

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

John Markarian

:

:

AFFIDAVIT OF MAILING

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 :
1974.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon John Markarian, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Markarian
17 Willowgrove E.
Tonawanda, NY 14150

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 April, 1982.

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

April 9, 1982

John Markarian
17 Willowgrove E.
Tonawanda, NY 14150

Dear Mr. Markarian:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JOHN MARKARIAN
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1974.

DECISION

Petitioner, John Markarian, 17 Willowgrove East, Tonawanda, New York 14150, 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 1974 (File No. 17323).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, One West Genesee Street, Buffalo, New York, on September 29, 1980 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the gains from the sale of real estate were capital gains or ordinary income.

FINDINGS OF FACT

1. Petitioner, John Markarian, timely filed a New York State Combined Income Tax Return for 1974 with his wife. On said return, petitioner reported a capital gain of \$3,198.90 on the sale of real estate.

2. On October 26, 1976, the Audit Division issued a Notice of Deficiency for 1974 against petitioner imposing personal income tax due of \$479.54, plus \$62.32 in interest, for a total of \$541.86. This was done on the grounds that

petitioner failed to meet all the conditions of Internal Revenue Code, section 1237, therefore, the entire gain on the sale of real estate is treated as ordinary income.

3. Petitioner, John Markarian, is a lawyer. He represented the original developer of the Willowgrove subdivision who built the front part of the subdivision. This developer died. Through his association with the developer and his living in the area, Mr. Markarian was aware of the land in back of the subdivision which could be developed. The land was owned by the town. Petitioner went to the town board and he asked if the land was for sale. He was told at first it was not for sale but later he was told by the board the land was for sale.

4. Mr. Markarian, Gordon H. Elwell and Eugene Knab, two builders who worked for the original developer, purchased 5 acres and 7 acres of the land on March 21, 1968 and July 29, 1969 respectively, as tenants in common. Prior to the purchase, the three men had agreed on the price for each lot which would be sold to Knab Associates, Inc., a house contracting firm formed by Mr. Elwell and Mr. Knab.

5. The land was subdivided into 18 and 28 lots, respectively. The improvements for roads and storm and sanitary sewers were paid for by Mr. Markarian, Mr. Elwell and Mr. Knab for the 18 lots. Prior to developing the 28 lots, Mr. Markarian went to the Town of Tonawanda and he asked the Town to make the improvement for these lots, since he became aware that the Town did this for another developer in the area. The Town made the improvements to the 28 lots and each lot was then assessed for the cost of the improvements which were paid for by Mr. Markarian, Mr. Elwell and Mr. Knab.

6. As it was agreed, all the lots except two were sold to Knab Associates, Inc. who built homes on the lots. When Knab Associates, Inc. sold the homes, Mr. Markarian would then receive the agreed to sale price of the lots. All the lots were sold at the price originally agreed to in this manner. Mr. Markarian did not participate in the business of building or the selling of the homes. In prior years, Mr. Markarian reported the gain on the lots as ordinary income.

7. The property in question was held by the petitioner for over six months. Petitioner's income from the sale of the lots represented approximately 17 percent of his income, the remaining portion of his earnings was derived from the practice of law during the year 1974.

CONCLUSIONS OF LAW

A. That section 1237 of the Internal Revenue Code applies to real property subdivided for sale. This section is not exclusive in its application in determining whether or not real property is held by a taxpayer primarily for sale in his business if any requirement under the section is not met. [Treas. Reg. section 1.1237-(1)(a)(4)(i).]

B. That petitioner along with Mr. Elwell and Mr. Knab neither transferred title to nor received payment for lots until homes constructed thereon by Knab Associates, Inc. were sold. Accordingly, Knab Associates, Inc. was acting for these three individuals as well as itself in the sale of houses and lots. That this situation is akin to an agent-principal relationship, the acts of the agent being imputed to the principal. (see Pointer, 48 TC 906, aff'd 419 F. 2d 213).

C. That while petitioner's vocation is that of a lawyer, the income he received from the sale of the lots and its character for tax purposes is determined by the activities which produce it and not by his vocation. The activities of the subdivision definitely constituted a trade or business. Therefore, the income arising therefrom must be taxed as ordinary income. (Bauschard, 31 TC 910, aff'd. 279 F.2d 115).

D. That the petition of John Markarian is denied and the Notice of Deficiency dated October 26, 1976 is sustained.

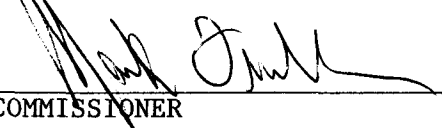
DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER