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STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

JOHN A. MENNELLA, SR. and MARY MENNELLA

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

For a Redetermination of a Deficiency or  
a Refund of Personal Income and Unincorporated Business  
Taxes under Article(s) 22 and 23 of the  
Tax Law for the Year(s) 1962, 1963, 1964  
and 1965.

State of New York  
County of Albany

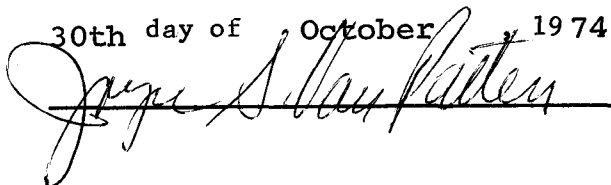
JANET MACK, being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 30th day of October, 1974, she served the within  
Notice of Decision (or Determination) by (certified) mail upon JOHN A. MENNELLA, SR.  
and MARY MENNELLA (representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Mr. and Mrs. John A. Mennella, Sr.  
Gardner Hollow Road  
Poughquag, New York

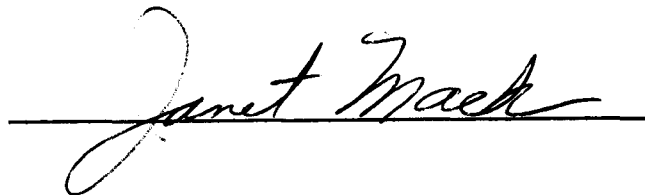
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Post Office Department within the State of New York.

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

30th day of October, 1974





STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

JOHN A. MENNELLA, SR. and MARY MENNELLA

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

For a Redetermination of a Deficiency or  
a Refund of Personal Income and Unincorporated Business  
Taxes under Article(s) 22 and 23 of the  
Tax Law for the Year(s) 1962, 1963, 1964  
and 1965.

State of New York  
County of Albany

JANET MACK, 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 30th day of October, 1974, she served the within Notice of Decision (or Determination) by (certified) mail upon SOL KAPLAN, 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:

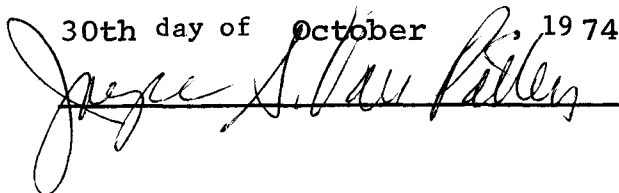
Sol Kaplan, P.A.  
1 Great Neck Road  
Great Neck, New York 11021

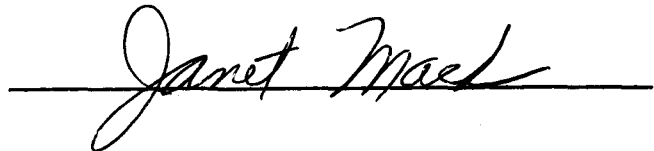
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

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

30th day of October, 1974







STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION  
HEARING UNIT

EDWARD ROOK  
SECRETARY TO  
COMMISSION

STATE TAX COMMISSION

MARIO A. PROCACCINO, PRESIDENT  
A. BRUCE MANLEY  
MILTON KOERNER

BUILDING 9, ROOM 214-A  
STATE CAMPUS  
ALBANY, N.Y. 12227

AREA CODE 518

ADDRESS YOUR REPLY TO

MR. WRIGHT 457-2655  
MR. LEISNER 457-2657  
MR. COBURN 457-2896

**DATED:** Albany, New York  
**October 30, 1974**

**Mr. and Mrs. John A. Mennella, Sr.**  
**Gardner Hollow Road**  
**Poughquag, New York**

**Dear Mr. and Mrs. Mennella:**

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,

**Nigel G. Wright**

HEARING OFFICER

Enc.

cc: Petitioner's Representative  
Law Bureau

AD-1.12 (8/73)

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
JOHN A. MENNELLA, SR. and MARY MENNELLA : 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 and of :  
Unincorporated Business Taxes under :  
Article 23 of the Tax Law for the :  
Years 1962, 1963, 1964 and 1965. :

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Petitioners, John A. Mennella, Sr. and Mary Mennella, have filed a petition for a redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the years 1963 through 1965 and of unincorporated business taxes under Article 23 of the Tax Law for the years 1962 through 1965. (File No. 34854303).

