

STATE OF NEW YORK

STATE TAX COMMISSION

|  |   |                      |
|--|---|----------------------|
| In the Matter of the Petition                      | : |                      |
| of   | : |                      |
| Estate of Irwin Sable                              | : |                      |
| c/o Abraham Tannenbaum, Executor & Anita Sable     | : | 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 1973 & 1974.                                 | : |                      |

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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Estate of Irwin Sable, c/o Abraham Tannenbaum, Executor & Anita Sable the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Irwin Sable  
c/o Abraham Tannenbaum, Executor & Anita Sable  
25-15 160th St.  
Flushing, NY 11358

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  
20th day of May, 1983.

David Parchuck

Annie A. Haglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Estate of Irwin Sable :  
c/o Abraham Tannenbaum, Executor & Anita Sable :  
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 1973 & 1974. :

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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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Abraham Tannenbaum the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Abraham Tannenbaum  
25-15 160th St.  
Flushing, NY 11358

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  
20th day of May, 1983.

David Parchuck

James P. Hammond  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 20, 1983

Estate of Irwin Sable  
c/o Abraham Tannenbaum, Executor & Anita Sable  
25-15 160th St.  
Flushing, NY 11358

Dear Mrs. Sable:

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  
Abraham Tannenbaum  
25-15 160th St.  
Flushing, NY 11358  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|   |   |          |
|---|---|----------|
| In the Matter of the Petition                     | : |          |
| of  | : |          |
| ESTATE OF IRWIN SABLE, C/O ABRAHAM TANNENBAUM,    | : | DECISION |
| EXECUTOR, AND ANITA SABLE                         | : |          |
| 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 1973 and 1974.                          | : |          |

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Petitioners, Estate of Irwin Sable, c/o Abraham Tannenbaum, Executor, and Anita Sable, 25-15 160th Street, Flushing, New York 11358, 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 years 1973 and 1974 (File Nos. 27469 and 27609).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 27, 1982 at 1:20 P.M. Petitioners appeared by Abraham Tannenbaum, P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUES

- I. Whether the Audit Division timely issued notices of deficiency against petitioners.
- II. Whether the income reconstruction audit properly reflected the income of Irwin Sable and Anita Sable.
- III. Whether the Audit Division properly disallowed petitioners' deduction for rental loss.

IV. Whether the Audit Division properly disallowed business purchases and rental expenses of Irwin Sable's unincorporated jewelry business.

FINDINGS OF FACT

1. Petitioner Anita Sable and her husband, Irwin Sable, timely filed a joint New York State Income Tax Resident Return for 1973 and reported total income of \$11,981.31. They<sup>1</sup> also timely filed a New York State Unincorporated Business Tax Return for 1973 showing "net profit from business" of \$11,628.36.

Petitioners Anita Sable and Irwin Sable timely filed a joint New York State Income Tax Resident Return for 1974 and reported total income of \$15,314.81. Irwin Sable also timely filed a New York State Unincorporated Business Tax Return for 1974 showing "net profit from business" of \$19,974.99.

2. On April 13, 1979, the Audit Division issued two notices of deficiency against petitioners, Estate of Irwin Sable and Anita Sable. One showed additional personal income tax due or tax deficiencies of \$7,827.00 plus interest for the 1973 tax year and \$6,710.00 plus interest for the 1974 tax year. The second showed additional unincorporated business tax due of \$2,985.00 plus interest for the 1973 tax year and \$2,321.00 plus interest for the 1974 tax year. The alleged deficiencies for 1973 and 1974 were the result of a field audit.

3. Irwin Sable, during the tax years at issue, operated an unincorporated jewelry business in his own name at 66 West 47th Street, New York, New York 10036. In the "tax field audit record", Exhibit L herein, Irwin Sable's "business activity" is described as a "retailer of semi-precious stones and gems".

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<sup>1</sup> Both Anita Sable and Irwin Sable signed the 1973 unincorporated business tax return. Only Irwin Sable signed the 1974 unincorporated business tax return.

4. The Audit Division reconstructed the income of Irwin Sable and Anita Sable by a source and application of funds indirect audit which found the following:

| <u>SOURCES</u>                               | <u>1973</u>  | <u>1974</u>               |
|--|--------------|---------------------------|
| Gross Receipts Per "1040 Schedule C"         | \$158,042.70 | \$125,124.58 <sup>2</sup> |
| Cash Drawings                                | 27,150.00    | 15,200.00 <sup>2</sup>    |
| Withdrawal from Seamen's Bank<br>C 611813    | 1,377.28     | -0-                       |
| Withdrawal from Seamen's Bank<br>C 611814    | 531.97       | -0-                       |
| Withdrawal from Bankers Trust Co.<br>53-6522 | 27,500.00    |                           |
| Gross Rents                                  | -0-          | 7,100.00                  |
| Cash from Personal Checking Account          | 1,100.00     | 4,100.00                  |
| Cash from Proceeds of Mutual Funds           | 7,622.64     | -0-                       |
| TOTAL SOURCES                                | \$223,324.59 | \$151,524.58              |
|  |              |                           |
| <u>APPLICATIONS</u>                          | <u>1973</u>  | <u>1974</u>               |
| Deposits to Business Checking Account        | \$165,017.48 | \$102,782.68              |
| Deposits to Personal Checking Account        | 46,657.08    | 26,029.18                 |
| Deposits to Bankers Trust Co.<br>53-6522     | 23,022.64    | -0-                       |
| Cash paid on purchase of house               | 23,574.78    | -0-                       |
| Cash paid on purchase of condominium         | 11,700.00    | -0-                       |
| Cash rental expenses on rental property      | -0-          | 384.47                    |
| TOTAL APPLICATIONS                           | \$269,971.98 | \$129,196.33              |
| Over Application of Funds                    | 46,647.39    | (22,328.22)               |
| Cash Living Expenses                         | 10,400.00    | 10,400.00                 |
| Additional Funds Required                    | \$ 57,047.00 | \$(11,928.00) Surplus     |

5. The Audit Division increased Irwin and Anita Sable's personal income for the 1973 tax year by \$57,047.00 which resulted in a determination of a personal income tax deficiency of \$7,827.00. The Audit Division also increased the taxable unincorporated business income for 1973 by \$54,273.00<sup>3</sup> resulting in a determination of an unincorporated business tax deficiency of \$2,985.00.

<sup>2</sup> This amount, derived from the analysis of the 1973 drawing account, should be \$15,250.00.

<sup>3</sup> The Audit Division allowed the maximum deduction of \$5,000.00 as reasonable compensation for Irwin Sable's personal services as prescribed by Tax Law §708. Since Irwin Sable had deducted \$2,226.00 as reasonable compensation on the return, an additional \$2,774.00 was allowed in calculating the alleged deficiency herein.

6. The Audit Division increased the personal income of Irwin Sable and Anita Sable by \$47,992.00 for the 1974 taxable year. This increase is based upon the disallowance as unsubstantiated of (i) \$35,000.00 of the \$65,406.06 reported as business purchases of the jewelry business operated by Irwin Sable, (ii) \$8,400.00 of the "rent on business property" of \$16,800.00 claimed as a business deduction, and (iii) \$4,592.00 of the \$4,794.68<sup>4</sup> that Irwin Sable and Anita Sable deducted as a rental loss. This increase in personal income resulted in a determination of a personal income tax deficiency of \$6,710.00 for 1974. The Audit Division also determined that the unincorporated business taxable income should be increased by \$42,197.00, which is the sum of the business expenses for purchases and rental expenses which were disallowed minus the additional allowance of \$1,203.00 for Irwin Sable's personal services,<sup>5</sup> which resulted in a determination of an unincorporated business tax deficiency of \$2,321.00 for 1974.

7. The Audit Division disallowed \$35,000.00 of the business purchases and \$8,400.00 of the rental expenses described in Finding of Fact "6", herein, in spite of the fact that an analysis of business checks and purchase invoices was never completed. The auditor testified that "I have no analysis of any

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<sup>4</sup> On Schedules E and R of the 1974 United States Form 1040, Irwin and Anita Sable reported gross income from property located at 5055 Collins Avenue, Miami, Florida, of \$4,400.00 and from property located at 9425 Carlyle Avenue, Miami Florida, of \$2,700.00. They reported expenses incurred of \$7,890.81 and \$4,003.87 for each property, respectively, which resulted in net loss from rent for each property of \$3,490.81 and \$1,303.87, respectively, for a total net loss from rents of \$4,794.68. Although the auditor who worked on the audit herein, testified that the entire rent loss was disallowed, the Audit Division in fact disallowed only \$4,592.00 of such net loss from rent.

<sup>5</sup> The Audit Division allowed the maximum deduction of \$5,000.00 as reasonable compensation for Irwin Sable's personal services as prescribed by Tax Law §708. Since Irwin Sable had deducted \$3,797.00 as reasonable compensation on the return, an additional \$1,203.00 was allowed in calculating the alleged deficiency herein.

business expenses". The record also lacks any factual basis for the disallowance of \$4,592.00 of the \$4,794.68 that petitioners deducted as a rental loss.

8. On November 30, 1976, petitioner Anita Sable executed a Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Taxes for 1973 which extended the period for the assessment of the taxes to "on or before April 15, 1978". On January 10, 1978, petitioner Anita Sable executed a subsequent Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Taxes for 1973 and 1974 which extended the period for the assessment of the taxes at issue herein to "on or before April 15, 1979". The Audit Division issued the notices of deficiency described in Finding of Fact "2", herein, on April 13, 1979, two days before the expiration of the period for assessment.

9. The Audit Division's increase of \$57,047.00 in Irwin and Anita Sable's personal income for 1973 is an amount vastly in excess of 25 percent of \$11,981.31, the New York adjusted gross income stated in their 1973 personal income tax return.

Likewise, the Audit Division's increase of \$54,273.00 in unincorporated business gross income for 1973 is an amount in excess of 25 percent of \$158,042.70, the unincorporated business gross income<sup>6</sup> reported by petitioner for 1973.

10. Petitioners failed to show that the source and application of funds audit described in Finding of Fact "4" herein was inaccurate or incorrect.

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<sup>6</sup> Tax Law §705(a) defines "unincorporated business gross income" as items of income of the business "includable in gross income for the taxable year for federal income tax purposes...". Irwin Sable reported gross income from his business for federal income tax purposes of \$158,042.73 for 1973.



CONCLUSIONS OF LAW

A. That pursuant to Tax Law sections 689(e) and 722, the burden of proof is imposed upon petitioners to show that the audit method used by the Audit Division in reconstructing their income for 1973 was inaccurate and/or incorrect. Matter of Robert R. Clark, State Tax Commission, December 14, 1982. As noted in Finding of Fact "10", herein, petitioners failed to show that the reconstruction of their income for 1973 was inaccurate and/or incorrect.

B. That the record does not show any factual basis to support the disallowance by the Audit Division of \$35,000.00 of the business purchases, \$8,400.00 of the rental expenses claimed as a business deduction, and \$4,592.00 of the \$4,794.68 that petitioners Anita Sable and Irwin Sable deducted as a rental loss. Therefore, the alleged personal income tax and unincorporated business tax deficiencies for 1974 may not be sustained. See Matter of Joseph Friedberg and Jeanette Friedberg, State Tax Commission, January 3, 1983.

C. That Tax Law section 683(d) provides, in part, as follows:

"Omission of income...on return.

-- The tax may be assessed at any time within six years after the return was filed if --

(1) an individual omits from his New York adjusted gross income...an amount properly includible therein which is in excess of twenty-five percent of the amount of New York adjusted gross income...".

D. That Tax Law section 722 incorporates Tax Law §683(d) into Article 23, the unincorporated business tax article, and also provides in part that "the term "adjusted gross income" shall be read as "unincorporated business gross income"...".

E. That pursuant to Tax Law sections 683(d) and 722, the Audit Division timely issued the notices of deficiency herein as they pertain to the 1973 tax year since the notices were issued within six years after the 1973 tax returns

were filed and the omission of income from such tax returns was in excess of twenty-five percent of the amount of New York adjusted gross income with respect to the personal income tax return and in excess of twenty-five percent of the amount of unincorporated business gross income with respect to the unincorporated business tax return.

F. That the petition of the Estate of Irwin Sable, c/o Abraham Tannenbaum, Executor, and Anita Sable is granted to the extent noted in Conclusion of Law "B", herein; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAY 20 1983

STATE TAX COMMISSION

Rodrick W. Clu  
PRESIDENT

Frank R. Koenig  
COMMISSIONER

Michael J. Smith  
COMMISSIONER