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STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

FRANK B. WEBER AND ALICE H. WEBER :

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

For a Redetermination of a Deficiency or  
a Refund of Personal Income & Unincorporated Business  
Taxes under Article(s) 22 and 23 of the  
Tax Law for the (Year(s)) 1965 and 1967:

State of New York  
County of Albany

MARTHA FUNARO , 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 15th day of January , 1973 , she served the within  
Notice of Decision (or Determination) by (certified) mail upon FRANK B. WEBER AND  
ALICE H. WEBER (representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows:

Frank B. and Alice H. Weber  
112 Cypress Drive  
Woodbury, New York 11797

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

15th day of January , 19 73

Lynn Wilson

Martha Funaro

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

FRANK B. WEBER AND ALICE H. WEBER

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

For a Redetermination of a Deficiency or  
a Refund of Personal Income & Unincorporated Business  
Taxes under Article(s) 22 and 23 of the  
Tax Law for the (Year(s) 1965 and 1967:

State of New York  
County of Albany

MARTHA FUNARO, 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 15th day of January, 1973, she served the within  
Notice of Decision (or Determination) by (certified) mail upon CHARLES J.

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

wrapper addressed as follows:

Charles J. McPeak  
158 Main Street  
Port Washington, New York 11050

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

15th day of January, 1973.

Lynn Wilson

Martha Funaro



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A

STATE CAMPUS

ALBANY, N. Y. 12226

AREA CODE 518

457-2655, 6, 7

STATE TAX COMMISSION

NORMAN F. GALLMAN, ACTING PRESIDENT

A. BRUCE MANLEY

MILTON KOERNER

STATE TAX COMMISSION  
HEARING UNIT

EDWARD ROOK  
SECRETARY TO  
COMMISSION

ADDRESS YOUR REPLY TO

**DATED:** Albany, New York  
**January 15, 1973**

**Frank B. and Alice M. Weber**  
**112 Cypress Drive**  
**Woodbury, New York 11797**

**Dear Mr. and Mrs. Weber:**

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

Please take further notice that pursuant to  
Section(s) **690 and 722** of the Tax Law, any  
proceeding in court to review an adverse deci-  
sion must be commenced within **4 months**  
from 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 relative  
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

Enc.

cc: Petitioner's Representative  
Law Bureau

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petitions	:	
of	:	
FRANK B. WEBER AND ALICE H. WEBER	:	DECISION
for Redetermination of Deficiency or for	:	
Refund of Personal Income and Unincorpor-	:	
ated Business Taxes under Articles 22 and	:	
23 of the Tax Law for the Years 1965 and	:	
1967.	:	

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Petitioners, Frank B. Weber and Alice H. Weber, have filed petitions for redetermination of deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1965 and 1967. (File No. 72015093). A formal hearing was scheduled before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, for August 19, 1971, at 9:15 A.M. On August 9, 1971, petitioners' representative, Charles J. McPeak, Esq., advised the State Tax Commission, in writing, that the petitioners waived a formal hearing and requested that the State Tax Commission decide the case upon the entire record contained in the file. The State Tax Commission renders the following decision after due consideration of said record.

ISSUES

I. Did the interest on the condemnation award received by petitioners, Frank B. Weber and Alice H. Weber, from the State of New York during the years 1965 and 1967 constitute income derived from an unincorporated business?

II. Were the expenses of litigation incurred by petitioners, Frank B. Weber and Alice H. Weber, during the years 1965 and 1967 in connection with a condemnation award deductible as ordinary and necessary business expenses?

III. Did the \$10,000.00 expended by petitioners, Frank B. Weber and Alice H. Weber, in 1960, in acquiring replacement property, qualify in 1967 for the nonrecognition exemption under section 1033(a) of the Internal Revenue Code?

FINDINGS OF FACT

1. Petitioners, Frank B. Weber and Alice H. Weber, filed New York State income tax resident returns for the years 1965 and 1967. Petitioner, Frank B. Weber, filed New York State unincorporated business tax returns for said years.

2. On March 16, 1970, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, Frank B. Weber and Alice H. Weber, imposing additional personal income tax for the years 1965, 1966 and 1967 in the sum of \$2,322.05 plus interest, and accordingly issued a Notice of Deficiency in the sum of \$2,732.48. On the same date the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Frank B. Weber, imposing additional unincorporated business tax for the years 1965 and 1967 in the sum of \$1,119.98 plus interest, and accordingly issued a Notice of Deficiency in the sum of \$1,294.92. All of the adjustments contained in the Statements of Audit Changes were conceded by the petitioners, with the exception of those items heretofore set forth in the Statement of Issues.

3. Between 1950 and 1955, petitioners, Frank B. Weber and Alice H. Weber, acquired by purchase a parcel of real property, measuring approximately 12.23 acres, located on Jericho Turnpike, Syosset (unincorporated area), Town of Oyster Bay, County of Nassau and State of New York, at the future intersection of Jericho Turnpike and the proposed Wantagh-Oyster Bay Expressway. Petitioner, Frank B. Weber, is a golf professional. Since the property was acquired, he has used it exclusively for business purposes, whereon he operates a golf driving range, a miniature golf course, gives golf lessons and sells golf clubs, golf balls and golfing accessories.

4. In about 1959, the State of New York, for the purpose of widening Jericho Turnpike and constructing the highway interchange between Jericho Turnpike and the Wantagh-Oyster Bay Expressway, acquired a portion of petitioners, Frank B. Weber and Alice H. Weber's property (approximately 2.10 acres) by condemnation. In 1960, a partial award of \$60,000.00 for the taking was made by the State to them. No agreement as to the total award was reached, and thereafter litigation was commenced in the Court of Claims.

5. Late in 1964, the Court of Claims rendered a decision awarding petitioners, Frank B. Weber and Alice H. Weber, the sum of \$163,750.00, including consequential damages of \$22,000.00. Both sides appealed the decision of the Court of Claims to the Appellate Division of the Supreme Court. The State, in 1965, made a further partial award to them in the amount of \$66,503.01, of which \$33,000.00 was direct damages for the taking, \$22,000.00 was consequential damages to the retained portion, and \$11,503.01 was interest. While the appeals were pending, they and the State arrived at a settlement upon which judgment was rendered on December 19, 1966, in favor of petitioners for the sum of \$147,600.00, plus interest. Accordingly, the State, in 1967, paid to them a final award in the amount of \$35,350.00, plus interest of \$10,013.15.

6. In 1960, within one year after the taking by the State, petitioners, Frank B. Weber and Alice H. Weber, acquired by purchase a parcel of land approximately 2.62 acres immediately adjacent to their retained property, and which said newly acquired land was intended as a replacement for land taken by the State and was and is used by petitioner, Frank B. Weber, in his business. The consideration for the replacement property was \$10,000.00.

7. Legal fees, appraisal fees and disbursements incurred during the course of litigation in the Court of Claims totaled \$21,537.13,

of which \$18,331.82 was paid in 1965 out of the partial award received that year, and \$3,205.13 was paid in 1967 out of the partial award received that year.

CONCLUSIONS OF LAW

A. That the interest payments received by petitioners, Frank B. Weber and Alice H. Weber, from the State of New York on the condemnation award of their business property totaling \$11,503.01 in the year 1965 and \$10,013.15 in the year 1967, constituted unincorporated business gross income for said years in accordance with the meaning and intent of section 705(a) of the Tax Law.

B. That the amounts paid or incurred for legal and appraisal fees and disbursements during the years 1965 and 1967 by petitioners, Frank B. Weber and Alice H. Weber, in prosecuting their claim for compensation for property condemned by the State of New York were capital items and hence were not deductible as ordinary and necessary business expenses. Mertens, Law of Federal Income Taxation (Vol. 4A, §25.59).

C. That the \$10,000.00 expended by petitioners, Frank B. Weber and Alice H. Weber, in 1960 in acquiring replacement property did not qualify for the nonrecognition exemption under section 1033(a) of the Internal Revenue Code for the year 1967 since the basis of the property, which was \$28,000.00, exceeded the cost of the replacement property which was \$10,000.00. The result is not changed by virtue of the fact that a portion of the condemnation award may have constituted severance or consequential damages.

D. That the petitions of Frank B. Weber and Alice H. Weber are denied and the notices of deficiency issued March 16, 1970, are sustained.

DATED: Albany, New York  
January 15, 1973

STATE TAX COMMISSION

\_\_\_\_\_  
COMMISSIONER

*Bruce Mawley*  
\_\_\_\_\_  
COMMISSIONER

*Matthew Korman*  
\_\_\_\_\_  
COMMISSIONER