

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

JOSEPH MASCIOLI AND ROSE MASCIOLI

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Personal Income :  
Taxes under Article (x) 22 of the :  
Tax Law for the Year (s) 1971 ~~(s) 1971~~ (x) :  
1971

State of New York  
County of Albany

John Huhn , 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 9 day of June , 1978, she served the within  
Notice of Decision by (certified) mail upon Joseph Mascioli and  
Rose Mascioli  
~~(representative of)~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Joseph Mascioli and Rose Mascioli  
7 Pine Tree Lane  
Manhasset, NY 11030  
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 Postal Service within the State of New York.  
That deponent further says that the said addressee is the ~~(representative of)~~  
~~(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

9 day of June , 1978

*[Signature]*

*John Huhn*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

JOSEPH MASCIOLI AND ROSE MASCIOLI

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Personal Income :  
Taxes under Article(\*) 22 of the :  
Tax Law for the Year ~~(s) or Period(s)~~ :  
1971

State of New York  
County of Albany

John Huhn , being duly sworn, deposes and says that  
~~s~~he is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 9 day of June , 1978, ~~s~~he served the within  
Notice of Decision by (certified) mail upon Herman L. Fried,  
CPA

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Herman L. Fried, CPA  
3000 Marcus Ave.  
Lake Success, NY 11040

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 Postal Service within the State of New York.

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

9 day of June , 1978.

  
\_\_\_\_\_

  
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STATE OF NEW YORK  
STATE TAX COMMISSION  
TAX APPEALS BUREAU  
ALBANY, NEW YORK 12227  
**June 9, 1978**

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

**Joseph Mascioli and Rose Mascioli  
7 Pine Tree Lane  
Manhasset, NY 11030**


**Dear Mr. & Mrs. Mascioli**

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

You have now exhausted your right of review at the administrative level. Pursuant to section **690** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within **4 months** from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

  
**Aloysius J. Mendez  
Assistant Director**

cc: Petitioner's Representative  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of :

JOSEPH MASCIOLI AND ROSE MASCIOLI : DECISION

for Redetermination of a Deficiency or :  
for Refund of Personal Income Tax under :  
Article 22 of the Tax Law for the Year :  
1971. :

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Petitioners, Joseph Mascioli and Rose Mascioli, 7 Pine Tree Lane, Manhasset, New York 11030, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1971 (File No. 13295).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1977 at 2:45 P.M. Petitioners appeared by Herman L. Fried, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUE

Whether the replacement property purchased by petitioner Joseph Mascioli, after threat or imminence of condemnation of the property subsequently converted, was similar property, thereby permitting petitioners a non-recognition of the gain for the year 1971, pursuant to election by said petitioners under section 1033 of the Internal Revenue Code.

FINDINGS OF FACT

1. Petitioners, Joseph Mascioli and Rose Mascioli, timely filed a New York State resident income tax return for the year 1971.

2. On March 31, 1975, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, Joseph Mascioli and Rose Mascioli, stating additional personal income tax due in the sum of \$5,086.96, plus interest, based on their failure to include as income a condemnation award and interest thereon received in 1971. Accordingly, a Notice of Deficiency was issued on March 31, 1975 to petitioners for tax and interest due, as stated above.

3. Petitioners attached an "amended statement for election to postpone gain from involuntary conversion filed in 1969 return" to their Federal income tax return for the year 1971, in which they listed the total condemnation award received, the cost of the replacement property, the postponed gain and the basis of the replacement investment.

4. Prior to January 2, 1969, petitioner Joseph Mascioli was advised by New York State that property in which he had an interest was to be the subject of condemnation. The property, which consisted of land and a gasoline station, was located in the Town of Islip, Suffolk County, New York. Joseph Mascioli acquired the condemned property by deed dated June 3, 1955 from John Chaika and Pauline Chaika. The deed was recorded in the Suffolk County Clerk's office on June 8, 1955 in Liber 3902, page 374. On June 23, 1969, \$82,558.91 was paid to Joseph Mascioli under an agreement for partial payment dated January 11, 1969. Pursuant to a decision of the New York State Court of Claims dated May 26, 1971, a total award of \$125,800.00 was determined to be due. Petitioners accordingly received the balance, plus \$7,148.98 in interest, in 1971.

5. The Internal Revenue Service audited and accepted the return of petitioners for 1969 which contained the election (see Finding of Fact "3", above), subject to the same interest income adjustment on the condemnation award which New York State made.

6. Prior to January 2, 1969, the replacement property was owned by Charles Mascioli, petitioner Joseph Mascioli and Steinway Terminal, each party having a one-third interest. On January 2, 1969, Charles Mascioli deeded his one-third interest to petitioner Joseph Mascioli and said deed, recorded in the County Clerk's office of Nassau County on August 20, 1969 in Liber 802<sup>4</sup>, page 30<sup>4</sup>, recited: "Upon the execution and delivery of this deed, the above described premises will be owned as follows: Joseph Mascioli -2/3rds interest Steinway Terminal - 1/3rd interest, as tenants in common."

7. A subsequent U.S. partnership return of income for 1973 states the name of the parties in regard to the replacement property to be "Joseph Mascioli & Steinway Terminal Tenants in Common of Plainview Property, 467 Great Neck Rd. Great Neck, NY 11021."

8. The parties agree that if the property was owned by the parties as tenants in common, and not by a partnership before the change occasioned by the replacement, the transaction would involve real property and the replacement property would qualify petitioners for the election to postpone gain.

9. Replacement property was purchased by petitioner within two years from the involuntary conversion by New York State.

#### CONCLUSIONS OF LAW

A. That the real property appropriated was owned by petitioner Joseph Mascioli.

B. That the replacement property was a one-third interest in similar property held as tenants in common.

C. That a tenant in common is a person with an estate in real property and is not an interest in a partnership which holds real property, such an interest being treated as a personal property.

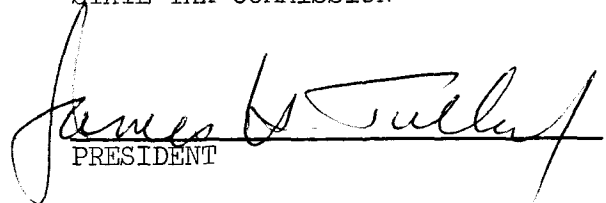
D. That petitioners, Joseph Mascioli and Rose Mascioli, properly elected to postpone recognition of the gain on the condemnation, pursuant to section 1033 of the Internal Revenue Code.

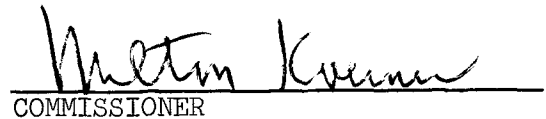
E. That the petition of Joseph Mascioli and Rose Mascioli is granted and the Notice of Deficiency dated March 31, 1975 is cancelled.

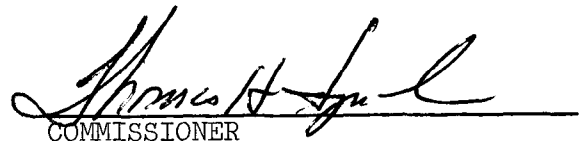
DATED: Albany, New York

June 9, 1978

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER