

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Estate of Gladys F. Aries :  
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 1972. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

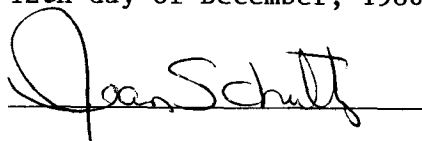
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Estate of Gladys F. Aries, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

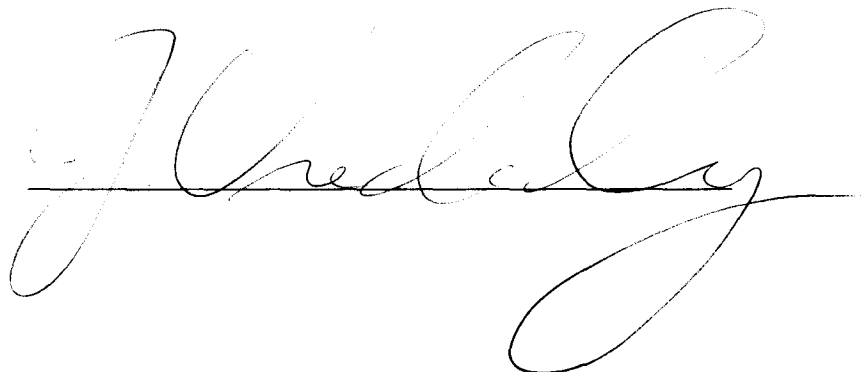
Estate of Gladys F. Aries  
c/o S. William Friedman  
11 Third St.  
Rye, NY 10580

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  
12th day of December, 1980.

  
Joan Schutt



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Estate of Gladys F. Aries :  
for Redetermination of a Deficiency or a Revision :  
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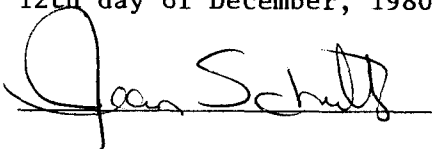
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon S. William Friedman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

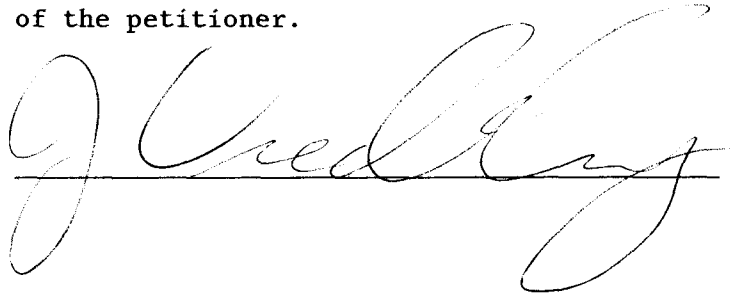
Mr. S. William Friedman  
11 Third St.  
Rye, NY 10580

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  
12th day of December, 1980.

  
Jan Schult

  
Jay Vredenburg

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

December 12, 1980

Estate of Gladys F. Aries  
c/o S. William Friedman  
11 Third St.  
Rye, NY 10580

To the Executors:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
S. William Friedman  
11 Third St.  
Rye, NY 10580  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
ESTATE OF GLADYS F. ARIES : DECISION  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Year 1972. :

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Petitioner, Estate of Gladys F. Aries, c/o S. William Friedman, Esq., 11 Third Street, Rye, New York 10580, 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 1972 (File No. 19473).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on October 29, 1979 at 2:30 P.M. Petitioner appeared by S. William Friedman, Esq. The Audit Division appeared by Ralph Vecchio, Esq. (Frank Levitt, Esq., of counsel).

#### ISSUE

Whether the appropriation award by the Court of Claims to the estate of the decedent property owner was taxable as income in respect of a decedent pursuant to section 691 of the Internal Revenue Code, or constituted proceeds earned by the estate which qualified for a stepped-up basis pursuant to section 1014 of the Code.

#### FINDINGS OF FACT

1. On April 11, 1977, the Audit Division issued a Notice of Deficiency to petitioner, the Estate of Gladys F. Aries, asserting additional taxes in the amount of \$12,678.95, plus interest of \$3,793.16, for a total of \$16,472.11.

The position of the Audit Division was set forth in the accompanying Statement of Audit Changes, as follows:

"Since it was not shown why the remaining portion of a condemnation award should be excluded from the New York State Income Tax Fiduciary Return of the Estate of Gladys F. Aries, the balance of the award (\$67,701.00) and interest (\$14,854.00) has been included on the 1972 Fiduciary Return."

2. The Audit Division conceded at the formal hearing that the interest on the award had been properly reported by petitioner on the 1972 New York State Income Tax Fiduciary Return, and further, that the award was a capital asset. Thus, the only issue remaining unresolved is whether the award constituted income in respect of a decedent.

3. Gladys F. Aries (the "decedent") and Sylvia Neidich owned approximately 0.542 acres of real property situated on the easterly side of Central Park Avenue, in the city of Yonkers, Westchester County, which they acquired by means of four deeds dated 1951, 1952, 1957 and 1966. In 1968, said property was appropriated by New York State pursuant to sections 30 and 349-c of the Highway Law, and decedent received a partial payment therefor in the sum of \$34,969.00, which amount exceeded her cost basis of the property.

4. On February 20, 1969, decedent and Sylvia Neidich filed in the Court of Claims a claim against New York State for a greater amount of compensation for the State's appropriation of their property.

5. Gladys F. Aries died on December 2, 1971, naming as executor of her Estate her husband Ernest J. Aries, who is now also deceased. The successor executors are Peter L. Aries and Linda A. Friedman.

6. On January 18, 1972, a decision was rendered by the Court of Claims, awarding to claimants direct damages in the amount of \$205,340.00, plus interest thereon of \$30,163.15. Pursuant to the judgment, a payment of \$67,701.00 was

made to petitioner representing the balance of decedent's share of the condemnation award, plus \$14,854.00 in interest.

7. Petitioner reported the claim of decedent at its full value, namely \$67,701.00, on decedent's Federal estate tax return; the claim was similarly included in the computation of New York State estate taxes. It is petitioner's position that there was no capital gain realized because of the operation of the stepped-up basis rule of section 1014 of the Internal Revenue Code, that is, the basis of the award was exactly equal to the amount received.

8. The legal fees incurred and paid by petitioner in connection with the condemnation proceeding totaled \$5,890.00.

#### CONCLUSIONS OF LAW

A. That the New York adjusted gross income of a resident individual is defined by section 612 of the Tax Law as such individual's Federal adjusted gross income for the taxable year, with certain New York modifications not herein at issue.

B. That section 691 of the Internal Revenue Code sets forth the general rule for inclusion in gross income of items of income in respect of a decedent, as follows:

"(a)(1) The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period... shall be included in the gross income, for the taxable year when received, of :

(A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;

(B) the person who, by reason of the death of the decedent, acquires the right to receive the amount, if the right to receive the amount is not acquired by the decedent's estate from the decedent; or

(C) the person who acquires from the decedent the right to receive the amount by bequest, devise, or inheritance, if the amount is received after a distribution by the decedent's estate of such right."

Treasury Regulation section 1.691(a)-1(b) furnishes a general definition for the term "income in respect of a decedent":

"...those amounts to which a decedent was entitled as gross income but which were not properly includible in computing his taxable income for the taxable year ending with the date of his death or for a previous taxable year under the method of accounting employed by the decedent... Thus, the term includes --

- (1) All accrued income of a decedent who reported his income by use of the cash receipts and disbursements method;
- (2) Income accrued solely by reason of the decedent's death in case of a decedent who reports his income by use of an accrual method of accounting; and
- (3) Income to which the decedent had a contingent claim at the time of his death."

C. That case law has distinguished the following two situations:

(1) Decedent sold property prior to his death, but the proceeds of the sale were received by his estate. (2) The economic activities in connection with a sale occurred during decedent's lifetime, but the sale was not consummated until after his death. The courts have deemed it pertinent to inquire whether the income received after death was attributable to the economic activities and efforts of decedent during his lifetime, but the crucial question is whether the status of the transaction giving rise to the income was such at the date of death that decedent had a right to the income at the time. Absent such a right, no matter how extensive were decedent's economic activities prior to his death, the income is not income in respect of a decedent; conversely, where such right came into being prior to the date of death, the income constitutes income in respect of a decedent. Keck v. Commissioner, 415 F.2d 531 (6th Cir. 1969), rev'g, 49 T.C. 313 (1967); Trust Co. of Georgia v. Ross, 392 F.2d 694 (5th Cir. 1967), aff'g, 262 F. Supp. 900 (N.D. Ga. 1966); Rev. Rul. 78-32, 1978-1 C.B. 198. Accord, Commissioner v. Linde, 213 F.2d 1 (9th Cir.), cert. denied, 348 U.S. 871 (1954); Estate of Harry B. Sidles, 65 T.C. 873, aff'd 8th Cir., in unpublished opinion, January 14, 1977.

D. That upon the filing of the appropriation map by the State in the office of the county clerk of the county wherein the property was situated, title to the property vested in the State of New York. Eminent Domain Procedure Law Section 402. T. Jack Foster, 25 T.C. Memo. 1390, 1425 (1966).

Title thus passed and decedent received partial payment for the appropriation prior to the date of her death.

E. That the appropriation award by the Court of Claims comprised income in respect of a decedent and was taxable as such. Decedent's right to compensation for the State's taking of her real estate came into being prior to her death; she was entitled, at a minimum, to the amount of the State's initial offer.

Petitioner could therefore not avail itself of the stepped-up basis provision of section 1014 of the Code.

F. That the expenses incurred by petitioner in connection with the litigation undertaken to increase the amount of the award were capital expenditures deductible from the amount of the award. Casalina Corp. v. Commissioner, 60 T.C. 694, aff'd mem., 511 F.2d 1162 (4th Cir. 1975); T. Jack Foster, supra at 1421.

G. That petitioner is entitled to deduct estate taxes paid which are attributable to the condemnation award, in accordance with section 691(c)(1) of the Internal Revenue Code.

H. That the petition of the Estate of Gladys F. Aries is granted to the extent that the \$14,854.00 interest payment was already included by petitioner on its Income Tax Fiduciary Return for 1972; that the \$67,701.00 condemnation award constitutes a capital gain; that petitioner is entitled to deduct from the amount of the award legal fees and estate taxes paid as indicated in



Conclusions of Law "F" and "G"; that the Audit Division is hereby directed to accordingly modify the Notice of Deficiency dated April 11, 1977; and, that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

DEC 12 1980

STATE TAX COMMISSION

*James W. Sull*  
\_\_\_\_\_  
PRESIDENT

*Thomas H. ...*  
\_\_\_\_\_  
COMMISSIONER

*Francis R. Kalny*  
\_\_\_\_\_  
COMMISSIONER