

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Albert T. & Alice W. Peck :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax & UBT :
under Article 22 & 23 of the Tax Law :
for the Years 1971 - 1973. :

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 23rd day of May, 1980, he served the within notice of Decision by certified mail upon Albert T. & Alice W. Peck, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

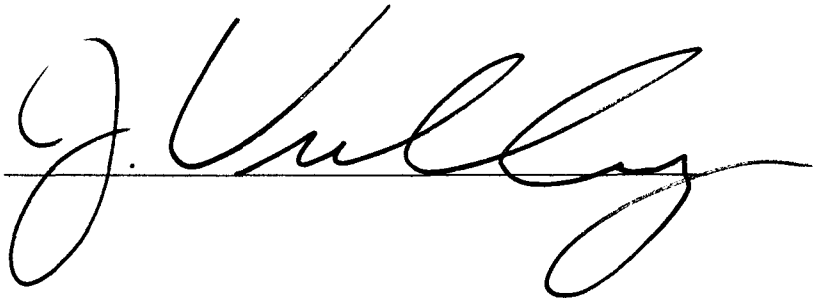
Albert T. & Alice W. Peck
Peck's Park
Gloversville, NY 12078

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
23rd day of May, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Albert T. & Alice W. Peck :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax & UBT :
under Article 22 & 23 of the Tax Law :
for the Years 1971 - 1973. :

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 23rd day of May, 1980, he served the within notice of Decision by certified mail upon Lydon F. Maider 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. Lydon F. Maider
Maider, Smith & Maider
29 W. Fulton St.
Gloversville, NY 12078

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
23rd day of May, 1980.

Joanne Knapp

J. Vredenburg

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

May 23, 1980

Albert T. & Alice W. Peck
Peck's Park
Gloversville, NY 12078

Dear Mr. & Mrs. Peck:

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) 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
Lydon F. Maider
Maider, Smith & Maider
29 W. Fulton St.
Gloversville, NY 12078
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ALBERT T. PECK and CHARLES W. PECK :
D/B/A PECK BROTHERS :
for Redetermination of a Deficiency or :
for Refund of Unincorporated Business Tax :
under Article 23 of the Tax Law for the :
Years 1969 to 1973. :

In the Matter of the Petition :
of :
ALBERT T. PECK and ALICE W. PECK :
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax and :
Unincorporated Business Tax under :
Articles 22 and 23 of the Tax Law for the :
Years 1971 to 1973. :

DECISION

In the Matter of the Petition :
of :
CHARLES W. PECK :
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Years :
1972 and 1973. :

Petitioners, Albert T. Peck and Charles W. Peck d/b/a Peck Brothers, Charles W. Peck, individually, Albert T. Peck, individually and Alice W. Peck, individually, all of Pecks Park, Gloversville, New York, filed petitions 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 1969 to 1973 (File Nos. 12302, 12303 and 12304).

A consolidated formal hearing was held before Louis M. Klein, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on February 18, 1977 at 9:15 A.M. Petitioners appeared by Maider, Smith & Maider, Esqs. (Lydon F. Maider and Robert L. Maider, Esqs., of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq. (Marilyn Kaltenborn, Esq., of counsel).

ISSUES

I. Whether the gain on the developing, subdividing and sale of land by petitioners Charles W. Peck and Albert T. Peck, once held by the partnership which they operated under the name Peck Brothers, is income of that partnership subject to unincorporated business tax, pursuant to Article 23 of the Tax Law.

II. Whether the exploiting, developing, subdividing and sale of land by petitioners Charles W. Peck and Albert T. Peck is a trade, business or occupation, engaged in by an unincorporated entity subject to the unincorporated business tax, pursuant to Article 23 of the Tax Law.

III. Whether the gain realized from the activities described in Issue "I" and "II" is gain from the sale of property held by petitioners primarily for sale to customers in the ordinary course of their trade or business.

IV. Whether the ownership, maintenance and operation of a private school bus by petitioner Albert T. Peck, under contract with a public school district, is a trade, business or occupation which is engaged in by an unincorporated entity subject to the unincorporated business tax, pursuant to Article 23 of the Tax Law.

FINDINGS OF FACT

1. On August 25, 1975, the Income Tax Bureau issued to Peck Brothers a Statement of Audit Changes detailing an unincorporated business tax deficiency

for the tax years 1969 through 1973. Accordingly, a Notice of Deficiency was issued to Peck Brothers on August 25, 1975 asserting tax due of \$27,709.49, plus interest of \$4,776.87 for a total of \$32,487.36.

2. On August 25, 1975, the Income Tax Bureau issued to Albert T. Peck and Alice W. Peck a Statement of Audit Changes detailing a personal income tax and unincorporated business tax deficiency for the tax years 1971, 1972 and 1973. Accordingly, a Notice of Deficiency was issued to Albert T. Peck and Alice W. Peck on August 25, 1975 for tax due of \$9,403.24 plus penalty and interest of \$1,563.41, for a total of \$10,966.65 less an overpayment to petitioner, Alice W. Peck, for 1973 of \$176.61, plus interest of \$18.04, for a net due of \$10,772.00.

3. On August 25, 1975, the Income Tax Bureau issued to Charles W. Peck a Statement of Audit Changes detailing a personal income tax deficiency for the tax years 1972 and 1973. Accordingly, a Notice of Deficiency was issued to Charles W. Peck on August 25, 1975 for tax due of \$8,483.69, plus interest of \$1,191.21, for a total of \$9,674.90, less an overpayment for 1973 of \$20.00, plus interest of \$2.04, for a net due of \$9,652.86.

4. In 1948, petitioners Albert T. Peck and Charles W. Peck inherited from their father, as tenants in common, all the property that he had owned which was located in and around Peck's Lake, Fulton County, New York.

5. On November 1, 1948, subsequent to the death of their father, petitioners Albert T. Peck and Charles W. Peck formed a partnership to be known as "Peck Brothers" (hereinafter "the partnership") to run the business that their father had operated. This business (hereinafter "the recreational business") consisted of the rental of cottages, boats and camp sites, as well as the sale of boats, motors and bait. The partnership was to manage the real property and operate the recreational business. Both brothers contributed cash and the

right to use all of the land they had inherited as tenants in common.

6. Between 1958 and 1962, on two separate occasions the brothers unsuccessfully attempted to sell, as one parcel, all their lands in and around Peck's Lake, except for a portion reserved for their private residences and for the recreational business.

7. Still wanting to sell the bulk of their land, the brothers decided in 1962 to subdivide the land and sell lots. Pursuant to this intent, the partnership agreement was amended on January 1, 1962, to exclude from its provisions approximately 2,531.25 acres of woodland which were not used by the partnership. The whole property was thus segregated into two parcels. One parcel consisted of the land which was used in the recreational business and the land on which were located the private residences of the brothers. This first parcel remained under the control of the partnership (hereinafter "Parcel A"). The second parcel consisted of the 2,531.25 acres of woodland which the partnership no longer controlled, but which the brothers owned as tenants in common (hereinafter "Parcel B").

8. Beginning in 1962, the brothers began to subdivide the land in Parcel B and sold individual lots. For this purpose, they executed instruments which gave to each a power of attorney to execute, acknowledge and deliver any and all options, agreements, contracts, deeds or conveyances in the Parcel B lands owned by them as tenants in common, without the consent of the other. Further, the brothers took the necessary steps to obtain and they received the necessary approval of various State agencies for their subdivision plans. They maintained no separate office for the sale of lots, borrowed money individually to finance the construction of access roads and hired a contractor to build such roads. After the roads were built, they deeded the roadbed to the appropriate town.

The loan was eventually repaid by the brothers and now, when improvements are needed, they finance them from the proceeds of lot sales. They gave easements to the power and telephone companies which installed power and telephone lines, and they maintained separate books of account for the sale of the lots and their respective expenses. They advertised the lots and occasionally advertised the lots and recreational business in the same advertisement. They sold 9 lots in 1962, 12 lots in 1963, 9 lots in 1964, 5 lots in 1965, 12 lots in 1966, 6 lots in 1967, 19 lots in 1968, 8 lots in 1969, 7 lots in 1970, 11 lots in 1971, 19 lots in 1972 and 18 lots in 1973. They developed the land in sections. As one section was developed and sold, they would then develop another section.

9. The brothers took and held mortgages on the purchase price of the lots when it was necessary to do so. The brothers also maintained savings accounts to hold mortgage payments and funds received from the sale of lots. They received interest from the mortgages and from the savings accounts.

10. The brothers received funds from the sale of timber from Parcel B.

11. In addition to operating the recreational business and the land sales, petitioner Albert T. Peck operated a school bus under contract with the local public school. He owned, maintained and operated this bus individually.

12. In addition to the activities described above, petitioner Charles W. Peck owned and operated the Right Way Roofing Company, Incorporated.

13. The profits from the exploitation, development, subdivision and sale of land constituted the brothers' major source of income.

CONCLUSIONS OF LAW

A. That since January 1, 1962, petitioners Charles W. Peck and Albert T. Peck segregated lands which were not used by the Peck Brothers partnership

from said partnership and resumed full control of this land as tenants in common. The segregated property is not an asset of the partnership, and income or proceeds from the sale of this property is not income of the partnership.

B. That the regular and systematic exploitation, development, subdivision and sale of land by petitioners Charles W. Peck and Albert T. Peck is a trade, business or occupation which constitutes the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law and that said trade, business or occupation was operated in the manner of a partnership within the meaning and intent of section 761 of the Internal Revenue Code and section 1.76.1(a) of the Regulations.

C. That the gross income of the unincorporated business described in Conclusion of Law "B" consists of proceeds from the sale of lots, interest on mortgages held by the brothers, interest on bank accounts held by the brothers and proceeds from the sale of timber in accordance with section 705(a) of the Tax Law.

D. That the brothers held the land involved primarily for sale to customers in the ordinary course of their trade or business. The gain from the sale of such property is ordinary income for personal income tax purposes pursuant to sections 1221(1) and 1231(b)(1)(B) of the Internal Revenue Code.

E. That the unincorporated business found in Conclusion of Law "B" and the unincorporated business of Peck Brothers should be treated as one unincorporated business pursuant to section 703(a) of the Tax Law.

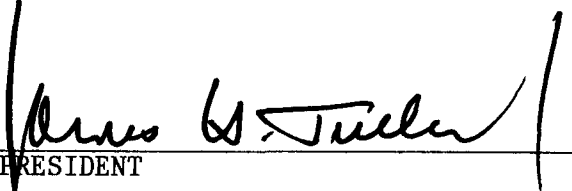
F. That the operation of a private school bus by Albert T. Peck is a trade, business or occupation which constitutes the carrying on of an unincorporated business in accordance with section 703(a) of the Tax Law and that the income derived therefrom is subject to the imposition of unincorporated business tax, in accordance with section 701(a) of the Tax Law.

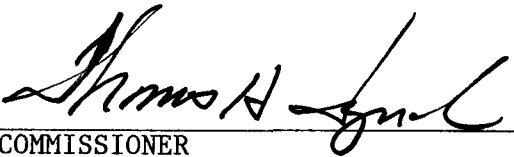
G. That the petitions of Albert T. Peck and Charles W. Peck d/b/a Peck Brothers, Albert T. Peck, Alice W. Peck and Charles W. Peck are denied and the notices of deficiency issued August 25, 1975 against them are sustained.

DATED: Albany, New York

MAY 23 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER