
For a Redetermination of a Deficiency or
a Refund of Personal Income
Taxes under Article(s) 22 of the
Tax Law for the (Year(s) 1961

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

State of New York
County of Albany

Lynn Wilson, 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 10th day of May, 1972, she served the within Notice of Decision (or Determination) by (certified) mail upon SOLOMON STEINER, C.P.A. (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Solomon Steiner, C.P.A. 5215 Shelling Place NE Washington, D.C.

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

10th day of May, 1972.

Martha [Signature]

Lynn Wilson



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

NORMAN F. GALLMAN, PRESIDENT
A. BRUCE MANLEY
MILTON KOERNER

BUILDING 9, ROOM 214A

STATE CAMPUS
ALBANY, N. Y. 12227

AREA CODE 518
457-2655, 6, 7

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

DATED: Albany, New York
May 10, 1972

Lucia K. Cunco & Irene Garbarino
Executrices of the Estate of Lawrence A. Cunco
c/o Van M. Logan, Esq.
11 Park Place
New York, New York

Dear Ms. Cunco and Ms. Garbarino:

Please take notice of the **DECISION** of
the State Tax Commission enclosed herewith.

Please take further notice that pursuant to section(s)
690 of the Tax Law any proceeding
in court to review an adverse decision must be commenced
within **4 months** after the date of this notice.

Any inquiries concerning the computation of tax due or
refund allowed in accordance with this decision or
concerning any other matter relating hereto may be
addressed to the undersigned. These will be referred
to the proper party for reply.

Very truly yours,


Paul B. Coburn
Hearing Officer

cc Petitioner's Representative
Law Bureau

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
LUCIA K. CUNEO :
& :
IRENE GARBARINO : DECISION
as Executrices of the Estate of Lawrence :
A. Cuneo, Deceased :
for Redetermination of Deficiency or for :
Refund of Personal Income Tax Under Article :
22 of the Tax Law for the year 1961 :

Petitioners, Lucia K. Cuneo and Irene Garbarino, as executrices of the Estate of Lawrence A. Cuneo, deceased, have filed a petition for redetermination of deficiency or for refund of Personal Income Tax under Article 22 of the Tax Law for the year 1961 (File #1027). A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on October 21, 1966, at 2:00 P.M. Petitioners appeared by Van M. Logan, Esq.

FINDINGS OF FACT

1. Petitioners, Lucia K. Cuneo and Irene Garbarino, filed a New York State Fiduciary Return for the estate of Lawrence A. Cuneo for the year 1961.
2. On March 16, 1964, the Income Tax Bureau issued a statement of audit changes against the estate of Lawrence A. Cuneo, Lucia K. Cuneo, Executrix, imposing personal income tax on its alleged share of the undistributed taxable income of Peter's Backyard, Inc., for the year ending February 28, 1961, upon the ground that since the corpo-

ration elected to be taxed as a small business corporation, the estate must include in its own income the current undistributed taxable income of such "Tax Option" corporation and accordingly issued a Notice of Deficiency in the sum of \$920.72.

3. Lawrence A. Cuneo died on February 23, 1961.

4. Letters testamentary for the estate of Lawrence A. Cuneo, deceased, were granted to Irene Garbarino and Lucia K. Cuneo, Executrices, named in his last will and testament, by the Surrogate's Court of the County of New York on March 22, 1961.

5. Prior to this death, Lawrence A. Cuneo was the owner of 25 shares of the common stock of Peter's Backyard, Inc., out of a total of 100 shares issued and outstanding.

6. On February 4, 1960, Lawrence A. Cuneo and the owners of all of the other issued and outstanding shares of Peter's Backyard, Inc., entered into a stockholders agreement providing for certain limitations upon the right to transfer or encumber the said stock and further providing a formula for the sale of said stock.

7. Paragraph "3" of the aforesaid stockholders agreement provided that upon the death of one of the parties all of the corporation's stock owned by him shall be "sold to and purchased by" the corporation to the extent it may legally purchase it and the balance of his stock shall be "sold to and purchased by" the surviving stockholders in ratio to their stockholdings. Paragraph "4" of the agreement provided for method of valuing the stock and for the terms of the payment of the purchase price.

8. That on March 24, 1960, Peter's Backyard, Inc., and its shareholders elected to be taxed as a small business corporation pursuant to Section 1372 of the Internal Revenue Code.

9. On the United States Small Business Corporation Return of Income of Peter's Backyard, Inc., for the taxable year beginning March 1, 1960, and ending February 28, 1961, the estate of Lawrence A. Cuneo was listed as the owner of 25 shares of the corporation and its share of undistributed taxable income was fixed at \$14,630.17.

10. On the United States Small Business Corporation Return of Income of Peter's Backyard, Inc., for the taxable year beginning March 1, 1961, and ending February 28, 1962, the estate is not listed as an owner of any shares of the corporation.

CONCLUSIONS OF LAW

A. That the beneficial owners of the stock of Peter's Backyard, Inc., as of February 28, 1961, were required to include in their gross income an amount equal to the corporations undistributed taxable income for its taxable year ending as of that date. Internal Revenue Code Sec. 1373 (b) Reg. Sec. 1.373-1 (a), Reg. Sec. 1.371-1 (d) (1); Harold C. Kean 51 TC No. 35.

B. That control of the shares of Peter's Backyard, Inc., owned by Lawrence A. Cuneo passed to the surviving stockholders at the time of the death of the decedent on February 23, 1961, and therefore they, and not the decedents estate, were the beneficial owners of the decedent's stock on February 28, 1961, even through legal title to the stock had not passed and the purchase price has not been fixed as of that date. In Re Estate of Galewitz, 160 N.Y.S. 2nd 564, 3 A.D. 2d 280 (1st Dept., 1957)

C. That since the estate of Lawrence A. Cuneo, as of February 28, 1961, was not the beneficial owner of the 25 shares of Peter's Backyard, Inc., owned by Lawrence A. Cuneo prior to his death, it properly excluded from New York State taxable income for the year 1961

the undistributable taxable income of Peter's Backyard, Inc., attributable to those shares for the year ending February 28, 1961.

D. That the petition of Lucia K. Cuneo and Irene Garbarino as executrixes of the estate of Lawrence A. Cuneo, deceased, is granted and the notice of deficiency dated March 16, 1964, is cancelled.

DATED: Albany, New York

May 10, 1972.

STATE TAX COMMISSION

COMMISSIONER

Bruce Penley
COMMISSIONER

Walter Coen
COMMISSIONER