

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Albert J. & Florine Schwarzler

:

: 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 1972.

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Albert J. & Florine Schwarzler, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert J. & Florine Schwarzler
23 Bluff Point Rd.
Northport, 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
29th day of January, 1982.

Eric A. Haylund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Albert J. & Florine Schwarzler : 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 1972.

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Arthur E. Luman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur E. Luman
Schultz, Fay & Luman
535 Fifth Ave.
New York, NY 10017

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
29th day of January, 1982.

Annice A. Hegelund

J. Vredenburg

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

January 29, 1982

Albert J. & Florine Schwarzler
23 Bluff Point Rd.
Northport, NY

Dear Mr. & Mrs. Schwarzler:

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
Arthur E. Luman
Schultz, Fay & Luman
535 Fifth Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ALBERT and FLORINE SCHWARZLER	:	DECISION
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 Year 1972.	:	

Petitioners, Albert and Florine Schwarzler, 23 Bluff Point Road, Northport, New York 11768, filed a petition 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 year 1972 (File No. 12376).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 29, 1979.

A continuation of the formal hearing was held before Stanley Buchsbaum, Hearing Officer, at the same offices on April 21, 1980, at 10:45 A.M. Petitioners appeared by Schultz, Fay & Luman, Esqs. (Arthur Luman, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether a gain on the sale of real property should be given installment sale treatment when more than 30 percent of the sale price is received during the tax year.

II. Whether discretionary relief should be granted to the taxpayer by crediting against the tax due on the sale the payments made on the installment basis in years for which a refund would be barred by the period of limitations.

FINDINGS OF FACT

1. Petitioners, Albert and Florine Schwarzler, timely filed income tax and unincorporated business tax returns for 1972.

2. In 1972, petitioners sold a parcel of real property for \$100,000.00 and received a partial payment of \$32,172.00. Nevertheless, in their tax returns they used the installment sale method of reporting their gain on the sale.

3. On May 19, 1975, the Audit Division issued a Statement of Audit Changes against petitioners for \$4,222.83, plus interest of \$662.94, for a total of \$4,885.77 for 1972. This was done because it was concluded that the use of the installment sale treatment was improper since more than 30 percent of the sale price was received during 1972. Accordingly, a Notice of Deficiency was issued on the same day for the same amount.

4. Installment payments on the gains from the sale were reported in the years 1973 through 1978 on New York State personal income tax returns and income tax was paid in the total amount of \$2,446.38.

5. At the hearing on April 21, 1980, counsel for the petitioners submitted a signed Withdrawal of Petition and Discontinuance of Case based on a tax of \$1,776.45 (\$4,222.83 principal, less credit for tax payments of \$2,446.38), plus interest; and requested that, in accordance therewith, the State Tax Commission exercise its discretion to permit credit for the payments on the installment basis made in years for which a refund would be barred by the period of limitations.

CONCLUSIONS OF LAW

A. That the petitioners improperly used the installment sale basis in paying tax on a gain from a sale of real property when more than 30 percent of

the sale price was received during the tax year. [Internal Revenue code Section 453(b)(2)(ii), Treas. Reg. §1.453-1(c)(1)]

B. That the petitioners should be given credit for the payments made in subsequent years on the installment basis including such payments made in years for which a refund would be barred by the period of limitations in the total amount of \$2,446.38. [See Matter of Philip Rosen, State Tax Commission March 14, 1980]

C. That the petition of Albert and Florine Schwarzler is denied and the Notice of Deficiency issued May 19, 1975 is sustained (subject to a credit of \$2,446.38), together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JAN 29 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER