

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Howard & Leonore Ellish :

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 Years 1968 & 1969. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

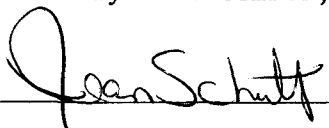
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Howard & Leonore Ellish, the petitioner in the within proceeding,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

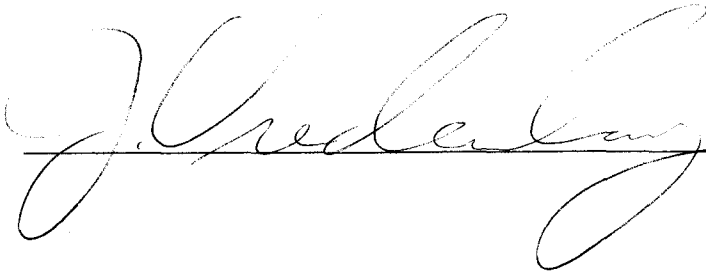
Howard & Leonore Ellish
c/o Matthew F. Magidson
1450 Broadway
New York, NY 10018

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.


Jean Schutt


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Howard & Leonore Ellish :

AFFIDAVIT OF MAILING

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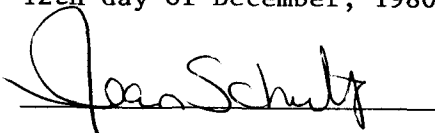
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Matthew F. Magidson the representative of the petitioner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

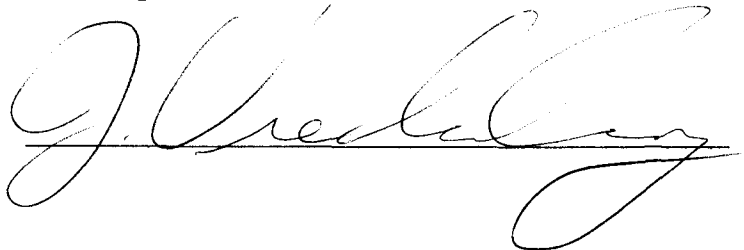
Mr. Matthew F. Magidson
Laitman, Matthews and Magidson
1450 Broadway
New York, NY 10018

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.


Joan Schultz


Jay Vredenburg

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

December 12, 1980

Howard & Leonore Ellish
c/o Matthew F. Magidson
1450 Broadway
New York, NY 10018

Dear Mr. & Mrs. Ellish:

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
Matthew F. Magidson
Laitman, Matthews and Magidson
1450 Broadway
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HOWARD ELLISH and LEONORE ELLISH	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1968 and 1969.	:	

Petitioners, Howard Ellish and Leonore Ellish, c/o Matthew F. Magidson, Laitman, Magidson & Matthews, 1450 Broadway, New York, New York 10018, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the years 1968 and 1969 (File No. 20394).

A formal hearing was held before Harry Issler, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on November 30, 1978 and continued to conclusion before Julius E. Braun, Hearing Officer, at the same location on January 26, 1979. Petitioner appeared by Matthew F. Magidson, Esq. The Audit Division appeared by Peter Crotty, Esq. (Barry M. Bresler, Esq. of counsel).

ISSUE

Whether petitioner Howard Ellish was required to report as ordinary income his distributive share of a condemnation award received by G.A.E. Associates.

FINDINGS OF FACT

1. On April 14, 1972, the Income Tax Bureau issued a Statement of Audit Changes against Howard Ellish and Leonore Ellish on the grounds that Howard Ellish's distributive share of income from G.A.E. Associates, a New York

partnership entity, represented income subject to New York State personal income tax. Further, as the Internal Revenue Service had determined the sale of property by a partnership resulted in ordinary income, and accordingly the capital gain treatment of the partnership distributions for the years 1968 and 1969 was not allowed and the distributive share of income thereof, was reportable in full for New York State personal income tax purposes. Accordingly, it issued a Notice of Deficiency in the amount of \$3,521.53, plus penalty of \$1,074.88 and interest of \$446.69, for a total of \$5,043.10.

2. No documentary or other substantial evidence was offered in reference to 1968. The only issue was whether that portion of gain realized from the condemnation award in 1969 by petitioner Howard Ellish was ordinary income or capital gain.

3. Petitioner Howard Ellish was a member of a partnership known as G.A.E. Associates. Petitioners were resident individuals and had filed a State income tax return for 1968. They were nonresidents for 1969 and had failed to file a State income tax return for that year. The partnership was founded in 1963 and acquired a 60 acre tract of land in Rockland County for approximately \$500,000.00. Ten acres were sold in 1964 to American Tack. In 1965, 23 acres were sold to J.H.W. Construction. Five parcels were sold in 1966, and in 1967, the profit from an installment sale in 1966 was reported. There were no sales in 1968 and no details were submitted in reference to the net long-term gain reported on the 1968 partnership return. In 1969 the profit from the sale of five parcels sold in 1966 was received and reported as were the proceeds from a condemnation award on the last of the subdivisions.

4. On November 10, 1969 pursuant to an audit of the G.A.E. Associates, the Internal Revenue Service found that for the years 1965, 1966 and 1967 the

gain realized on the sale of the property was ordinary income rather than a long-term capital gain as originally reported, and that the property sold on the installment basis was determined to be property sold in the ordinary course of business.

5. Petitioners offered no documentary or other substantial evidence of what was done with the proceeds of the condemnation award realized in 1969.

CONCLUSION OF LAW

A. That sections 632 and 637 in part provides:

"Section 632. New York adjusted gross income of a nonresident individual.

(a) General. The New York adjusted gross income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:

A. his distributive share of partnership income, gain, loss and deduction determined under section six hundred thirty-seven..."

"Section 637. Nonresident partners.

(a) Portion derived from New York sources

(1) In determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income..."

B. That sections 617 and 637 in part provides:

"Section 617. Resident Partners.

* * *

(b) Character of Items. Each item of partnership income, gain, loss or deduction shall have the same character for a partner under this article as for federal income tax purposes."

"Section 637. Nonresident Partners.

* * *

(e)(2) The character of partnership items for a nonresident partner shall be determined under subsection (b) of section six hundred seventeen."