A formal hearing was held before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on December 11, 1973, at 1:00 P.M. The petitioners were represented by Sol Kaplan, P.A. The Income Tax Bureau was represented by Saul Heckelman, Esq., (James A. Scott, Esq., of counsel).

ISSUE

Was the gain on the sale of lots received by petitioners, John A. Mennella, Sr. and Mary Mennella, during the years 1962 through 1965, and reported by them as capital gains, ordinary business income under the personal income tax, and was such gain subject to the unincorporated business tax?

1. During the years 1962 through 1965, petitioner, John A. Mennella, Sr., subdivided his farm property into lots and offered them for sale. He claims that the income that he received from the sale of these lots constitutes capital gains and not ordinary business income for purposes of the personal income tax.

2. On March 25, 1968, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, John A. Mennella, Sr. and Mary Mennella, imposing additional personal income tax for the years 1963 through 1965, upon the grounds that the income received by them from the sale of the aforementioned lots constituted ordinary business income and not capital gains. In accordance with the aforesaid Statement of Audit Changes, it issued a Notice of Deficiency in the sum of \$2,884.72.

3. On March 25, 1969, the Income Tax Bureau issued a second Statement of Audit Changes against petitioners imposing unincorporated business tax for the years 1962 through 1965, upon the grounds that the selling of the aforementioned lots constituted the carrying on of an unincorporated business. In accordance with the aforesaid Statement of Audit Changes, it issued a Notice of Deficiency in the sum of \$2,405.21.

4. In 1957, petitioner, John A. Mennella, Sr., had purchased 600 acres of land from his son-in-law. For several years, he operated a small part of this land as a dairy farm. In 1960, he made some substantial improvements, greatly increasing the value of the property, and sold off 10 lots. In 1961, he sold off another 25 lots. In 1962, due to financial difficulties, petitioner sold his herd of cattle and, in order to sell off more of his land, had dirt access roads built. That year he sold off

17 lots. In 1963, he started building gravel roads and, in order to seal the stones, had oil and hot tar poured over the roads, thus producing hard surfaced roads. That year he sold off 26 lots. In 1964, he sold off 18 lots and in 1965, 17 lots. At the end of 1965, a portion of petitioner's land still remained undivided and unsold.

CONCLUSIONS OF LAW

A. Income received by a taxpayer from the sale of a tract of land will be considered ordinary business income, unless it qualifies under section 1237 of the Internal Revenue Code for capital gains treatment. The sale of property here in issue does not so qualify. Petitioner made substantial improvements that significantly enhance the value of the land.

B. Petitioners have not carried the burden of proof that the sales here in question were not sales in liquidation of the farm business or were not sales in the ordinary course of a real estate business. The gains here in issue are therefore subject to unincorporated business tax.

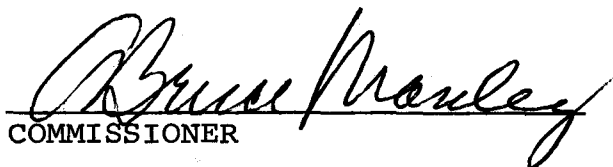
C. That the gain on the sale of lots received by petitioners, John A. Mennella, Sr., and Mary Mennella, during 1962 through 1965 and reported as long-term capital gains must be held to be business income subject to both the personal income and unincorporated business taxes.

D. That the petition of John A. Mennella, Sr. and Mary Mennella is denied and the notices of deficiency, issued March 25, 1968, are sustained.

DATED: Albany, New York  
October 30, 1974

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER