

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Abraham & Regina Weiss :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Personal Income & UBT :  
under Article 22 & 23 of the Tax Law  
for the Years 1960,1961,1962. :

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 January, 1981, he served the within notice of Decision by certified mail upon Abraham & Regina Weiss, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Abraham & Regina Weiss  
1353 47th St.  
Brooklyn, NY

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 January, 1981.

*Annie J. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Abraham & Regina Weiss :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Personal Income & UBT :

under Article 22 & 23 of the Tax Law

for the Years 1960, 1961, 1962. :

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 January, 1981, he served the within notice of Decision by certified mail upon Burton A. 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. Burton A. Friedman  
225 W. 34th t.  
New York, NY 10001

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 January, 1981.

*Marie P. Hagelund*

*J. Vredenburg*

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

January 9, 1981

Abraham & Regina Weiss  
1353 47th St.  
Brooklyn, NY

Dear Mr. & Mrs. Weiss:

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  
Burton A. Friedman  
225 W. 34th t.  
New York, NY 10001  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
ABRAHAM and REGINA WEISS	:	DECISION
	:	
for Redetermination of Deficiencies or	:	
for Refund of Personal Income and	:	
Unincorporated Business Taxes under	:	
Article 22 of the Tax Law for the Years	:	
1960, 1961 and 1962 and under Article 23	:	
of the Tax Law for the Years 1960 and	:	
1962.	:	

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Petitioners, Abraham and Regina Weiss, 1353 47th Street, Brooklyn, New York, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1960, 1961 and 1962 and for unincorporated business tax under Article 23 of the Tax Law for the years 1960 and 1962 (File No. 01410).

A formal hearing was held before Harvey Baum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 4, 1976. Petitioners appeared by Louis Septimus, CPA. The Audit Division appeared by Peter Crotty, Esq. (Howard Herman, Esq., of counsel). The hearing was adjourned and continued on March 14, 1977 before Harvey Baum, Hearing Officer. Petitioner, Regina Weiss, appeared pro se and for her husband, Abraham Weiss. The Audit Division appeared by Peter Crotty, Esq. (Louis Senft, Esq., of counsel). Subsequently, on petitioners' motion, the formal hearing was reopened by order of the State Tax Commission and held on August 11, 1977 before Frank Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York at 9:15 A.M. Petitioners appeared by Burton A. Friedman, Esq. The Audit Division appeared by Peter Crotty, Esq. (Lawrence Stevens, Esq., of counsel).

ISSUES

I. Whether deductions for interest expense in the amounts of \$940.00 for the year 1960 and \$3,325.88 for 1962 were properly disallowed by the Income Tax Bureau.

II. Whether portions of Abraham Weiss' travel expenses relating to his real estate management activities in the amounts of \$1,000.00 for the year 1961 and \$3,000.00 for 1962 were properly disallowed by the Income Tax Bureau for personal income tax purposes.

III. Whether Abraham Weiss failed to report income from the sale of diamonds in the amount of \$33,528.00 during the year 1962 thereby understating both unincorporated business and personal income.

IV. Whether petitioners overstated their cost basis in certain capital transactions on their personal income tax return for the year 1961.

V. Whether penalty pursuant to section 685(a) of the Tax Law was properly imposed upon Abraham Weiss by the Income Tax Bureau for failure to file an unincorporated business tax return for the year 1962.

VI. Whether destruction of the Income Tax Bureau's worksheets and other material by the Department of Taxation and Finance prior to the formal hearing and the absence of the auditor or his supervisor at the hearing prevented petitioners from properly defending their petition.

VII. Whether the administrative delay in bringing this matter to a formal hearing was tantamount to a denial of due process of law and was harmful to petitioners, whose records, because of said delay, were unavailable.

FINDINGS OF FACT

1. Petitioners, Abraham and Regina Weiss, timely filed New York State personal income tax returns for the years 1960, 1961 and 1962. Petitioner Abraham Weiss timely filed unincorporated business tax returns for the years

1960 and 1961. He did not file an unincorporated business tax return for 1962.

The Income Tax Bureau, Brooklyn District Office, conducted a field audit for the years at issue. As a result of said audit, statements of audit changes were issued against petitioners on March 3, 1967 and revised June 26, 1967. A consent form had previously been executed extending the period of limitation upon assessment to April 15, 1968.

The Income Tax Bureau made the following adjustments:

Abraham Weiss				
<u>Unincorporated Business Tax</u>		<u>1960</u>	<u>1962</u>	
Interest expense (unsubstantiated)		\$940.00	\$ 3,325.58	
Income from sale of precious stones not reported			33,528.64	
Section 685(a) Penalty imposed for failure to file an unincorporated business tax return for the year 1962				
Abraham and Regina Weiss				
<u>Personal Income Tax</u>		<u>1960</u>	<u>1961</u>	<u>1962</u>
Income - sale of precious stones not reported				\$33,528.64
Interest expense (unsubstantiated)	\$940.00			3,325.58
Basis of Bruche Realty overstated		\$10,000.00		
Basis of Semcar overstated		563.50		
Travel expense disallowed		1,000.00		3,000.00

On June 26, 1967, the Income Tax Bureau issued a Notice of Deficiency against petitioners for the years 1960, 1961 and 1962 in the amount of \$4,859.86 in personal income tax, plus \$1,295.06 in interest, for a total due of \$6,154.92. Also on June 26, 1967, the Bureau issued a Notice of Deficiency against petitioner Abraham Weiss for the years 1960 and 1962 in the amount of \$1,146.30 in unincorporated business tax, plus \$279.06 in penalty pursuant to section 685(a) of the Tax Law for the year 1962, plus \$292.25 in interest, for a total due of \$1,717.61.

2. During the years at issue, petitioner Abraham Weiss derived income from his unincorporated business as a diamond wholesaler. He also derived

income from the ownership and management of real rental property for his own account.

3. As a diamond wholesaler, Abraham Weiss maintained an office in New York City. His wife and secretary helped with the bookkeeping involved. He gave uncontroverted testimony that he kept records of sales and purchases in a proper manner. Admittedly, he did not keep all receipts or precise records of his travel and entertainment expenses. Mr. Weiss purchased rough and cut diamonds individually and in bulk. He resold the diamonds in New York City, Chicago, Los Angeles, Cleveland, Cincinnati and other cities. He terminated his business in 1963 or 1964.

4. Petitioner Abraham Weiss' real estate activities began in 1959 or 1960 and consisted in management of low income garden apartment developments (in excess of 600 apartment units) in which he had ownership. The developments were located in New Jersey, Washington, D.C. and Maryland. Mr. Weiss traveled frequently in the managements of the properties.

5. The Internal Revenue Service audited petitioners' 1960 Federal tax return. The result of the audit was the disallowance of only \$940.00 in interest expense. Petitioners did not report the Federal change and the Income Tax Bureau also disallowed the \$940.00. Petitioners did not contest the disallowance. During the audit of the records of petitioner Abraham Weiss' diamond business, \$3,325.88 of interest expense was disallowed by the Income Tax Bureau for the year 1962. This was the entire amount on the Federal tax return. Mr. Weiss contended that the auditor did not understand the business. Diamonds were sold by Mr. Weiss and he was paid by cash, check and by notes. Mr. Weiss discounted the notes thereby incurring interest expense. He contends further that it was unreasonable to disallow the entire expense

claimed since the Federal audit disallowed only a small percentage of the amount claimed in 1960.

6. The Income Tax Bureau disallowed portions of Abraham Weiss' claimed travel expenses relating to his real estate activities in the amounts of \$1,000.00 for the year 1961 and \$3,000.00 for 1962. He did not obtain receipts for hotels, gasoline, tolls, air fares or meals with business associates. He contended that he kept a diary (although he admitted it was inaccurate) which he would give to his wife or secretary to record. Mr. Weiss testified that these records are no longer available. He did not submit any documentary or any substantial evidence to support his contention.

7. The Income Tax Bureau contended that Mr. Weiss failed to report income from the sale of diamonds in the amount of \$33,528.00 during the year 1962. The Audit Division did not explain how this omission was determined. He testified that he kept accurate records in his books of all purchases and sales, however, due to the lapse of time, the books and records could not be found. The Audit Division concedes that although Mr. Weiss did not keep accurate records of travel expenses "...it is clearer that he kept accurate records of diamond transactions...The Tax Commission may find that the deficiency item relating to unreported sale of precious stones should be omitted." Neither the auditor nor his supervisor were present at the hearing, both having left New York State service.

8. The Income Tax Bureau contended that petitioners overstated their cost basis in certain capital transactions during the year 1961. Mr. Weiss contended that he did not know why the adjustment was made. He did not submit any documentary or any substantial evidence to support his petition as to this issue.



9. Section 685(a) penalty was imposed on Abraham Weiss for failure to file an unincorporated business tax return for the year 1962. Mr. Weiss contended that he relied on his accountant to file all tax returns required. His gross income was over \$10,000.00 (which would require him to file a return); however, his net income was \$3,046.63 which would result in no tax.

10. The Department of Taxation and Finance inadvertently and incorrectly destroyed the worksheets and other pertinent material of the auditor in 1971. The auditors were no longer in New York State service at the time of the hearing. Petitioners have not submitted any documentary or any substantial evidence to show that any disallowances were incorrectly determined and that the results derived from the worksheets which appeared on the statements of audit changes were incorrect. The items involved in the audit were not matters of law but rather, except for issue V, were all items of substantiation. Petitioners were required to substantiate these items appearing on their tax returns. Petitioners' petition dated September 16, 1967 states "Additional information now available (and not available at time of audit) should reduce deficiency substantially." A conference was held on June 4, 1968 with petitioners' representatives. No substantiation which would have reduced the deficiency was submitted.

11. There was a seven year administrative delay in the scheduling of a formal hearing.

#### CONCLUSIONS OF LAW

A. That deductions for interest expense in the amount of \$940.00 were properly disallowed for the year 1960.

B. That the Income Tax Bureau was not unreasonable in disallowing all interest expense claimed for the year 1962. Petitioner Abraham Weiss has

failed to provide any documentary or any other evidence to show the amount of interest expense which should be allowed.

C. That the Income Tax Bureau properly disallowed portions of Mr. Weiss' travel expense in the amounts of \$1,000.00 for the year 1961 and \$3,000.00 in 1962.

D. That petitioner Abraham Weiss reported all income from the sale of diamonds during the year 1962 and did not understate unincorporated business and personal income by \$33,528.00. In view of the Income Tax Bureau's failure to produce records showing how the understatement was computed and petitioner Abraham Weiss' uncontroverted testimony that he kept accurate records of his purchases and sales of diamonds, the adjustment is deemed arbitrary.

E. That petitioners overstated their cost basis used for Bruche Realty and Semcon in capital transactions during the year 1961.

F. That petitioner Abraham Weiss did not willfully fail to file an unincorporated business tax return for the year 1962 and the penalty imposed pursuant to section 685(a) of the Tax Law is cancelled.

G. That petitioners have not shown that the destruction of the Income Tax Bureau's worksheets and other material prevented petitioners from properly defending their petition.

H. That petitioners have not shown that the delay in scheduling a formal hearing was a denial of due process and harmful to them. The delay was in fact in petitioners' favor in that the \$33,528.00 understatement is determined to be arbitrary, since there appeared to be no basis for the adjustment.

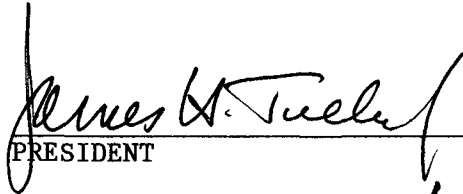
I. That the petition of Abraham and Regina Weiss is granted only to the extent indicated in Conclusions of Law "D" and "F". The Audit Division is hereby directed to modify the revised notices of deficiency issued June 26, 1967; that the modified amount shall be due, together with such additional

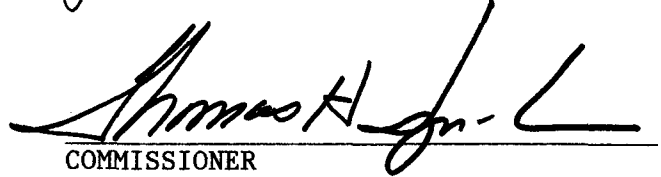
interest as may be lawfully owing; and that, except as so granted, the petition is in all other respects denied.

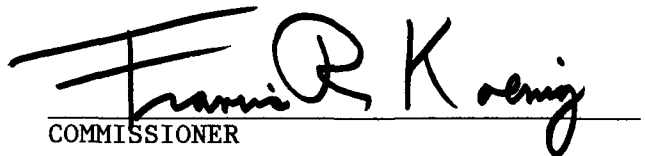
DATED: Albany, New York

JAN 09 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER