

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Victor Levine :
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 1972. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 22nd day of November, 1983, she served the within notice of Decision by certified mail upon Victor Levine, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Victor Levine
Flanders K507
Del Ray Beach, FL 33446

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
22nd day of November, 1983.

Maucha L. Scunelle

Connie A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Victor Levine :
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 1972. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 22nd day of November, 1983, she served the within notice of Decision by certified mail upon Alvin Emory the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alvin Emory
209-34 30th Ave.
Bayside, NY 11360

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
22nd day of November, 1983.

Maucha L. Sennelle

Connie A. Hagelund

ADMINISTRATOR TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

November 22, 1983

Victor Levine
Flanders K507
Del Ray Beach, FL 33446

Dear Mr. Levine:

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Alvin Emory
209-34 30th Ave.
Bayside, NY 11360
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
VICTOR LEVINE	:	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 1972.	:	

Petitioner, Victor Levine, Flanders K507, Del Ray Beach, Florida 33446, 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 1972 (File No. 17707).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 17, 1980. Petitioner, Victor Levine, appeared with Alvin Emory, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether a capital gain derived from the sale of real property is subject to the unincorporated business tax.

II. Whether the statute of limitations for asserting a personal income tax deficiency had expired.

III. Whether a capital gain derived from the sale of real property was properly reported by petitioner for personal income tax purposes.

FINDINGS OF FACT

1. Petitioner, Victor Levine, and Frances Levine, his wife, timely filed a New York State Combined Income Tax Return for the year 1972 wherein petitioner reported a gain from the sale of capital assets of \$18,779.14. No Federal Schedule D or minimum income tax schedule were attached to the return. The return did not disclose how the gain was computed or the nature of the gain. Petitioner did not file an unincorporated business tax return for the year 1972, since he reported a rental loss of \$5,399.11 from the operation of a bungalow colony.

2. On December 20, 1976, the Audit Division issued a Notice of Deficiency for the year 1972 for \$2,486.06, plus penalties and interest, along with an explanatory Statement of Audit Changes which indicated:

"The remainder of long term capital gains not subject to New York personal income tax is considered to be an item of tax preference and subject to New York minimum tax."

"Net long term capital gains are taxed by New York State at 60% rather than 50%. Accordingly, 20% of the capital gains deduction should be added to income: \$18,779.15 @ 20% = \$3,755.83."

"Rental income received from furnished lodging, to short term tenants, is subject to the unincorporated business tax."

"Penalty is imposed for failure to file and pay unincorporated business tax."

In addition, interest income of \$2,022.04 and a capital gain of \$37,558.29 was held subject to the unincorporated business tax.

3. Petitioner, Victor Levine, and his wife, jointly owned approximately 66 acres of land located in Sullivan County, New York. Petitioner operated a bungalow colony, as an unincorporated sole proprietorship, situated on approximately 15 acres of this land. Although these 15 acres were segregated from the other 51 acres by a stone wall, title to the entire 66 acres was held by

petitioner and Mrs. Levine as one parcel. The mortgage note, taken by petitioner and his wife when they sold the property, described the property as one parcel. The real property tax and insurance premiums covered the entire 66 acres. The 15 acres contained furnished bungalows, a swimming pool, handball courts, etc., and a home utilized by petitioner and his family. The other 51 acres consisted of undeveloped land, which was not used by petitioner.

4. On September 23, 1972, petitioner, Victor Levine, and his wife, sold the entire 66 acres for \$150,000.00 on the installment basis, and petitioner reported a gain from the money received during 1972 of \$37,558.29, prior to a capital gain exclusion.

5. Petitioner contended that the gain at issue was realized from the sale of the land jointly owned by himself and his wife, and was unrelated to the unincorporated business conducted on it.

6. Petitioner contended that he erroneously reported the full amount of the net capital gain on the New York State Combined Income Tax Return filed for the year 1972, which allowed him and his wife to file separate returns. Petitioner reasoned that since the real property at issue was jointly owned by himself and his wife, that he was solely required to report half the capital gain realized and that his wife was required to report the other half.

CONCLUSIONS OF LAW

A. That section 705(a) of the Tax Law provides that the unincorporated business gross income of an unincorporated business includes "income and gain from any property employed in the business", and 20 NYCRR 205.1 further provides, in part, that unincorporated business gross income means the sum of the items of income and gain which are includible in the gross income of the individual or unincorporated entity for Federal income tax purposes and which are derived

from the carrying on or liquidation of the business, including, without limitation, income and gain "from any property of the individual or unincorporated entity, or a member thereof, employed in the business".

B. That the land in question constituted property employed in the unincorporated business conducted by petitioner, Victor Levine, and insufficient basis exists to support an argument that the 51 undeveloped acres were separate and distinct from the 15 acres of improved land. Accordingly, the gain on the sale of the entire 66 acres is subject to the unincorporated business tax in accordance with the meaning and intent of section 705(a) of the Tax Law and 20 NYCRR 205.1. (See Matter of Richard Karweck and Raymond Karweck d/b/a Seneca Motel, State Tax Comm., December 31, 1970).

C. That petitioner failed to disclose in the return filed for the year in issue, or in a statement attached to said return, in a manner adequate to apprise the Tax Commission that an item of tax preference was reported on said return. Since petitioner omitted an item of tax preference in excess of 25 percent of the sum of the items of tax preference items stated in the return, the tax may be assessed at any time within six years after the return was filed. Accordingly, the personal income tax deficiency was timely asserted pursuant to section 683(d)(1) of the Tax Law. (Matter of Alfred H. and Ray Lawrence, State Tax Comm., July 18, 1980).

D. That since the property in question was jointly owned by petitioner and his wife, it is proper, for income tax purposes, for petitioner to report one-half of the gain from the sale of said property and one-half of the item of tax preference related thereto on his separate income tax return. The remaining one-half of such income and item of tax preference are properly reportable by Mrs. Levine on her separate income tax return.

E. That any refund resulting from the recomputation of petitioner's personal income tax by virtue of Conclusion of Law "D" is limited to zero in accordance with the meaning and intent of section 687 of the Tax Law. (See Matter of Ford Motor Company, State Tax Comm., June 18, 1982). Furthermore, any tax due from Mrs. Levine by virtue of Conclusion of Law "D" may not now be assessed pursuant to section 683 of the Tax Law.

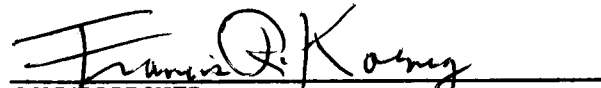
F. That the petition of Victor Levine is granted to the extent that the additional tax imposed under Article 22 of the Tax Law is cancelled in full. The Audit Division is directed to adjust the Notice of Deficiency, dated December 20, 1976, accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 22 1983


PRESIDENT


COMMISSIONER


COMMISSIONER