

MEMORANDUM

TO: Mr. Gabriel DiCerbo, Chief
Review Unit
Income Tax Bureau
Room 104, Building #8

DATE: 3/14/74

SOCIAL SECURITY NO.

FROM: Nigel G. Wright, Hearing Officer
Hearing Unit
Room 214A, Building #9

RE: Fergus Shaw, Jr.

Please advise as to the last known address for the above named taxpayer.


HEARING OFFICER

Taxpayer's last known address is:

139 WAGSTAFF LN.
WEST ISLIP, N.Y.
1972 return

RECEIVED
NEW YORK STATE
INCOME TAX BUREAU
MAR 15 1974
REVIEW UNIT
ALBANY OFFICE

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

FERGUS SHAW, JR. & ETHEL SHAW

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) 1966 & 1967 :

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

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 22nd day of March , 1974 , she served the within
Notice of Decision (or Determination) by (certified) mail upon Fergus & Ethel Shaw,
Jr.

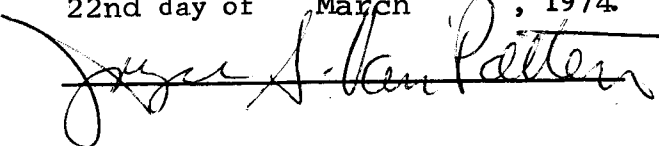
(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Mr. & Mrs. Fergus Shaw, Jr.
139 Wagstaff Lane
West Islip, New York

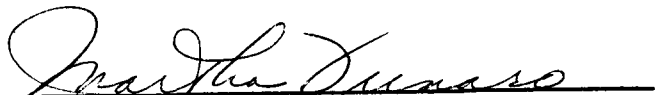
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Post Office Department within the State of New York.

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

22nd day of March , 1974





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

FERGUS SHAW, JR. & ETHEL SHAW

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) 1966 & 1967;

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

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 8th day of March, 1974, she served the within
Notice of Decision (or Determination) by (certified) mail upon Fergus, Jr. &
Ethel Shaw (representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows:

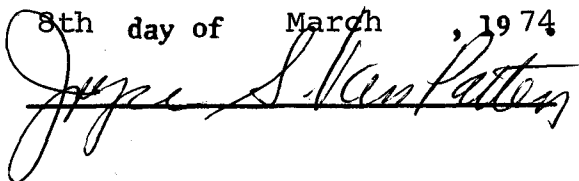
Mr. & Mrs. Fergus Shaw, Jr.
50 Belton Road
Babylon, New York 11702

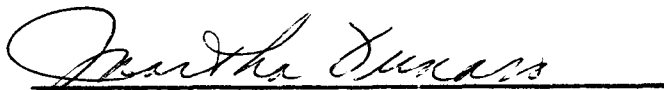
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Post Office Department within the State of New York.

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

8th day of March, 1974





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

FERGUS SHAW, JR. & ETHEL SHAW

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) 1966 & 1967.:

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

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 8th day of March, 1974, she served the within
Notice of Decision (or Determination) by (certified) mail upon Harold R.
Hofner, 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:

Harold R. Hofner, C.P.A.
66 Plaindome Road
Sound Beach, 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

8th day of March, 1974.

Joyce Stanfatten

Martha Funaro



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

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

AREA CODE 518
457-2655, 6, 7

STATE TAX COMMISSION
Mario A. Procaccino
~~STATE TAX COMMISSION~~, PRESIDENT

A. BRUCE MANLEY
MILTON KOERNER

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

DATED: Albany, New York
March 8, 1974

Mr. & Mrs. Fergus Shaw, Jr.
50 Belton Road
Babylon, New York 11702

Dear Mr. & Mrs. Shaw:

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

Please take further notice that pursuant to **Section 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 relat-
ing 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

cc Petitioner's Representative
Law Bureau

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
FERGUS SHAW, JR. & ETHEL SHAW	:	DECISION
	:	
for a Redetermination of a Deficiency	:	
or for Refund of Personal Income Tax	:	
under Article 22 of the Tax Law for	:	
the Years 1966 and 1967.	:	
	:	
	:	

Fergus Shaw, Jr. and Ethel Shaw filed a petition under section 689 of the Tax Law for the redetermination of deficiency in personal income tax under Article 22 of the Tax Law, dated February 24, 1970, for 1966 in the amount of \$68.11 plus \$11.68 interest for a total of \$79.79 and for 1967 in the amount of \$564.74 plus \$62.95 interest for a total of \$627.69.

A hearing was duly held on June 14, 1972, at the offices of the State Tax Commission, 80 Centre Street, New York City, before Nigel G. Wright, Hearing Officer. The petitioners were represented by Harold R. Hofner, C.P.A. The Income Tax Bureau was represented by Saul Heckelman, Esq., appearing by Francis X. Boylan, Esq. The record of said hearing has been duly examined and considered.

ISSUE

The issue in this case is the proper method by which to apportion the cost of a large tract of land to a small portion which has been appropriated by the State, when the cost of the small portion is necessary to determine both the amount of capital gain realized therefrom and the proper year when the

gain was first realized for purposes of fixing the period with which property must be replaced under I.R.C. 1033(a)(3)(B) to qualify for nonrecognition of such gain to the extent the property was replaced.

FINDINGS OF FACT

1. On March 3, 1960, petitioners had purchased a 6 1/2 acre tract of property in Babylon, New York on Deer Park Avenue. The cost of this property was \$100,000.00 and the value of the land alone without the stock and buildings was \$21,567.00. It was a tree nursery at the time and had a zoning variance to do business as a nursery along the frontage and going back 100 feet. There was an outdoor lathe "garden" type building and several sheds on this front portion. The back portion was zoned "residence C" but had no streets and there was no demand for housing. Petitioner's appraiser testified that in the petitioners locality, a variance once granted is continued and never taken away.

2. Part of petitioner's Babylon, New York tract was appropriated as of June 13, 1962, by the State of New York. The part condemned was the frontage running 374 feet along Deer Park Avenue and going 61 feet deep for an area of 22,563 square feet or .518 acres. That left a strip only 39 feet deep remaining under the alleged terms of the zoning variance. The exact terms of the variance have not been stated by petitioner.

3. As a result of the appropriation, the tax assessment on the Babylon tract was reduced from \$8,490.00 to \$8,425.00, a reduction of \$65.00.

4. An appraisal by a William F. Herns submitted in evidence by petitioners claims that this appropriation "destroyed the original showroom, [and] substantial nursery stock..." The Hern appraisal assigns 42.55% of the value of the entire tract to the front 100 feet. That ratio of the original cost of the entire tract of \$28,567.00 gives a cost for the portion taken of \$9,090.49.

5. Petitioners actually vacated the appropriated parcel when the State engineers had to get in which was in 1967 or 1968. At that time, they had received a new variance and proceeded to move the garden building and sheds further back from the road and continued in business.

6. New property was purchased by petitioners on December 15, 1965. This was a 35-acre tract in Manorville, New York about 15 miles east of Babylon. The cost and expenses of such purchase amounted to \$50,277.94. Petitioners grow nursery stock on this parcel.

7. Petitioners received payments for the appropriated tract in 1963, 1966 and 1967, of respectively, \$8,198.49, \$2,000.00, and \$14,590.00 totaling \$24,788.49. The total of \$24,788.49 had been agreed upon as a final settlement on July 12, 1966. The petitioner incurred expenses in the appropriation proceedings amounting to \$1,745.00, so that the net amount realized on the condemnation of the appropriated parcel was \$23,043.49.

8. Petitioners filed Federal and New York State income tax returns, but did not report any income from the appropriation of the Babylon property.

They take the position that the new property purchased in December, 1965, qualifies as a replacement of the appropriated property so as to defer any gain therefrom under section 1033 of the Internal Revenue Code.

This is based on the assertion that the purchase of the new property in 1965 met the requirement of I.R.C. section 1033(a)(3)(B)(2) as it then read (see U.S. Treas. Reg. 1.1033(a)-2(c)(3)) that new property must be purchased before the end of the taxable year following the year in which any part of the gain otherwise taxable is realized, because of the further assertion that said gain was first realized no earlier than in 1964. To reach this result, petitioners asserts that the basis of the appropriated parcel was greater than the \$8,198.49 advance received in 1963 so that they did not recover this basis until the receipt of the 1965 advance payment.

9. The deficiencies asserted add to petitioners' income in the amount of \$2,000.00 in 1966 and \$14,590.00 in 1967. This is asserted on the basis that petitioners must have realized some gain on the appropriation of the Babylon property when they received the first payment in 1963 so that the purchase of the new property in 1965 could not have been purchased in the taxable year following the year in which said gain was realized with the result that section 1033 of the I.R.C. would not apply. To reach this result, the deficiency assumes that the basis of the appropriated parcel was less than the advance payment received in 1963.

10. (a) The cost basis of the appropriated parcel is \$3,180.00 if the cost of the original parcel is simply prorated over each acre.

10. (b) The cost basis of the appropriated parcel is \$9,090.49, as testified by an appraiser William F. Heins, if it is proper to appraise the front parcel covered by the zoning variance at a higher value than the rear portion. That appraisal assigns 42.55% of total value to such front portion of about 1/2 acre and 57.45% or \$12,477.00 to the back 6 acres which are used solely for nursery stock. The front business acreage is then valued at about \$18,000.00 an acre and the rear nursery stock acreage is valued at about \$2,000.00 an acre.

CONCLUSIONS OF LAW

The cost basis of the appropriated parcel must be computed by use of prorating the cost of the whole parcel.

The cost basis urged by the petitioner on the basis of the appraiser must be rejected. That appraisal is based upon a relatively high valuation for the appropriated parcel on the theory that it was front footage which was available for business use. Yet, after the appropriation, the business continued on the remaining parcel which had been valued relatively low.

Furthermore, a critical factor in the basis of the appraisal is the alleged terms of the zoning variance and the alleged difficulty of obtaining a new variance. Yet the documents which would best establish these allegations have not been offered in evidence. It would appear from the facts, that the appropriated

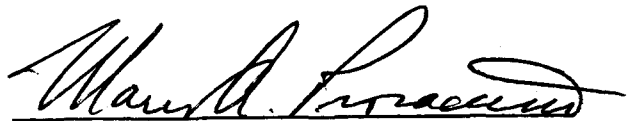
parcel should, in fact, be valued as if it had been part of the rear land which was reduced in acreage and which was replaced in function by the new property purchased.

DECISION


The deficiency is found to be correct and is due together with such interest as shall be computed under section 684 of the Tax Law.

DATED: Albany, New York
March 8, 1974

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER