

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

October 9, 1979

Joseph Reiss
1237 E. 23rd St.
Brooklyn, NY 11203

Dear Mr. Reiss:

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 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

Sincerely,

STATE TAX COMMISSION

cc: Petitioner's Representative
Harold Deitchman
60 E. 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Joseph Reiss :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Personal Income Tax :

under Article 22 of the Tax Law

for the Year 1970. :

State of New York

County of Albany

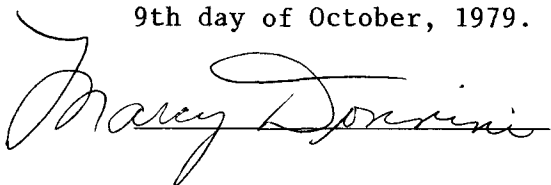
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1979, he served the within notice of Decision by certified mail upon Joseph Reiss, the petitioner in the within proceeding, by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

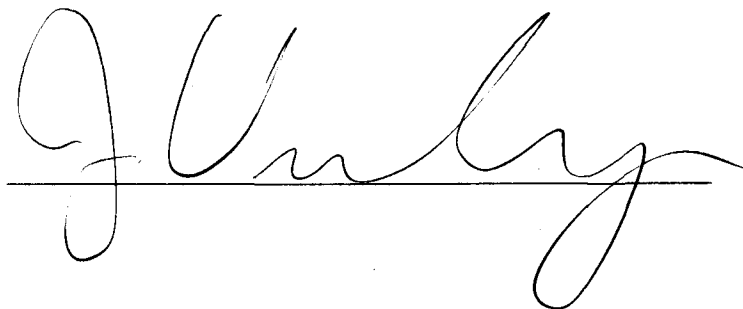
Joseph Reiss
1237 E. 23rd St.
Brooklyn, NY 11203

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 October, 1979.


Nancy Dorrini


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Joseph Reiss :

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for Redetermination of a Deficiency or a Revision :

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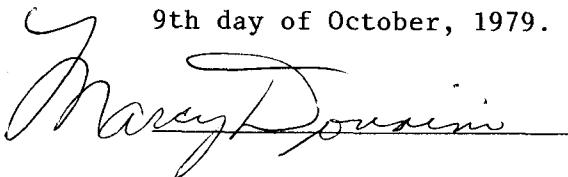
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1979, he served the within notice of Decision by certified mail upon Harold Deitchman the representative of the petitioner in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

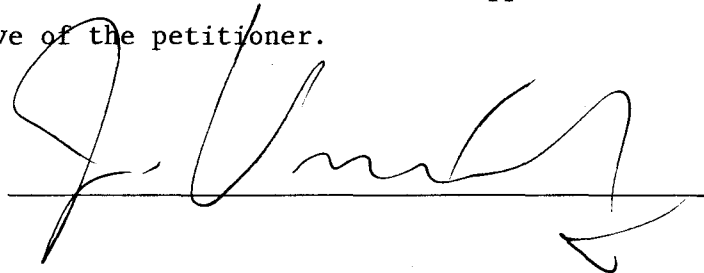
Mr. Harold Deitchman
60 E. 42nd St.
New York, NY 10017

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
9th day of October, 1979.


Mary Dousin


Jay Vredenburg

STATE TAX COMMISSION

A small claims hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 22, 1978 at 10:45 A.M. Petitioner appeared by Harold Deitchman, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether amounts paid to petitioner pursuant to a consulting agreement constituted ordinary income or capital gain income.

II. Whether the Income Tax Bureau properly adjusted the contributions claimed on petitioner's 1970 income tax return.

FINDINGS OF FACT

1. Petitioner, Joseph Reiss, filed a resident New York State combined income tax return for 1970 with his wife, Miriam Reiss.

2. On March 25, 1974, the Income Tax Bureau issued a Notice of Deficiency against Joseph Reiss, based on an audit of his return. Said audit resulted in the inclusion (as ordinary income) of a portion of income which had been reported by him as a capital gain. It also resulted in the reduction of claimed charitable contributions to the amount for which substantiation had been submitted. The Notice of Deficiency also included other adjustments which were not contested by petitioner and are not at issue here.

3. Petitioner's representative contended that petitioner had properly reported the gain on the sale of stock in a corporation as a capital gain, and that no portion of amounts received constituted ordinary income. He also contended that contributions should be allowed as claimed on petitioner's return, since most of the total amount claimed had been substantiated.

4. Petitioner, Joseph Reiss, and Arthur Ducas were owners of Osher & Reiss, Inc. ("O & R") and Orco Oil Burner Co., Inc., two corporations engaged in the retail oil distribution business. Mr. Reiss had been in the oil business for approximately 35 years. During 1970 negotiations took place for the sale of the stock of the two corporations.

5. On August 6, 1970, Mr. Reiss and Mr. Ducas signed an agreement transferring their capital stock in O & R to Halber Fuel Corp. ("Halber") in return for a consideration of \$500,000.00. The consideration consisted of checks totalling \$71,428.57 and promissory notes totalling \$428,571.43. The agreement stated in part that "No portion of the \$500,000.00 payment hereunder is being paid in consideration of any covenant not to compete."

6. In connection with this agreement, petitioner also entered into a consulting agreement with Nassau Reliance Fuel Corp. ("Nassau"). This agreement provided that Mr. Reiss would perform consulting services for the period of the agreement, i.e., 7 years. The agreement also contained a covenant not to compete for the period of the agreement, plus 3 years. Under the terms of the agreement, Mr. Reiss was to receive \$2,675.00 per month for 84 months. In the event of his death or disability, the payments were to continue until all 84 payments were made. The payments were made to Mr. Reiss during his lifetime. After his death in 1977, the final monthly payments were made to his estate.

7. Petitioner never performed any consulting services for Nassau. Petitioner's representative claimed that Nassau never intended that petitioner perform any of said services. Said representative further claimed that the so-called consulting agreement was really a sham and that the payments made thereunder were actually for the purchase of stock.

8. In the sale of O & R, petitioner and Mr. Ducas were represented by a large and well-known New York City law firm.

9. On October 29, 1970, Total Resources, Inc. acquired Halber and assumed all of Halber's obligations arising from the sale of O & R to Halber. Petitioner's representative submitted a letter from Total Resources, Inc., stating that it paid petitioner a monthly sum of \$2,675.00, and that said payments were shown as reductions of notes due to him and were never deducted by the corporation as an expense.

10. Petitioner reported total income of \$107,081.28 for the year at issue. He claimed \$9,149.50 in charitable deductions. On audit, he was allowed \$8,357.00 of said charitable deductions, the amount for which he had provided documentary substantiation. Testimony at the hearing substantiated the additional contributions.

CONCLUSIONS OF LAW

A. That the amounts paid to petitioner by Nassau Reliance Fuel Corp. did not constitute payment for the stock of Osher & Reiss, Inc., but rather were for consulting services and for a covenant not to compete. Accordingly, said payments constitute ordinary income and not capital gain income.

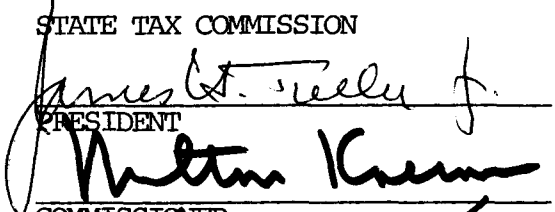
B. That petitioner is entitled to a deduction for charitable contributions of \$9,149.50.

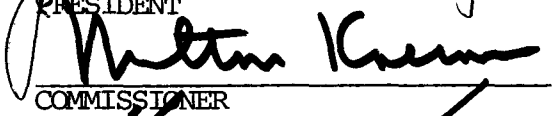
C. That the petition of Joseph Reiss is granted to the extent indicated in Conclusion of Law "B"; that the Notice of Deficiency issued March 25, 1974 is to be modified accordingly; and that, except as so modified, the deficiency is in all other respects sustained.

DATED: Albany, New York

OCT 9 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER



New York State Department of
TAXATION and FINANCE
TAX APPEALS BUREAU

TO Mr.. Coburn.....

No better address - please file.

10/23/79

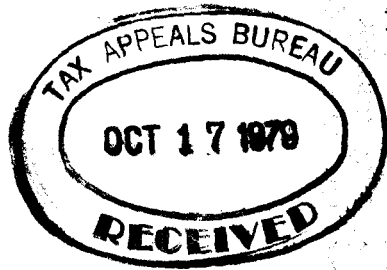
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STATE OF NEW YORK
Department of Taxation and Finance
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

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Joseph Reiss
1237 E. 23rd St.
Brooklyn, NY 11203

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ALBANY, NEW YORK 12227

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STATE TAX COMMISSION

In the Matter of the Petition :
of :
JOSEPH REISS : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Year :
1970. :
:

Petitioner, Joseph Reiss (now deceased), 1237 East 23rd Street, Brooklyn, New York 11203, 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 1970 (File No. 14024).

A small claims hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 22, 1978 at 10:45 A.M. Petitioner appeared by Harold Deitchman, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

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CONCLUSIONS OF LAW

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B. That petitioner is entitled to a deduction for charitable contributions of \$9,149.50.

C. That the petition of Joseph Reiss is granted to the extent indicated in Conclusion of Law "B"; that the Notice of Deficiency issued March 25, 1974 is to be modified accordingly; and that, except as so modified, the deficiency is in all other respects sustained.

DATED: Albany, New York

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