

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Arthur & Inez Gschwind : 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 1975 & 1976. :

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State of New York  
County of Albany

Kathy Pfaffenbach, 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 24th day of January, 1983, she served the within notice of Decision by certified mail upon Arthur & Inez Gschwind, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur & Inez Gschwind  
1 Beech Rd.  
Islip, NY 11751

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  
24th day of January, 1983.

Kathy Pfaffenbach

Ann M. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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Arthur & Inez Gschwind : AFFIDAVIT OF MAILING  
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State of New York  
County of Albany

Kathy Pfaffenbach, 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 24th day of January, 1983, she served the within notice of Decision by certified mail upon Joseph T. Leo the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

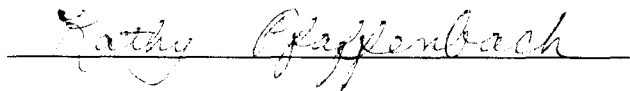
Joseph T. Leo  
40 Main St., P.O. Box 69  
Sayville, NY 11782

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  
24th day of January, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

January 24, 1983

Arthur & Inez Gschwind  
1 Beech Rd.  
Islip, NY 11751

Dear Mr. & Mrs. Gschwind:

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  
Joseph T. Leo  
40 Main St., P.O. Box 69  
Sayville, NY 11782  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
ARTHUR GSCHWIND and INEZ GSCHWIND	:	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 Years 1975 and 1976.	:	

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Petitioners, Arthur Gschwind and Inez Gschwind, 1 Beech Road, Islip, New York 11751, filed a petition for redetermination of deficiencies or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1975 and 1976 (File Nos. 28569, 28570 and 28571).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 23, 1982 at 2:45 P.M. Petitioners appeared by Joseph T. Leo, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether field audit adjustments attributing additional business receipts to petitioner Arthur Gschwind for 1975 and 1976 were proper.

II. Whether certain rental income is subject to the unincorporated business tax.

III. Whether a gain derived from a condemnation award is taxable in its entirety for unincorporated business tax purposes.

IV. Whether a portion of such gain is taxable in 1975.

V. Whether petitioners may elect to file separate returns for taxable year 1975.

FINDINGS OF FACT

1. Petitioners filed a joint New York State Income Tax Resident Return for 1975. For taxable year 1976 they filed separately on a combined return. Pursuant to a schedule submitted therewith, petitioners elected for non-recognition of a \$31,102.00 gain derived from a condemnation in accordance with section 1033(a)(2)(A) of the Internal Revenue Code. Petitioner Arthur Gschwind filed unincorporated business tax returns for 1975 and 1976 for his retail hardware business, Bay Shore Hardware, located at 1715 Union Boulevard, Bayshore, New York.

2. On September 17, 1979 the Audit Division issued a Statement of Audit Changes to petitioners wherein, pursuant to two schedules of audit adjustments attached thereto, the following adjustments were made which are contested herein by petitioners:

1975

(a) Additional receipts per analysis of cash availability and total living expenses. Adjustment applied for both personal income tax and unincorporated business tax purposes.  
\$10,029.00

(b) Rental income reported for personal income tax purposes held subject to unincorporated business tax on the basis that such income was derived from an asset employed in the unincorporated business.  
\$ 2,948.00

1976

(a) Additional receipts (as per 1975).  
\$10,914.00

(b) Rental income held subject to unincorporated business tax (as per 1975).  
\$ 1,306.00

(c) Gain derived from condemnation award. Since replacement property was not purchased within the period provided under section 1033(a)(2)(B) of the Internal Revenue Code, such gain, as reported for purposes of non-recognition, was held

subject to both personal income tax and unincorporated business tax.

For personal income tax purposes  $\frac{1}{2}$  of \$31,102.00 = \$15,551.00.

For unincorporated business tax purposes at 100% \$31,102.00.

3. On December 31, 1979, the Audit Division issued three notices of deficiency against petitioners as follows:

(a) Arthur and Inez Gschwind - 1975 - Asserting personal income tax of \$1,144.98, unincorporated business tax of \$645.99, plus penalty and interest of \$669.55, for a total due of \$2,460.52.

(b) Arthur Gschwind - 1976 - Asserting personal income tax of \$2,043.43, unincorporated business tax of \$2,472.66, plus penalty and interest of \$1,304.47, for a total due of \$5,820.56

(c) Inez Gschwind - 1976 - Asserting personal income tax of \$818.25, plus penalty and interest of \$236.35, for a total due of \$1,054.60.

Said penalties were asserted pursuant to section 685(b) of the Tax Law for negligence.

4. On March 5, 1979, petitioners' representative executed a Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Taxes. Said consent extended the period for assessment of 1975 taxes to April 15, 1980.

5. The adjustment for additional receipts of \$10,029.00 for 1975 was comprised of unexplained funds of \$4,529.00 determined from an analysis of funds using the source and application of funds method and \$5,500.00 additional cash living expenses determined through the use of a cost of living analysis. The adjustment for additional receipts of \$10,914.00 for 1976 was comprised of unexplained funds of \$5,214.00 and additional cash living expenses of \$5,700.00 as determined through use of the aforesaid methods of income reconstruction.

6. Petitioner Arthur Gschwind contended that the unexplained funds determined for each year at issue consisted of repayments of loans by his son. No documentation was offered to support said contention.

7. Petitioner objected to the adjustments for additional cash living expenses as determined through use of a cost of living analysis. Although he contended that such method is inappropriate since the business used the accrual method of accounting, he failed to demonstrate how use of said method results in inconsistent, unequitable or erroneous conclusions. Petitioners filed their personal income tax returns on the cash basis.

8. The rental income of \$2,948.00 and \$1,306.00 for 1975 and 1976 respectively was derived from apartments situated above petitioner Arthur Gschwind's hardware store located at 1715 Union Boulevard, Bayshore, New York. Petitioners jointly owned the building. Petitioners contended that the rental property was unrelated to the hardware store and accordingly, the rental income should not be attributed to the unincorporated business.

9. The rental property at issue was carried as an asset on the business books of the hardware store.

10. Petitioner conceded the taxability of the gain derived from the condemnation of the real property housing his unincorporated business, however, he contended that since such property was jointly owned, and his wife was not a party to the business, only half the gain should be taxable for unincorporated business tax purposes. Petitioner applied the same reasoning in his claim that at most, half the aforestated rental income could be held applicable to the business.

11. On August 26, 1975, petitioners were mailed a statement from the County of Suffolk, Department of Land Management wherein a condemnation award offer was

made of \$56,000.00. Petitioner's were advised pursuant to said statement that "should you reject this offer, you have the right to demand an advancement payment in the above stated amount (of \$56,000.00)". In 1974, title had previously passed to the county. As the result of an appeal and subsequent litigation, an award of \$72,525.38 was paid to petitioners in 1976. Said award included interest of \$7,525.38.

12. Petitioners argued that since they had a right to receive payment of \$56,000.00 in 1975, a portion of the condemnation award gain should be taxable in said year as follows:

	<u>Totals</u>	<u>1975</u>	<u>1976</u>
Amount offered and set aside by county August, 1975	\$56,000.00	\$56,000.00	
Additional amount secured by litigation February, 1976	<u>16,525.00</u>		<u>\$16,525.00</u>
Total Adjusted Condemnation Award	\$72,525.00	\$56,000.00	\$16,525.00
Less: Amounts representing interest	<u>7,525.00</u>		<u>7,525.00</u>
Amounts received from condemnation award attributable to real estate.	\$65,000.00	\$56,000.00	\$ 9,000.00
Less: Reinvested in building reconstruction	(24,402.00)	(24,402.00)	
Legal fees paid	( 4,002.00)		( 4,002.00)
Basis of land and building lost in condemnation	<u>( 5,494.00)</u>	<u>( 5,494.00)</u>	
Gain on condemnation not reinvested	<u>\$31,102.00</u>	<u>\$26,104.00</u>	<u>\$ 4,998.00</u>

13. As a result of the adjustments made with respect to 1975, petitioners requested that their 1975 liabilities be computed separately. Their return was filed jointly since based on their income, as reported, no benefit would have been gained by filing separately at that time.



CONCLUSIONS OF LAW

A. That petitioner Arthur Gschwind has failed to sustain his burden of proof required pursuant to sections 689(e) and 722 of the Tax Law to show that the field audit adjustments attributing additional business receipts to him for taxable years 1975 and 1976 were improper or erroneous. Accordingly, said adjustments are hereby sustained.

B. That section 705(a) of the Tax Law provides in pertinent part that:

Unincorporated business gross income of an unincorporated business means the sum of the items of income and gain of the business, of whatever kind and in whatever form paid, includible in gross income for the taxable year for federal income tax purposes, including income and gain from any property employed in the business.

C. That petitioner Arthur Gschwind has failed to sustain his burden of proof required pursuant to sections 689(e) and 722 of the Tax Law to show that the jointly owned building which housed his unincorporated business and the rental apartments was not employed in his business. Accordingly, the rental income and condemnation award gain at issue are fully includible in his unincorporated business gross income. Matter of Charles Schmidt, State Tax Commission decision, August 4, 1982.

D. That since as of August 26, 1975, petitioners had the right to demand and receive \$56,000.00 of the condemnation award, the gain realized from said portion is deemed taxable in 1975 even though actual payment was not received until 1976. (W.Q. Boyce, (Ct. Cls), 69-1 USTC 9124, 405 F.2d 526.) Accordingly, the gain realized from said condemnation award is to be apportioned between 1975 and 1976 as per Finding of Fact "12" supra.

E. That petitioners are granted a change of election from a joint return to separate returns for 1975. Accordingly, the deficiency determined for said year is to be computed separately for each spouse. (20 NYCRR 154.4(c)).

F. That the petition of Arthur Gschwind and Inez Gschwind is granted to the extent provided in Conclusions of Law "D" and "E" supra, and except as so granted said petition is, in all other respects, denied.

G. That the Audit Division is hereby directed to modify the notices of deficiency issued December 31, 1979 to be consistent with the decision rendered herein.

DATED: Albany, New York


JAN 24 1983

STATE TAX COMMISSION

ACTING

PRESIDENT

  
COMMISSIONER

  
COMMISSIONER