

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 of :
 Solomon S. & Arlene Melnick :
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 1968. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Solomon S. & Arlene Melnick, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Solomon S. & Arlene Melnick
3546 E. Forest Lakes Dr.
Sarasota, FL 33579

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
6th day of May, 1983.

David Parchuck

Ann A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE TAX COMMISSION

State of New York
County of Albany

Samuel Roth
753 Bergen Blvd.
Ridgefield, NJ 07657

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.

David Purchuck

James C. Hayward

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 6, 1983

Solomon S. & Arlene Melnick
3546 E. Forest Lakes Dr.
Sarasota, FL 33579

Dear Mr. & Mrs. Melnick:

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
Samuel Roth
753 Bergen Blvd.
Ridgefield, NJ 07657
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SOLOMON S. and ARLENE MELNICK	:	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 1968.	:	

Petitioners, Solomon S. and Arlene Melnick, 3546 East Forest Lakes Drive, Sarasota, Florida 33579, 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 1968 (File Nos. 13309 and 13310).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on September 22, 1982 at 10:45 A.M, with all briefs to be submitted by October 18, 1982. Petitioners appeared by Samuel Roth, P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the penalties and interest imposed upon an asserted deficiency of personal income tax and unincorporated business tax should be waived.

FINDINGS OF FACT

1. Petitioners filed a joint U.S. Individual Income Tax Return for 1968, reporting the gain and interest income arising from an installment sale which occurred in 1967. Petitioners also reported rental income.

2. Petitioners, Solomon S. Melnick and Arlene Melnick, filed a joint New York State Income Tax Resident Return for the period January 1, 1968 through

May 31, 1968. On this return, petitioners reported that they were residents of New York from January 1, 1968 to May 31, 1968. Petitioners reported the interest income and gain attributed to their period of residence arising from an installment sale which took place in 1967. They did not report any rental income.

3. Petitioners filed a joint New York State Income Tax Nonresident Return for the period June 1, 1968 through December 31, 1968. On this return, petitioners did not report any interest income or rental income as being attributable to New York.

4. Solomon S. Melnick did not file an unincorporated business tax return for 1968.

5. On April 10, 1972 the Audit Division issued to petitioners a Notice of Deficiency which asserted a deficiency of personal income tax of \$2,821.93 plus interest of \$505.89 for a total amount due of \$3,327.82. The Statement of Audit Changes, which was also issued on April 10, 1972, explained, in part, that if a taxpayer sells his business in New York at a gain, under a contract in which the purchase price is to be paid in installments, and the taxpayer changes his status from resident to nonresident, the entire amount of the gain must be accrued on petitioner's last resident return. The Statement of Audit Changes also stated that rental income from New York property must be reported as New York income on both the resident and nonresident New York State personal income tax returns.

6. On April 10, 1972 the Audit Division issued to Solomon S. Melnick a Notice of Deficiency which asserted a deficiency of unincorporated business tax in the amount of \$673.24, penalty pursuant to section 685(a) of the Tax Law of \$168.31 for failure to file an unincorporated business tax return, and interest

of \$120.69 for a total amount due of \$962.24. The Statement of Audit Changes, which was issued on the same date, explained, in part, that since petitioner Solomon S. Melnick failed to file an unincorporated business tax return for 1968, the correct unincorporated business tax for that year was computed.

7. In December, 1967 Solomon S. Melnick sold a jewelry and giftware business which was located in Staten Island, New York. The sale was made on an installment basis for a total amount of \$90,000.00. The sales price of the business was allocated as follows:

Merchandise and Stock-in-Trade	\$50,000.00
Furniture and Fixtures	30,000.00
Restrictive Covenant	5,000.00
Goodwill	5,000.00

8. In 1967 petitioners reported to New York \$9,820.34 which represented the pro rata share of the gain on the installment sale.

9. In June, 1968 petitioners changed their residence from New York to Florida on the advice of their physicians, because each petitioner was suffering from poor health. During 1968 petitioners were primarily concerned with their failing health and their attempts to recover.

10. The Notice of Deficiency was based on information reported to the Audit Division by petitioners' representative. On the basis of this information, the taxable gain from the sale was determined to be \$36,077.67 and the amount of gain to be accrued was this amount, \$36,077.67, less the amount that was reported in 1967 (\$9,820.34). In 1978, petitioners' representative gave the Audit Division a copy of the contract of sale. Thereafter, the Audit Division acknowledged that, under the terms of the contract, the installment gain which should have been accrued in 1968 was \$24,500.00

11. At the beginning of the hearing, the only issue raised by the parties was the propriety of the accrual of the gain on the installment sale when

petitioners changed their status from residents to nonresidents. At the conclusion of the hearing, petitioners' representative conceded that a revised deficiency based upon the contract of sale was proper. However, petitioners' representative requested that the penalties and interest be waived.

CONCLUSIONS OF LAW

A. That, in view of Finding of Fact "11", the portion of the asserted deficiencies premised upon the accrual of the gain on the sale of business is sustained. However, the Audit Division is directed to recompute the asserted deficiency based upon the contract of sale noted in Finding of Fact "10".

B. That the failure of petitioners to file an unincorporated business tax return was due to reasonable cause and not willful neglect. Therefore, the penalty asserted pursuant to section 685(a) of the Tax Law is cancelled.

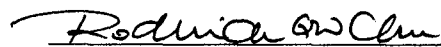
C. That there is no provision in the New York State Tax Law which provides for the waiver of interest on an asserted deficiency.

D. That the petition of Solomon S. Melnick and Arlene Melnick is granted only to the extent of Conclusions of Law "A" and "B"; the Audit Division is directed to modify the Notice of Deficiency accordingly; and except as so granted, the Notices of Deficiency are sustained and the petition of Solomon Melnick and Arlene Melnick is denied.

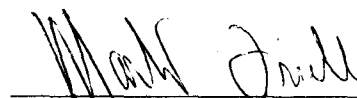
DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER