

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
George J. Seitz :
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 :
Year 1976. :

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 14th day of December, 1982, he served the within notice of Decision by certified mail upon George J. Seitz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

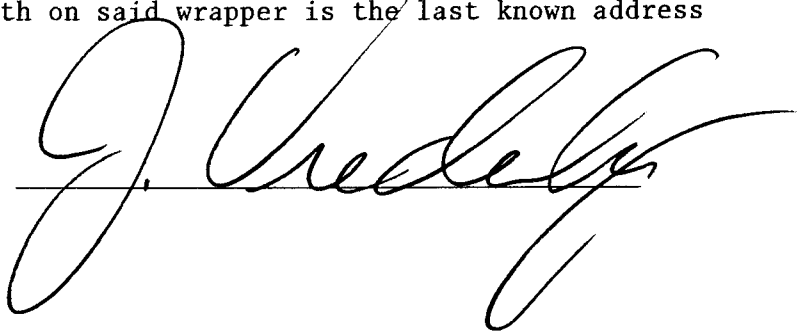
George J. Seitz
54 Alpine Place
Buffalo, NY 14225

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
14th day of December, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 14, 1982

George J. Seitz
54 Alpine Place
Buffalo, NY 14225

Dear Mr. Seitz:

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
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	:	
	:	
GEORGE J. SEITZ	:	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 1976.	:	

Petitioner, George J. Seitz, 54 Alpine Place, Buffalo, New York 14225, 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 1976 (File No. 30399).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on December 17, 1981 at 1:15 P.M. Petitioner George J. Seitz appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Anna D. Colello, Esq., of counsel).

ISSUE

Whether gain on sale of an asset used in petitioner's business was subject to unincorporated business tax or whether said gain was derived from the holding of real property and exempt from tax.

FINDINGS OF FACT

1. Petitioner timely filed a New York State Income Tax Resident Return and a Unincorporated Business Tax Return for 1976. Petitioner reported the gain on the sale of Highland Motor Court on his personal income tax return but not on his unincorporated business tax return.

2. On August 30, 1979, the Audit Division issued a Statement of Audit Changes against petitioner which applied a personal income tax refund of \$153.48 against an unincorporated business tax of \$1,222.59. The Statement was issued on the following grounds:

- (A) Gain on the sale of business assets must be included on your 1976 unincorporated business tax return at 100%.
- (B) Since your 1976 unincorporated business tax return was filed for less than twelve months, the business exemption must be prorated.
- (C) The specific deduction allowable when computing minimum income tax is \$5,000.00 for a single individual rather than \$2,500.00 as shown by you.
- (D) Section 685(c) Penalty is assessed for underestimation of tax on your 1976 return.

Accordingly, a Notice of Deficiency was issued against petitioner George J. Seitz, dated April 14, 1980, asserting a net tax due for the tax year 1976 amounting in its aggregate to \$1,069.11, together with interest and penalty of \$321.33.

3. Petitioner conceded all adjustments other than gain on the sale of the business property asset.

4. In 1972, petitioner George J. Seitz purchased the Highland Motor Court, which was in a depressed area, to be used and rented as apartments. It consisted of two houses, nine small buildings or cabins and a small building that was rented as a laundromat. The houses were of the two- and three-bedroom size and rented on a monthly basis. The cabins were a combination livingroom and bedroom, kitchen, dinette, and bathroom except for one cabin which had a separate living room and bedroom. Except for one of the cabins, each was rented on a weekly basis. Three of the cabins had two apartments in each.

5. Prior to the purchase of the motor court by petitioner, it had operated as a motel renting to transient guests, but the construction of the New York State Thruway caused a change in the operations and type of tenants. At the time the petitioner purchased the complex, tenants were staying from six to eight months. At the time the petitioner sold the Highland Motor Court in 1976, one weekly tenant had been there over five years, two other tenants from three to four years, two others for over a year and the remaining four tenants for less than a year. The tenants in the houses had been there for years.

6. All of the apartments were furnished and the petitioner provided utilities and linens. The complex had no office or full time employees other than a maid who came in one day per week. The petitioner would do the other maintenance on the weekends.

7. During the year at issue, the petitioner rented one apartment on a one night basis, on eight separate occasions. In all cases, this was done for friends who had guests in town. The petitioner did not advertise and did not want tenants for a short duration.

8. Petitioner had no leases with any of his tenants in the cabins or the houses and charged sales tax on their first three months of rent.

9. Petitioner's rental records showed the apartments and the amounts collected each week, but did not show the names of the tenants. The Audit Division contended that the rental records did not show the names of the tenants and that the petitioner's testimony is immaterial as proof to the length of stay of the tenants; therefore, the operation of the complex was open to the public for accommodations of short duration which would constitute an unincorporated business activity, the income from which would be subject to the unincorporated business tax.

10. Petitioner's unincorporated business tax return reported the rental income and expenses of the cabins and houses which made up the Highland Motor Court complex. The petitioner followed this reporting procedure because this was the procedure used by the previous owner.

CONCLUSIONS OF LAW

A. That in view of the demeanor of the petitioner while testifying, the fact that petitioner's records were timely kept though they had the flaw of the missing names, and the amount of income reported and type and sizes of expenditure, it is hereby found that petitioner's testimony was credible and that petitioner has sustained his burden of proof imposed by section 689(e) of the Tax Law in demonstrating that a change occurred in the business activity when the property was purchased in 1972. Thus, the gain from the sale of the property did not constitute unincorporated business gross income within the meaning and intent of section 705(a) of the Tax Law.

B. That the petitioner was the owner of real property and was not engaged in an unincorporated business solely by reason of holding, leasing or managing (including operating) real property for his own account in accordance with section 703(e) of the Tax Law.

C. That the Audit Division is directed to modify the Notice of Deficiency issued April 14, 1980 so as to exclude gain from the sale of real property from the unincorporated business tax; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION
Robert M. Pauland
ACTING PRESIDENT
Frank R. Koenig
COMMISSIONER
Mark J. Smith
COMMISSIONER