

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
The Estate of Frank A. Wiederman : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax & UBT under Article 22 & 23 of the Tax Law for :
the Years 1974 & 1976.

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 11th day of February, 1983, he served the within notice of Decision by certified mail upon The Estate of Frank A. Wiederman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

The Estate of Frank A. Wiederman
c/o Anna G. Wiederman
824 N. McKinley Ave.
Endicott, NY 13760

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
11th day of February, 1983.

David Parchuck

Constance A. Haydel

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
The Estate of Frank A. Wiederman : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income
Tax & UBT under Article 22 & 23 of the Tax Law for:
the Years 1974 & 1976.

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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Salvatore Fauci the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Salvatore Fauci
Simmonds & Fauci
43 Washington Ave.
Endicott, NY 13760

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
11th day of February, 1983.

David Parchuck

James D. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

February 11, 1983

The Estate of Frank A. Wiederman
c/o Anna G. Wiederman
824 N. McKinley Ave.
Endicott, NY 13760

To The Executor:

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
Salvatore Fauci
Simmonds & Fauci
43 Washington Ave.
Endicott, NY 13760
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
THE ESTATE OF FRANK A. WIEDERMAN	:	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 1974 and 1976.	:	

Petitioner, The Estate of Frank A. Wiederman, 824 N. McKinley Avenue, Endicott, New York 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 1974 and 1976 (File No. 26168).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on September 23, 1981 at 1:15 P.M. Petitioner appeared by Anna G. Wiederman and Salvatore Fauci, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Anna D. Colello, Esq., of counsel).

ISSUE

Whether Frank A. Wiederman, Dec'd. and his wife Anna G. Wiederman were entitled to report the income received from the sale of a business owned by them on the installment method prescribed by section 453 of the Internal Revenue Code.

FINDINGS OF FACT

1. Frank A. Wiederman and his wife Anna G. Wiederman, filed New York State resident income tax returns for 1974 and 1976. The income reported on their New York State return for 1976 included amounts from their Federal return

which represented a gain received on the sale of \$4,000.00 of restaurant equipment and the gain on the installment sale of real property. They reported a total sale price of \$74,000.00 for the real property and a gross profit of \$15,933.00, with a gain of \$14,225.00 in 1976.

2. A consent extending the period of limitation for 1974 was executed in January 1978 in accordance with section 683(c)(2) of the Tax Law. Said consent extended the period of limitation for assessment to April 15, 1979.

3. On June 1, 1978, the Audit Division issued a Statement of Audit Changes to Anna G. Wiederman and the Estate of Frank A. Wiederman, for the years 1974 and 1976, asserting additional personal income tax due of \$3,612.63 plus \$347.31 in interest. On that same date, the Audit Division issued a Statement of Audit Changes to the Estate of Frank A. Wiederman, for the years 1974 and 1976 asserting unincorporated business tax due of \$2,543.03, plus interest and penalty of \$921.32. These statements contained the explanation, "Section 453(b)(2) of the Internal Revenue Code limits the use of the installment method of reporting gain to sales where not more than 30% of the selling price is received in the taxable year in which the sale takes place. Since you have not met this limitation your gain reportable for 1976 has been recomputed...". Other adjustments made for the year of 1976, and all adjustments for the year of 1974, and are not contested. Accordingly, notices of deficiency were issued on November 28, 1978, but only against the Estate of Frank A. Wiederman and not Anna G. Wiederman.

4. On June 26, 1976, Frank A. Wiederman and his wife Anna G. Wiederman entered into a Uniform Sales Closing Contract, drawn by their realtor, to sell

real property and equipment to Evelyn B. Smith. This agreement combined the purchase price of the real property and the equipment for a total of \$78,000.00. The buyer was to deposit \$2,000.00 with the realtor. This agreement, drawn by the realtor, required the buyer to put down \$23,000.00 and the balance of \$55,000.00 was to be obtained from the proceeds of a purchase money mortgage held by Frank A. Wiederman and his wife.

5. On the date of closing, October 1, 1976, Frank A. Wiederman and his wife executed a bill of sale for the equipment in the amount of \$4,000.00. The buyer, Evelyn B. Smith's, \$23,000.00 downpayment consisted of \$4,000.00 which was applied to the equipment and \$19,000.00 which was applied towards the real property purchase price of \$74,000.00. The bookkeeper (Data - EZ - Systems) for Evelyn B. Smith stated her books and records reflect that Evelyn B. Smith paid cash for the equipment. Evelyn B. Smith's tax returns reflect depreciation of equipment on that same basis. The remaining \$55,000.00 was a mortgage back, applied to the real property. The bill of sale executed on October 1, 1976 modifies the Uniform Sales Closing Contract drawn on June 26, 1976.

6. Frank A. Wiederman and his wife, on their 1976 federal return, reported the sale of the equipment on Form 4797, Part III "Gain From Disposition of Property Under Sections 1245, 1250, 1251, 1252, 1254" so as recapture the depreciation of the equipment as required. The calculation for the installment method included only the sale price of the real property of \$74,000.00 and not the equipment.

7. The Audit Division contended that Frank A. Wiederman and his wife contracted to sell certain real property in 1976 for the sum of \$78,000.00.

That pursuant to the Uniform Sales Closing Contract, the buyer was required to pay \$23,000.00 in cash upon closing, with the sellers holding a purchase money mortgage for the balance. The principal portion of the mortgage payments made to Frank A. Wiederman during the year 1976 was \$620.15. The total received in the year of sale (\$23,620.15), therefore, exceeded the 30 percent limitation of the Internal Revenue Code Section 453(b) by .282 percent and, therefore, does not qualify as an installment sale.

8. The Audit Division contended that the Uniform Sales Closing Contract drawn by the realtor was complete and clear on its face and provided for a lump sum purchase price. It further contended that the bill of sale executed at the closing and the intentions of both Frank A. Weiderman and the buyer are immaterial.

CONCLUSIONS OF LAW

A. That Frank A. Wiederman and Anna G. Wiederman at the time of the closing had two separate sales. One for the sale of equipment for which they received \$4,000.00 in full payment. The second for the sale of the real property for which they received \$19,000.00 and a purchase money mortgage of \$55,000.00 for a total of \$74,000.00. That the payments (\$19,620.15) received by the petitioners in 1976 did not exceed thirty percent of their selling price (\$74,000.00) for the real property. Therefore, they are entitled to report their gain from such sale under the installment method within the meaning and intent of section 453 of the Internal Revenue Code.

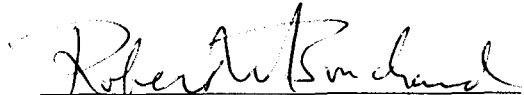
B. That the petition of the Estate of Frank A. Wiederman is granted to the extent provided in Conclusion of Law "A" supra; and that said petition is in all other respects denied.

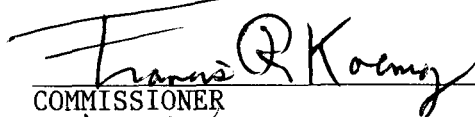
C. That the Audit Division is hereby directed to modify the notices of deficiency for the years 1974 and 1976 dated November 28, 1978, to be consistent with the decision rendered herein.

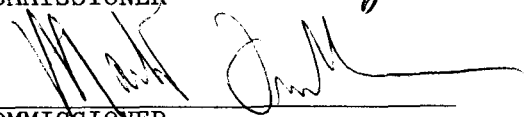
DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER