

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Thomas B. & Helen C. Murphy :

AFFIDAVIT OF MAILING

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 Year 1971. :

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 20th day of June, 1980, he served the within notice of Decision by certified mail upon Thomas B. & Helen C. Murphy, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas B. & Helen C. Murphy  
505 Cook Rd.  
Hamlin, NY 14464

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  
20th day of June, 1980.

Joanne Krapp

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

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Personal Income Tax & UBT :

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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 20th day of June, 1980, he served the within notice of Decision by certified mail upon Thomas J. Young 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. Thomas J. Young  
66 Village Square  
Holley, NY 14470

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  
20th day of June, 1980.

Joanne Knapp

J. Vredenburg

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

June 20, 1980

Thomas B. & Helen C. Murphy  
505 Cook Rd.  
Hamlin, NY 14464

Dear Mr. & Mrs. Murphy:

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  
Thomas J. Young  
66 Village Square  
Holley, NY 14470  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
THOMAS B. MURPHY and HELEN C. MURPHY	:	DECISION
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 Year 1971.	:	

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Petitioners, Thomas B. Murphy and Helen C. Murphy, 505 Cook Road, Hamlin, New York 14464, 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 year 1971 (File No. 14185).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on February 15, 1978 at 1:15 P.M. Petitioners appeared by Thomas J. Young, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the receipt on the sale of material excavated from petitioner's farmland was subject to unincorporated business tax.

FINDINGS OF FACT

1. On November 4, 1974, pursuant to an audit, the Audit Division issued a Statement of Audit Changes to petitioners. This was done on the grounds that the sale of gravel was considered the sale of business-connected property, subject to both income and unincorporated business tax. Accordingly, on December 22, 1975, a Notice of Deficiency was issued to Thomas B. and Helen C. Murphy for \$7,671.24, plus interest of \$1,696.49, for a total of \$9,367.73.

2. On January 21, 1975, petitioners executed a consent extending the period of limitation for assessment of personal income and unincorporated business taxes for 1971 to April 15, 1976; the consent was validated by the Income Tax Bureau on January 29, 1975.

3. Petitioners, Thomas B. Murphy and Helen C. Murphy, timely filed a New York State Combined Income Tax Return for 1971. Petitioner Thomas B. Murphy also filed a 1971 New York State Unincorporated Business Tax Return (Form IT-202) for his fruit and brokerage business. On August 13, 1974, the Income Tax Bureau received a "Notice of Change in Taxable Income" from Thomas B. Murphy individually, pursuant to a Federal adjustment of income "from gravel extraction agreement;" additional personal income tax and interest was paid by him. Petitioner Helen C. Murphy also filed a "Notice of Change in Taxable Income" and paid additional personal income tax and interest.

4. On August 17, 1971, petitioners, Thomas B. Murphy and Helen C. Murphy, contracted with the Cold Spring Construction Co., Inc. of Akron, New York, for the excavation of material from their acreage. The company purchased all materials which it removed from the ground at one dollar (\$1.00) per cubic yard, plus sales tax. Petitioners received \$107,200.00 for said material in 1971. The contract limited excavation to material required for a state parkway. The property was then to be regraded with stockpiled top soil which was reserved so that the farmland would be usable.

5. Information submitted with petitioners' petition shows that the 4.93 acre area of excavation involved in this matter, was located next to a former gravel pit.

6. The disagreement between the Internal Revenue Service and petitioners rested on whether the sale of the fill was of a capital asset (as reported by petitioners), or whether the sale represented royalties from a lease.

7. Petitioners, Thomas B. Murphy and Helen C. Murphy, paid \$4,057.26 and \$2,725.74 in tax respectively, with their 1971 return. On their IT-115 they also paid \$2,850.76 and \$2,876.78, for a total of \$5,727.54. Total New York State tax paid by petitioners was \$12,510.54. The Income Tax Bureau only credited petitioners with tax payments of \$11,589.76.

CONCLUSIONS OF LAW

A. That section 705(a) of the Tax Law provides that the unincorporated business gross income of an unincorporated business means "the sum of the items of income and gain of the business... includible in gross income for the taxable year for Federal income tax purposes, including income and gain from any property employed in the business..."; that the sale of fill by petitioner Thomas B. Murphy was connected with his unincorporated business, in accordance with the meaning and intent of section 705(a) of the Tax Law.

B. That petitioners were not given full credit of tax paid for 1971 as indicated in Finding of Fact "7"; therefore, the Audit Division is directed to modify the Notice of Deficiency issued on December 22, 1975.

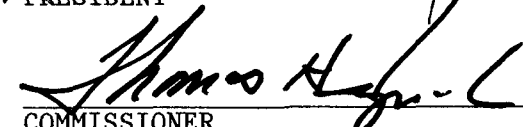
C. That except as granted in Conclusion of Law "B", the petition of Thomas B. Murphy and Helen C. Murphy is denied and the Notice of Deficiency issued on December 22, 1975, as modified, is sustained, together with such interest as may be lawfully owing.

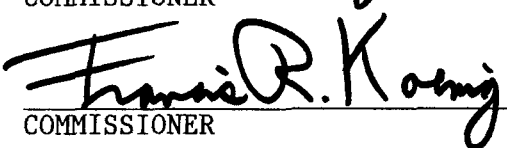
DATED: Albany, New York

JUN 20 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



New York State  
Department of  
TAXATION  
and FINANCE

Date 9/15/80

To John J. Sollecito

Re: Thomas B. and Helen C. Murphy

Please have a corrected decision prepared and returned for Commission action by September 29, 1980. The file is attached hereto.

Attachment  
PBC/par

Paul Coburn  
Secretary to the  
State Tax Commission

September 15, 1980

Thomas J. Young, Esq.  
Heath & Young  
66 Village Square  
P.O. Box 238  
Holley, New York 14470

Dear Mr. Young:

Re: Thomas B. Murphy and Helen C. Murphy

This is in response to your letter of August 4, 1980 requesting that the Tax Commission reconsider its decision and issue a corrected decision.

Please be advised that the State Tax Commission has agreed to reopen the case and return it to the Tax Appeals Bureau for preparation of a corrected decision that considers the issue of income splitting.

You will receive a copy of the corrected decision after it has been signed by the State Tax Commission.

Very truly yours,

PAUL B. COBURN  
Secretary to the  
State Tax Commission

cc--John J. Sollecito, Director  
Tax Appeals Bureau

Michael Alexander, Principal  
Attorney, Litigation Unit,  
Law Bureau

PBC/par






Date 8/21/80

To State Tax Commission

For your signatures, upon your approval.

THOMAS B. MURPHY AND HELEN C. MURPHY

  
Paul Coburn  
Secretary to the  
State Tax Commission



New York State Department of  
**TAXATION and FINANCE**

**MEMORANDUM**

AD-53.1 (4/77)

**TO:** State Tax Commission  
**FROM:** Paul B. Coburn  
**SUBJECT:** Thomas B. Murphy and Helen C. Murphy

The State Tax Commission issued a decision in the above entitled matter on June 20, 1980.

On August 4, 1980 the petitioner's attorney wrote a letter to the Department requesting that the Tax Commission reconsider its decision and issue a corrected decision.

The basis for petitioner's request is the fact that in their petition at page 5 they raised the issue that the income in question was income for purposes of unincorporated business tax of both the husband and wife, and not just the husband and that the decision issued by the Commission failed to consider this issue.

A review of the decision indicates that this issue was not considered.

While it is the general policy of the Tax Commission not to reconsider cases after a decision is issued, I would however recommend that this case be reopened and returned to Tax Appeals Bureau for a corrected decision to be written that considers the inadvertantly omitted issue of income splitting.

Secretary to the State Tax Commission

August 21, 1980  
Attachment

PRESIDENT

COMMISSIONER

COMMISSIONER

REOPEN

DON'T REOPEN

☒

☐

☒

HEATH & YOUNG

ATTORNEYS AT LAW

66 VILLAGE SQUARE

P. O. BOX 238

HOLLEY, N. Y. 14470

638-6331

637-3110

AREA CODE 716

EDWARD N. HEATH (1859-1940)  
MARK HEATH (1895-1966)  
ROBERT E. HEATH  
THOMAS J. YOUNG

OF COUNSEL:  
HUBERT J. GILLETTE

August 4, 1980

NYS Department of Taxation and Finance  
Deputy Commissioner and Counsel  
Building No. 9  
Albany, New York 12227

ATTN: Mr. Michael Alexander

RE: Thomas B. Murphy and Helen C. Murphy  
File No. 1-72280595 and 1-4185

Gentlemen:

In accordance with my telephone conversation with Mr. Alexander of your office, please be advised that I represent the Estate of Thomas B. Murphy and Helen C. Murphy, the taxpayers in a formal hearing which was held February 17, 1978 in Rochester New York which resulted in a formal decision from the State Tax Commission dated June 20, 1980, a copy of which is enclosed.

In reviewing the decision, I would like to point out that one ground brought up at the formal hearing before Julia Braun hearing officer, of the splitting of the income between both taxpayers, Thomas B. Murphy and Helen C. Murphy, his wife. This ground was raised in a written statement and formal testimony presented at the hearing. The copy of the written statement is enclosed to you herewith identifying this ground as No. 3 on page 5. Due to the two and one-half year lapse between the formal hearing and the decision, I can understand that perhaps some of the testimony or information presented may be clouded as a result of the passage of time, however, I would like to be able to discuss with the State Tax Commission their failure to address this basic issue.


Perhaps in my writing this letter the Tax Commission may wish to review their file including the contract with both taxpayers for the receipt of the income, the title and ownership of the property from which the income was derived and the testimony developed at the hearing. After reviewing the file, the Commission may find it appropriate to issue a corrected decision to address the question which may alleviate the necessity of my filing an Article 78 proceeding to obtain an answer on the question presented.

NYS Department of Taxation and Finance  
Page Two  
August 4, 1980

I would appreciate your prompt reply to this request due to the time limits involved in my presenting an Article 78 proceeding.

I might point out that our going to a formal hearing was necessitated by the failure of the Tax Commission to adjust based upon the obvious errors of failure to allow taxes as paid. I would like to short circuit this to close this case once and for all based upon a meaningful discussion with a person in authority.

Very truly yours,

  
Thomas J. Young *ju*

TJY:jw  
Encs.  
cc: Helen C. Murphy

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
THOMAS B. MURPHY and HELEN C. MURPHY : DECISION  
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1. On November 4, 1974, pursuant to an audit, the Audit Division issued a Statement of Audit Changes to petitioners. This was done on the grounds that the sale of gravel was considered the sale of business-connected property, subject to both income and unincorporated business tax. Accordingly, on December 22, 1975, a Notice of Deficiency was issued to Thomas B. and Helen C. Murphy for \$7,671.24, plus interest of \$1,696.49, for a total of \$9,367.73.

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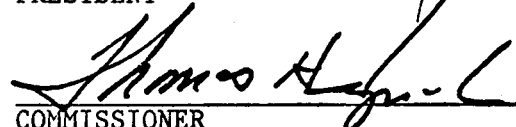
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DATED: Albany, New York

JUN 20 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

## STATEMENT

Each ground upon which redetermination of the deficiency or refund is claimed, and the facts relied upon to inform the State Tax Commission of the exact basis thereof, are as follows:

### GROUND 1

The petitioners on the IT 38 Attachment to the New York State Department of Taxation Statement of Audit Changes (See Schedule E attached) were not given proper credit for tax paid with their original IT 208 Return (See Schedule C attached).

On the original IT 208 (Schedule C) Petitioners computed and paid tax per that return in the amount of \$4,057.26 for Thomas B. Murphy and \$2,725.74 for Helen C. Murphy or a total tax paid of \$6,783.00. On Petitioners return from IT 115, (See Schedule D attached) dated 8/12/74, petitioners paid \$2,850.76 for Thomas B. Murphy and \$2,876.78 for Helen C. Murphy for a total tax per IT 115 of \$5,727.54, and total New York State Tax paid of \$12,510.54.

The IT 38 Attachment (See Schedule E) reports the petitioners New York State Tax per return of \$5,862.22 and New York State per IT 115 as \$5,727.54 for a total New York State tax paid of \$11,589.76. This is \$920.78 less than the petitioners have already paid and proper adjustments should be made to the petitioners alleged deficiency to reflect this obvious error.



## GROUND 2

The proceeds received by the petitioners from the gravel extraction agreement with Cold Spring Construction Co., Inc., (See Schedule G attached), is not subject to New York State Unincorporated Business Tax.

A brief statement of the history leading up to the deficiency assessment subject of this petition will help to clarify the issues.

In tax year, 1971, petitioners received \$107,220.00 from Cold Spring Construction Co., Inc. under an agreement (See Schedule G) with Cold Spring for the excavation of mineral from 5 acres of the petitioners land (See Schedule F). Petitioners reported this income to the IRS as income from the "sale" of gravel as capital asset allowing themselves capital gain treatment of the income. (See Schedule A for petitioners reasons for so reporting the income)

The IRS rejected petitioners position and determined that the income was not the "sale" of a capital asset but rather income or royalties from a "lease." (See Schedule B). The primary question as stated by the IRS auditor was "what type of transaction took place; the sale of a capital asset or a lease?" (ref.: Schedule B page 4). This issue was resolved against petitioners and as resolved determined that the income in question was to be treated as income from a lease and reported as such.

Whether or not the income from the "lease" in question is subject to New York State Unincorporated Business Tax depends on whether or not petitioners received the "rent" or royalties from the "lease" in connection with or incidental to an un-

incorporated business.

New York State Tax Law § 703(e) entitled "Holding leasing, or managing real property" states the law in point, "An owner of real property, lessee or a fiduciary shall not be deemed engaged in an unincorporated business solely by reason of holding, leasing or managing real property."

Petitioners set forth the following facts in support of their exempting from unincorporated business tax:

1. Under the extraction agreement the amount of material to be removed was limited to the amount required by New York State Contract LSP-70-3 for the improvement of Lake Ontario State Parkway and required Cold Spring to regrade the property to a usable piece of farm land. There was no intent by Mr. and Mrs. Murphy to go into the business of selling gravel.

Petitioners "lease" with Cold Spring was basically a one time transaction and as such would be exempt under Tax Law § 703(e).

2. The IRS did not treat the income as income from the taxpayer's "business." An examination of "Schedule B", the IRS audit report will show that the income was not finally determined as being reportable on taxpayer, Thomas B. Murphy's Form 1040 Schedule C "Business Income" or Form 1040 Schedule F "Farm Income." If it had been, the IRS would have required the taxpayers to pay Social Security Self Employment Tax which was not done. Rather it was treated as royalties from a lease which was "divorced from" the taxpayers business

3. The minerals extracted pursuant to the agreement with Cold Spring were owned by both petitioners, Thomas B. Murphy and Helen C. Murphy. Both petitioners executed the agreement. Both petitioners owned the land from which the minerals were extracted. But for the fact that Helen C. Murphy executed the agreement to extract, income derived from the agreement would not have been realized by both petitioners. All proceeds in the form of checks from Cold Spring were payable to both petitioners and deposited in their joint accounts, (See Schedule E, \$46,000.00 deposit as an example.) The fact is that the income derived from the agreement by both petitioners was income entirely divorce from petitioner Thomas B. Murphy's "business" and "farm". It was a one time venture jointly with wife, Helen C. Murphy.

4. The State Tax Commission in their deficiency notice to petitioners on Form IT 38 (See Schedule E attached) stated: "Adjustment is made to conform with the audit of your federal income tax return." (As above set forth and as shown on IRS audit Schedule B attached, it was determined by the IRS that the transaction involving Cold Spring and taxpayers was not a "sale" but rather a "lease".)

Why then does the New York State Tax Commission go on in the IT 38 statement and directly contradict the IRS audit when they state, "Sale of gravel is considered sale of business connected property and therefore subject to unincorporated business tax?" If it had been determined by the IRS that this

a "sale" of gravel, then the IRS would have sustained taxpayers original position in reporting the income as a capital gain. Of course, this did not happen. However, if it is the New York State Tax Commission's position that the income in question was as a result of a "sale" then appropriate recomputation of the tax as shown on IT38 should be made and the taxpayers allowed proper credit.

### GROUND 3

The income received by the petitioners from the Cold Spring Agreement is income of both the petitioners Thomas B. Murphy and Helen C. Murphy.

Even assuming that it is held that petitioners were in the gravel sale "business" thus subjecting them to unincorporated business tax and treatment of the income as "business income", the New York State tax commission's position as stated in IT 38 ie., ".....the total amount is reported by the husband on his personal income tax return," is contrary to law and not sustained by the facts of this case.

New York State Tax Law § 632(f) states "If a husband and wife determine their federal income tax on a joint return but determine their New York Income Taxes separately, they shall determine their New York State adjusted gross incomes separately as if their federal adjusted gross incomes had been determined separately."

Under the Internal Revenue Code, petitioner Helen C. Murphy had she determined her federal adjusted gross income separately would have been required to include in her income fifty per cent (50%) of the proceeds received from Cold Spring

Construction Co., Inc. as ordinary income proceeds from the "lease" she had entered into with Cold Spring. (I.R.C. Reg. § 1.61-8 gross income includes royalties. ....may be received from exploitation of natural resources.)

The following facts sustain this position:

1. See above listed under Sub-paragraph 3 of "Ground 2."

2. By reason of the facts above set forth, taxpayer Helen C. Murphy, had she not received the payments from Cold Springs, or in the alternative if taxpayer Thomas B. Murphy had converted the entire sum paid to his own use, would have a legally enforceable contract claim against Cold Spring or Thomas B. Murphy for one-half of the income from the agreement. This claim would be enforceable in any court and as such would be legally binding on Cold Spring or Thomas C. Murphy.

Cold Spring was under a binding contract to pay the income to Thomas B. Murphy and Helen C. Murphy. If this was not done Helen C. Murphy could by virtue of legal action compel Cold Spring or Thomas B. Murphy to pay her fifty per cent (50%) of the income. Accordingly, once she received payment, she would have been required to report this sum as income had she determined her federal adjusted gross income separately. Accordingly, it is respectfully submitted that Tax Law § 632(f) requires her to report this as her income.

It would seem that the conclusory determination of the New York State Tax Commission that "Since the income is considered

business income, the total amount is reported by the husband on his personal income tax return," would violate petitioner, Helen C. Murphy's civil right to be protected against discrimination on the basis of sex as set forth in New York "Human Rights Law" and the Constitution of New York and the United States.

Petitioners and their attorney, Thomas J. Young, appeared at a conference in the State Tax Commission office in Rochester on August 6, 1975. The Hearing Officer was N. Rivaldo who when questioned on the determination said he didn't know why it was done and it would have to be sent to Albany with our objections noted, petitioners feel they were not given a proper conference at that stage in that the Hearing Officer was unable to intelligently answer their questions or give them the reasons for the Audit Changes.

Petitioners request a redetermination in front of a knowledgeable Hearing Officer. If this can not be done in Rochester, New York, petitioners are willing to travel to Albany for the hearing.

It seems quite odd that the Statement of Audit Changes which was the subject matter of the above conference dated 11/4/74 when returned by N. Rivaldo to Albany was merely amended by crossing out the date 11/4/74 and inserting the dated 12/22/75 (See Schedule E) did not reflect any response by the Tax Commission to petitioners contention whatsoever. A fair conference hearing with a knowledgeable person probably would have

resolved many of the questions presented herein.

WHEREFORE, petitioners respectfully pray that the deficiency as determined be re-examined in accordance with the above and that it be found that their IT 115 return properly reflected their income in accordance with the audit of their federal income tax return.