

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Martin & Carol Meyers :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Year :
1976. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

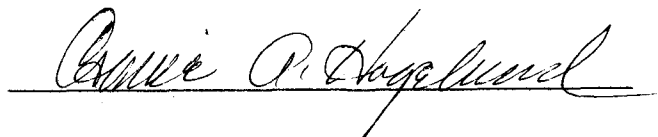
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Martin & Carol Meyers, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Martin & Carol Meyers
32 Sparta Rd.
Short Hills, NJ 07078

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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Martin & Carol Meyers :
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Tax under Article 22 of the Tax Law for the Year :
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AFFIDAVIT OF MAILING

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Connie Hagelund, 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 15th day of July, 1983, she served the within notice of Decision by certified mail upon Donald P. O'Connor the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald P. O'Connor
Touche Ross & Co.
Gateway I
Newark, NJ 07102

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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

July 15, 1983

Martin & Carol Meyers
32 Sparta Rd.
Short Hills, NJ 07078

Dear Mr. & Mrs. Meyers:

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 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
Donald P. O'Connor
Touche Ross & Co.
Gateway I
Newark, NJ 07102
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MARTIN MEYERS and CAROL MEYERS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1976.	:	

Petitioners, Martin Meyers and Carol Meyers, 32 Sparta Road, Short Hills, New Jersey 07078, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1976 (File No. 31484).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 2, 1982 at 1:15 P.M., with all briefs to be submitted by February 25, 1983. Petitioners appeared by Touche, Ross & Co. (Donald O'Connor, Jay Vodofsky and Claire Tapen). The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether income of a nonresident, consisting of gain on the sale of a leasehold held on property located in New York as well as interest income from notes taken in connection with such sale, constitutes income properly subject to taxation by New York State.

FINDINGS OF FACT

1. Petitioners, Martin Meyers and Carol Meyers, timely filed a joint New York State Income Tax Nonresident Return (Form IT 203/209) for the year 1976. On January 14, 1980, petitioners executed a consent allowing personal income

and/or unincorporated business taxes for the year ended December 31, 1976 to be assessed at any time on or before April 15, 1981.

2. On May 30, 1980 the Audit Division issued to petitioners a Notice of Deficiency asserting additional tax due for 1976 in the amount of \$3,914.08, plus interest.

3. A Statement of Personal Income Tax Audit Changes dated April 22, 1980 explained the basis for the asserted deficiency as follows:

"[b]ased on Field Audit, the following adjustments have been made: As your leasehold is a tangible business property having situs in N.Y.S. the proceeds from sale is (sic) subject to N.Y.S. income tax."

Gain realized in 1976 from installment sale	\$21,375.00
50% long-term gain reportable	\$10,688.00
20% modification of capital gains	2,138.00
Interest income from notes on sale of leasehold	11,741.00
Modification for allocable expenses (IT-220)	697.00
Net Adjustments	<u>\$25,264.00</u>

The income tax computation by the Audit Division included minimum income tax due of \$29.23.¹

4. During the period at issue herein, petitioner Martin Meyers was employed by several corporations of which he was the sole shareholder or a substantial shareholder. Each of these various corporations was engaged in the business of operating parking garages or facilities located in New York City which were leased by the corporations from third parties. Mr. Meyers' occupation was that of an "executive" of the corporations, wherein he managed the operations of the various leased parking garages or facilities for the corporations.

¹ In computing total items of tax preference, the 20% capital gain subtraction of \$2,138.00 was erroneously added to and not subtracted from capital gains of \$10,688.00. Therefore, since the amount of the specific deduction and New York tax is larger than total items of tax preference, no minimum income tax is due.

5. In 1971 the Sixth Avenue Garage Corporation ("Sixth Avenue"), one of the above-corporations, was liquidated with petitioner Martin Meyers, as sole shareholder, receiving Sixth Avenue's lease of the parking facilities in exchange for his stock in Sixth Avenue. At the date of the distribution, this lease had a remaining term of approximately seventeen (17) years.

6. Mr. Meyers sold the lease immediately after it was distributed to him (on the same day). This sale was on the installment basis, with petitioners recognizing a gain of \$21,375.00 in 1976 upon collection of installment receipts together with interest income of \$11,741.00 from notes given by the purchaser of the lease. It was asserted that petitioner did not operate the leased facilities on his own account since the commercial liability risks of such an operation would be prohibitive.

7. Neither the gain on the sale of the lease nor the interest income from the notes was reported as New York source income by petitioners on their New York State Nonresident Income Tax Return for 1976.

8. Petitioners assert specifically that the ownership of a leasehold on property situated in New York State does not constitute the ownership of the requisite interest in real property or tangible personal property for purposes of section 632(b)(1)(A) of the Tax Law. Furthermore, petitioners assert that the sale of the lease, held by Mr. Meyers in his individual capacity, constituted one isolated transaction and did not constitute the carrying on of a business, trade, profession or occupation by Mr. Meyers. Mr. Meyers was not in the business of operating parking garages or facilities nor of selling such leases in his own right, and petitioners assert the operations of the corporations employing Mr. Meyers should not be attributed to him.

CONCLUSIONS OF LAW

A. That section 632 of the Tax Law in pertinent part provides:

"New York adjusted gross income of a nonresident individual.
-- (a) General. -- The New York adjusted gross income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:

* * *

(b) Income and deductions from New York sources -- (1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this state or

(B) a business, trade, profession or occupation carried on in this state.

(2) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state.

B. That the interest income from the unpaid balance of installment notes held by petitioners was not income derived from or connected with New York sources. These notes (intangible personal property giving rise to the income) were not employed or utilized by petitioners in a business, trade, profession or occupation carried on by petitioners in New York State. (see Matter of Epstein v. Tax Commission, 89 A.D.2d 256).

C. That "[a] lease has a twofold aspect. It is both a contract and a conveyance of an estate or interest in land." (emphasis added) [33 N.Y. Jur. Landlord and Tenant §2; see also 33 N.Y. Jur. Landlord and Tenant §3]. While

a lease may properly be classified as intangible property (a contract evidencing the right to possess real property for a period of time), a lease also represents the ownership of an interest in real property. Since the lease was owned by petitioner and represented an interest in real property having its situs in New York State, the gain on the sale of this lease is properly taxable by New York State in accordance with the meaning and intent of section 632(b)(1)(A) of the Tax Law.

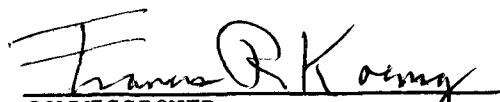
D. That the petition of Martin Meyers and Carol Meyers is granted to the extent indicated in Conclusion of Law "B", but is in all other respects denied. The Audit Division is hereby directed to modify the Notice of Deficiency dated May 30, 1980 in accordance with this decision, and said notice as modified, together with such interest as may be lawfully owing, is sustained.

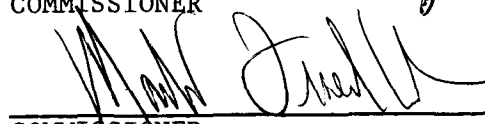
DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983


PRESIDENT


COMMISSIONER


COMMISSIONER