

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sol & Sylvia Novack :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income & :
Unincorporated Business Taxes under Articles 22 & :
23 of the Tax Law for the Year 1976. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 16th day of July, 1985, he served the within notice of Decision by certified mail upon Sol & Sylvia Novack, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sol & Sylvia Novack
801 Surrey Ct.
Port Richey, FL 33568

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
16th day of July, 1985.

David Parchuck

Conrad A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sol & Sylvia Novack :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income & :
Unincorporated Business Taxes under Articles 22 & :
23 of the Tax Law for the Year 1976. :
:

AFFIDAVIT OF MAILING

State of New York :
ss.:
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 16th day of July, 1985, he served the within notice of Decision by certified mail upon Philip Granowitz, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip Granowitz
Irving M. Granowitz & Co.
13 N. Main St.
Port Chester, NY 10573

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
16th day of July, 1985.

David Parchuck

Constance A. Hageman
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 16, 1985

Sol & Sylvia Novack
801 Surrey Ct.
Port Richey, FL 33568

Dear Mr. & Mrs. Novack:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Philip Granowitz
Irving M. Granowitz & Co.
13 N. Main St.
Port Chester, NY 10573
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
SOL NOVACK and SYLVIA NOVACK
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1976.

:
:
:
DECISION
:
:
:

Petitioners, Sol Novack and Sylvia Novack, 801 Surrey Court, Port Richey, Florida 33568, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1976 (File No. 29842).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on November 28, 1984 at 10:45 A.M., with all briefs to be submitted by February 7, 1985. Petitioners appeared by Philip Granowitz, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the gain realized by petitioners from the sale of real property is subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioners herein, Sol Novack and Sylvia Novack,¹ timely filed a joint New York State Income Tax Resident Return for 1976 reporting, inter alia,

1 Sylvia Novack is involved in this proceeding solely as the result of filing a joint tax return with her husband. Accordingly, the term petitioner shall hereinafter refer only to Sol Novack.

business income of \$2,659.30, a long-term capital gain of \$23,371.84 and rental income of \$564.43. Petitioner Sol Novack also filed a New York State Unincorporated Business Tax Return for 1976, reporting thereon business income of \$2,659.30.

2. On January 14, 1980, the Audit Division issued a Statement of Audit Changes to petitioner proposing numerous adjustments to his 1976 personal income and unincorporated business tax liabilities. Based on the Statement of Audit Changes, the Audit Division, on January 25, 1980, issued a Notice of Deficiency to petitioner for 1976, proposing additional personal income and unincorporated business taxes of \$2,579.88, plus penalty² and interest of \$738.94, for a total allegedly due of \$3,318.82.

3. Petitioner contests only one adjustment shown on the aforementioned Statement of Audit Changes. Said disputed adjustment was explained in the following manner:

"The gain from the installment sale reported on Federal Schedule D in the amount of \$46,670.00³ is considered business income subject to New York State Unincorporated Business Tax."

2 Penalty was imposed pursuant to sections 722 and 685(c) of the Tax Law for underpayment of estimated tax.

3 On Federal Schedule D petitioner reported a gain of \$73.67 from an installment sale consummated in 1972 and a gain of \$46,670.00 from an installment sale consummated in 1976. Pursuant to section 1202 of the Internal Revenue Code, only one-half of the total gain of \$46,743.67 (i.e. \$23,371.84) is included in Federal adjusted gross income. For unincorporated business tax purposes, I.R.C. §1202 is not applicable and the entire gain realized on property used in or connected with the unincorporated business is subject to tax. In the instant matter, only the \$46,670.00 gain is at issue.

4. Petitioner, in 1945, acquired a small parcel of real estate located on Boston Post Road in Port Chester, New York. A gas station with repair bays was situated on a portion of the property and the balance was vacant land. In 1950, petitioner commenced selling used automobiles, using the aforementioned vacant portion of the premises to store and show said used automobiles. Petitioner's "office" was, as described by his representative, "One of those six seater bubbletop buses".

5. The record does not disclose whether petitioner ever personally operated the gas station, however, it is clear that during the year at issue said gas station and repair bays were (prior to sale) leased by petitioner to another individual.

6. In July, 1976, petitioner sold the parcel of real estate described in Findings of Fact "4", supra. Petitioner elected to report the gain realized from said sale on the installment basis. The portion of the gain included in 1976 gross income from said installment sale amounted to \$46,670.00. After the sale of said real estate, petitioner continued to sell used automobiles using the vacant land as before. Petitioner paid a monthly rental of \$200.00 to the new owners for the use of said vacant land.

7. Petitioner maintains that the gain realized on the sale of the real property in question is not subject to unincorporated business tax since he was only holding, leasing or managing said real property for his own account [Tax Law Section 703(e)].

8. Petitioner alternatively argues that only a small portion of the real property in question was used in or connected with his unincorporated business (i.e. the sale of used automobiles) and that, therefore, only a small portion of the gain realized on the disposition of said real property should be subject

to unincorporated business tax. Petitioner's representative asserted that not more than ten (10) percent of the real property was used in or connected with the unincorporated business. No evidence was adduced to show what portion of the real property in question was used by petitioner in his unincorporated business.

9. Although the net profit reported by petitioner from the sale of used automobiles was small, i.e. \$2,659.30, reported gross receipts of \$123,920.25 suggests that petitioner's activities were more extensive. By comparison, the gross rental income received by petitioner from the lease of the gas station for an approximate six (6) month period totalled \$3,150.00.

CONCLUSIONS OF LAW

A. That section 705(a) of the Tax Law provides that unincorporated business gross income includes "...income and gain from any property employed in the business...". Regulation 20 NYCRR 205.1 further provides, as relevant herein, that unincorporated business gross income means the sum of the items of income and gain which are includable in the gross income of the individual 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...employed in the business".

B. That section 703(e) of the Tax Law provides that the owner of real property "...shall not be deemed engaged in an unincorporated business solely by reason of holding, leasing or managing real property". Regulation 20 NYCRR 203.13(b) further provides:

"Where the holding, leasing or managing of real property relates to property used in or connected with an unincorporated business otherwise regularly carried on by an

individual or other entity, any gains, profits, rents and other income from the property will be includible in the unincorporated business gross income of the individual or other entity.

* * *

(2) Another example is one in which an individual is engaged in a manufacturing business which is carried on in a building owned by him. His business requires the use of one-half of the building, and the unused portion of the building is rented to tenants. The rental income is subject to the unincorporated business income tax since such income results from the use of an asset connected with the taxpayer's business."⁴

C. That the real property in question was one parcel of property part of which was used by petitioner in his unincorporated business and part of which was leased to others. There is nothing in the record to support that there existed two separate and distinct parcels of property.

D. That the real property at issue constituted property employed in petitioner's unincorporated business and, accordingly, any gain realized from the disposition or liquidation of said property is includable in unincorporated business gross income within the meaning and intent of section 705(a) of the Tax Law and 20 NYCRR 205.1 and 20 NYCRR 203.13(b) (Matter of Victor Levine, State Tax Comm., November 22, 1983). Furthermore, there is no provision in the Tax Law which would permit an allocation of the gain realized on said real property between business and non-business use.

⁴ The Audit Division did not assert, either at or before the hearing, that the rental income received by petitioner from the real property in question was subject to unincorporated business tax.

E. That the petition of Sol Novack and Sylvia Novack is denied; and that the Notice of Deficiency dated January 25, 1980, is sustained, together with such additional penalty and interest as may be lawfully due and owing.

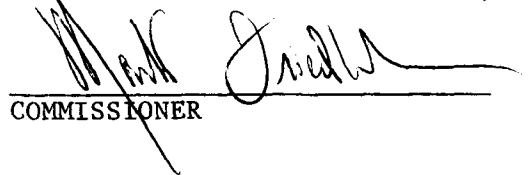
DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER



New York State Tax Commission
TAX APPEALS BUREAU

State Campus
Albany, New York 12227

John J. Sollecito, Director
(518) 457-1723

May 29, 1985

Joel & Jane Nudelman
5904 Little Brook Way
Columbus, OH 43227

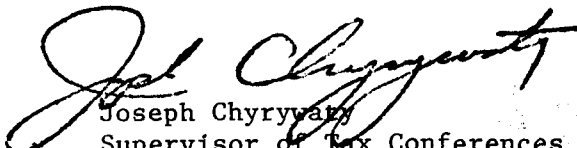
Dear Mr. & Mrs. Nudelman:

Please take notice of the Default Order of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to Section(s) 690 of the Tax Law, any proceeding in court to review this decision must be commenced 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 the undersigned at the above address.

Very truly yours,


Joseph Chyrywaty
Supervisor of Tax Conferences

cc: Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joel & Jane Nudelman : DEFAULT ORDER
: 85-C-10
for Redetermination of a Deficiency or Revision of :
a Determination or Refund of Personal Income Tax :
under Article 22 of the Tax Law for the Year 1979. :

Petitioner(s) Joel & Jane Nudelman filed a petition for redetermination of a deficiency or revision of a determination or refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1979. File No. 42918.

A pre-hearing conference on the petition was scheduled before Regina Jaffe, at the offices of the State Tax Commission, Two World Trade Center, Room 65-51, New York, New York 10047 on Friday, March 8, 1985 at 10:30 a.m. Notice of said pre-hearing conference was given to petitioner(s). Petitioner(s) did not appear at the pre-hearing conference. A default has been duly noted.

Now on motion of the State Tax Commission, it is

ORDERED that the petition of Joel & Jane Nudelman be and the same is hereby denied.

DEFAULT ORDER
ADOPTED BY THE STATE TAX COMMISSION
ALBANY, NEW YORK
MAY 29, 1985

TA 26 (9-79)

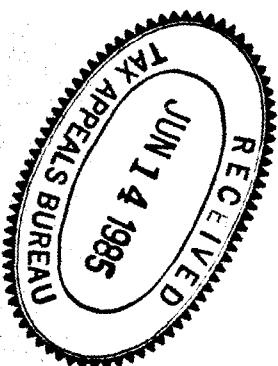
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CERTIFIED

P 151 478 306

MAIL

Joel & Jane Nudelman
5904 Little Brook Way
Columbus, OH 43227



NUD 04 281003N1 06/10/85
RETURN TO SENDER
NO FORWARDING ORDER ON FILE
UNABLE TO FORWARD

CLAIM CHECK
NO.

280432

DATE

5-31-85

FINAL NOTICE

2ND NOTICE

6-16

RETURN

Detached from
PS Form 3849-A
Oct. 1980



New York State Tax Commission
TAX APPEALS BUREAU

State Campus
Albany, New York 12227

John J. Sollecito, Director
(518) 457-1723

May 29, 1985

Joel & Jane Nudelman
5904 Little Brook Way
Columbus, OH 43227

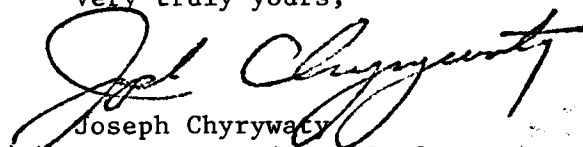
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Supervisor of Tax Conferences

cc: Taxing Bureau's Representative

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MAY 29, 1985