

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Raymond & Sylvia Krinsky :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income & UBT :
under Article 22&23 of the Tax Law :
for the Years 1961,1962,1963. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of November, 1979, he served the within notice of Decision by certified mail upon Raymond & Sylvia Krinsky, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Raymond & Sylvia Krinsky
23542 Via Benavente
Mission Viejo, CA 92692

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
9th day of November, 1979.

Joanna Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 9, 1979

Raymond & Sylvia Krinsky
23542 Via Benavente
Mission Viejo, CA 92692

Dear Mr. & Mrs. Krinsky:

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(s) 690 & 722 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
RAYMOND KRINSKY and SYLVIA KRINSKY : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income and Unin- :
corporated Business Taxes under Articles :
22 and 23 of the Tax Law for the Years :
1961, 1962 and 1963. :

Petitioners, Raymond Krinsky and Sylvia Krinsky, 23542 Via Benavente, Mission Viejo, California 92692, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1961, 1962 and 1963 (File No. 01310).

On December 13, 1978, petitioners informed the State Tax Commission, in writing, that they desired to waive a small claims hearing and to submit the case to the State Tax Commission, based on the entire record contained in the file.

ISSUES

I. Whether \$25,000.00 paid to petitioner Raymond Krinsky for a covenant not to compete was subject to unincorporated business tax.

II. Whether "reasonable cause" exists for the cancelling of penalties imposed for failure to file unincorporated business tax returns for 1962 and 1963.

FINDINGS OF FACT

1. Petitioners, Raymond and Sylvia Krinsky, filed New York State combined income tax returns for 1961, 1962 and 1963. Petitioner Raymond Krinsky filed an unincorporated business tax return for 1961, but did not file unincorporated business tax returns for 1962 and 1963.

2. On December 12, 1965, petitioners reported changes in Federal taxable income only to petitioner Raymond Krinsky's taxable income, pursuant to section 659 of the Tax Law. Based on this information and the fact that petitioner Raymond Krinsky did not file unincorporated business tax returns for 1962 and 1963 and report the gain from the installment sale of his business, the interest income thereon and a payment received for a covenant not to compete, the Income Tax Bureau issued a Statement of Audit Changes on July 15, 1966. Said Statement was for personal income tax of \$154.01, unincorporated business tax of \$2,634.02, plus penalty of \$594.70 (pursuant to section 685(a) of the Tax Law) and interest of \$575.78, for a total due of \$3,959.51.

3. On November 9, 1966, petitioners remitted a check for \$2,000.00 to be applied against the tax liability for issues conceded by them at the conference held by the Income Tax Bureau on October 20, 1966.

4. On May 22, 1967, the Income Tax Bureau issued a Notice of Deficiency based on the aforementioned Statement of Audit Changes.

5. On August 15, 1967, the Income Tax Bureau received a petition for a hearing. Attached thereto was a statement by the certified public accountant and preparer of petitioners' returns in which he claimed responsibility for the non-filing of unincorporated business tax returns; accordingly, he requested that the penalty be abated.

6. Petitioner Raymond Krinsky agreed that interest income and installment sale gain from the sale of the business were subject to unincorporated business tax. He took issue only with the imposition of unincorporated business tax on the income which resulted from a covenant not to compete.

7. In July of 1961, petitioner Raymond Krinsky sold his fuel oil business as a result of his induction into military service. There were two separate contracts. The first contract was for the sale of the assets and goodwill on the installment basis. The second contract was a restrictive covenant, which stated that the

buyer of the business agreed to pay the seller \$25,000.00 over a period of years if the seller refrained from competing with the buyer for five years from the date of sale of the business.

8. Petitioner Raymond Krinsky contended that two separate contracts were in effect and that the restrictive covenant was an isolated transaction, separate from the sale of the business.

CONCLUSIONS OF LAW

A. That since petitioners, Raymond and Sylvia Krinsky, filed combined New York State income tax returns for the years at issue and since petitioner Sylvia Krinsky was not engaged in the unincorporated business, the Income Tax Bureau is directed to delete her name from the Notice of Deficiency issued on May 22, 1967.

B. That the covenant not to engage in an occupation or undertaking that would conflict with the business interests of the buyer constituted the surrender of an intangible asset, property right or right of value directly connected with the sale of the business.

C. That the income derived by petitioner Raymond Krinsky during the years at issue, from the covenant not to compete, constituted unincorporated business gross income, within the meaning of section 705 of the Tax Law; therefore, it was subject to tax under section 701 of the Tax Law.

D. That petitioners' failure to file unincorporated business tax returns was due to reasonable cause; therefore, all penalties are cancelled.

E. That the petition of Raymond and Sylvia Krinsky is granted to the extent shown in Conclusions of Law "A" and "D". The Income Tax Bureau is hereby directed

to modify the Notice of Deficiency issued on May 22, 1967; however, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 9 1973

STATE TAX COMMISSION

James W. Tucker

PRESIDENT

Merton Krum

COMMISSIONER

James H. [unclear]

COMMISSIONER