

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Robert & Joan Postel

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refunds :
of New York State Personal Income and Unincorporated
Business Taxes under Articles 22 and 23 of the Tax :
Law and New York City Personal Income Tax under
Chapter 46, Title T of the Administrative Code of :
the City of New York for the Years 1979 and 1980.

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Robert & Joan Postel, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert & Joan Postel
435 East 52 Street
New York, NY 10022

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
23rd day of May, 1985.

David Parchuck

James P. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Robert & Joan Postel :

AFFIDAVIT OF MAILING

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Business Taxes under Articles 22 and 23 of the Tax :
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the City of New York for the Years 1979 and 1980.

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Sidney W. Arziliant, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney W. Arziliant
36 West 44th Street
New York, NY 10036

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
23rd day of May, 1985.

David Parchuck

James A. Hagelund

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 23, 1985

Robert & Joan Postel
435 East 52 Street
New York, NY 10022

Dear Mr. & Mrs. Postel:

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 & 1312 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
Sidney W. Arziliant
36 West 44th Street
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
ROBERT POSTEL AND JOAN POSTEL	:	DECISION
	:	
for Redetermination of Deficiencies or for	:	
Refunds of New York State Personal Income and	:	
Unincorporated Business Taxes under Articles	:	
22 and 23 of the Tax Law and New York City	:	
Personal Income Tax under Chapter 46, Title T	:	
of the Administrative Code of the City of New	:	
York for the Years 1979 and 1980.	:	

Petitioners, Robert Postel and Joan Postel, 435 East 52nd Street, New York, New York 10022, filed petitions for redetermination of deficiencies or for refunds of New York State personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1979 and 1980 (File No. 48097).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 13, 1984 at 11:30 A.M., with all briefs to be submitted by December 1, 1984. Petitioners appeared by Sidney W. Azriliant, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the petitions filed with respect to the personal income tax deficiencies were timely filed.

II. Whether the Statement of Audit Changes issued with respect to the personal income tax liabilities properly delineated the adjustments and computations arriving at the asserted tax due.

III. Whether the minimum income taxes asserted for 1980 were properly computed.

IV. Whether the income reported by petitioner Robert Postel on his Federal schedules C filed for the years 1979 and 1980 is subject to the imposition of unincorporated business tax.

V. Whether the income reported by petitioner Joan Postel on her Federal schedules C filed for the years 1979 and 1980 is subject to the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Robert Postel and Joan Postel, filed a New York State Income Tax Resident Return (with City of New York Personal Income Tax) for each of the years 1979 and 1980. The 1979 return was filed under filing status "married filing separately on one return". The 1980 return was filed under filing status "married filing joint return". Each petitioner filed a separate Federal Schedule C for 1979 and 1980 whereon they characterized the nature of their respective business activities as follows:

<u>PETITIONER</u>	<u>YEAR</u>	<u>BUSINESS ACTIVITY</u>
Robert Postel	1979	Consultant
Robert Postel	1980	Real Estate Broker
Joan Postel	1979	Consultant
Joan Postel	1980	Consultant

Neither petitioner filed a New York State unincorporated business tax return for the years 1979 and 1980.

2. On December 6, 1982, the Audit Division issued a Statement of Audit Changes to petitioners wherein certain adjustments were made with respect to New York State and New York City personal income taxes. Said adjustments, which dealt primarily with the New York State capital gain modification and the

imposition of minimum income taxes by both of said jurisdictions, were explained in such statement as follows:

"If you were entitled to a 60% net capital gain deduction in computing your Federal Adjusted Gross Income, you must add 20% of one-half of the net capital gain in computing your Total New York Income.

The remainder of the Long Term Capital Gains not subject to New York personal income tax is considered to be an Item of Tax Preference and subject to New York minimum income tax.

Married taxpayers who file separate New York State/City income tax returns must compute their minimum income tax on separate Forms IT-220 and the maximum specific deduction allowable to each spouse is \$2,500.00.

When computing Maximum Tax on Personal Service Income, total New York State items of tax preference must be deducted. This reduces your Personal Service Taxable Income below the amount which would result in a tax benefit."

Accordingly, on March 10, 1983, two (2) notices of deficiency were issued against petitioners with respect to the aforestated adjustments. One notice asserted New York State and City personal income taxes for 1979 of \$31,025.02, plus interest of \$10,088.39, for a total due of \$41,113.41. The other notice asserted New York State and City personal income taxes for 1980 of \$11,508.92, plus interest of \$2,764.09, for a total due of \$14,273.01. Although the Statement of Audit Changes explained that "Section 685(c) Penalty for underestimation of tax is asserted for 1979", neither the liability computed thereon, nor the Notice of Deficiency issued with respect thereto, show the assertion of said penalty.

3. On December 6, 1982, a Statement of Audit Changes was issued to petitioners wherein their income derived during 1979 and 1980 from their reported respective business activities (see Finding of Fact "1", supra) was held subject to the unincorporated business tax. Accordingly, on November 4, 1983, two (2) notices of deficiency were issued against petitioners. One

notice, which asserted 1979 and 1980 unincorporated business taxes of \$35,815.58 determined to be due from petitioner Robert Postel, was erroneously issued against both petitioners. Said notice also asserted interest of \$10,951.44, for a total due of \$46,767.02. The other notice, which was issued solely against petitioner Joan Postel, asserted 1979 and 1980 unincorporated business taxes determined to be due from her of \$5,624.44, plus interest of \$1,748.45, for a total due of \$7,372.89.

4. The Audit Division conceded that petitioners had filed timely petitions with respect to the notices of deficiency issued for unincorporated business taxes. However, it alleged that the petitions filed with respect to the notices of deficiency issued for personal income taxes were untimely.

5. The two (2) notices of deficiency asserting personal income taxes were issued on March 10, 1983. The petitions filed with respect to said notices were mailed in an envelope which bore a machine metered stamp rather than a United States postmark. The machine metered stamp bore a date which appears to be June 3, 1983; however, it is possible that such date was June 8, 1983 with the number 8 partially obliterated. Said envelope, as well as the petitions mailed therein, were stamped by the Tax Appeals Bureau indicating receipt on June 13, 1983. Affixed to said envelope is a certified mail sticker; however, petitioners failed to submit a certified mailing receipt to establish the mailing date.

6. Petitioners did not personally appear at the hearing held herein. Mr. Kenneth I. Singer, C.P.A., who prepared petitioners' returns for the years at issue herein, appeared as a witness on their behalf. Mr. Singer rendered sworn testimony to the effect that:

a) The envelope containing the petitions at issue was machine meter stamped at petitioner Robert Postel's office.

b) He (Mr. Singer) personally mailed said envelope containing the petitions on June 8, 1983.

c) The notices of deficiency issued with respect to personal income taxes were mailed to an address at which petitioners did not reside at the time said notices were mailed.

d) The petitioners were residing at 435 East 52nd Street, New York City "since sometime in 1982".

7. The notices of deficiency issued with respect to personal income taxes were mailed to petitioners' last known address.

8. Petitioners submitted what is purported to be a copy of a memorandum from Mr. Singer dated June 8, 1983. Said memorandum states:

"For your records enclosed are copies of petitions filed today with NYS re your 1979 & 1980 assessments. When I receive a reply I will notify you."

9. Petitioners alleged that the Statement of Audit Changes issued with respect to the personal income tax deficiencies lacks foundation in that certain amounts used in the computation contained therein appear, in their opinion, to have no basis. Accordingly, they contend that the notices of deficiency issued with respect thereto are arbitrary. Furthermore, with respect to the minimum income taxes asserted, petitioners claimed that the items of tax preference were overstated for 1980 since they reported a negative New York taxable income for said year and accordingly, they did not receive a full tax benefit from the capital gain deduction which was held to be an item of tax preference.

10. Petitioner Robert Postel alleged that his business income, as reported on his Federal schedules C filed for each of the years 1979 and 1980, is exempt from the imposition of unincorporated business tax since such income was derived from the practice of law. He contended that the listing of his business activities on the Federal schedules C as "Consultant" (1979) and "Real Estate Broker" (1980) was erroneous. In a protest letter dated January 18, 1983, petitioner Robert Postel stated:

"It appears that my accountant made the mistake in preparing my tax returns in that he incorrectly listed as my occupation two areas of business activities in which my clients - but not I - are active and which clients pay me fees for legal services rendered."

11. Petitioner Robert Postel practiced law in New York State during the years 1979 and 1980 as a professional service corporation under the name Robert I. Postel, P.C. He drew a salary from said corporation of \$76,108.00 in 1979 and \$60,000.00 in 1980. His field of specialty was real property law.

12. It was alleged that in addition to his practice as a professional service corporation, Mr. Postel practiced law as an individual, the income derived therefrom being reported on the Federal schedules C. No reason was provided at the hearing as to why Mr. Postel would maintain two separate legal practices.

13. No records were produced at the hearing held herein with respect to the sources and nature of either Mr. Postel's or Mrs. Postel's income which was reported on the Federal schedules C. Their accountant, Mr. Singer, testified that Mr. Postel "had two law offices in the period of time from 1979 until now" and that "at both office locations pipe bursts and leaks from the ceiling created substantial damage" which destroyed all records except the tax returns and underlying worksheets, which were physically separated from the rest of his files and not affected by the floods.

14. Mr. Singer, who has been a practicing certified public accountant for eighteen years, further testified that he listed Mr. Postel's business activities in 1980 as "Real Estate Broker" because "it was my understanding that an attorney in New York State was also a licensed real estate broker."

15. Petitioner Joan Postel alleged that her reported business income, which was characterized on her 1980 Federal Schedule C as being derived from her activities as a "consultant", was actually primarily derived from the sale of real property for her own account. Accordingly, it was argued that such income is exempt from the imposition of unincorporated business tax pursuant to sections 703(d) and 703(e) of the Tax Law. Of the \$153,218.00 gross receipts reported on her 1980 Federal Schedule C, it was alleged that only \$4,400.00 represented consulting fees while the balance represented gain derived from the sale of real property for her own account.

16. It was alleged that during 1980, Mrs. Postel purchased stock certificates representing ownership in approximately one hundred (100) apartments in a cooperative apartment building. Such purchases, it was argued, were made for the purpose of producing rental income. During the same year she allegedly sold stock certificates representing eight (8) such apartments. The reason provided for such sales was to correct her negative cash flow situation. Although it was claimed that Mrs. Postel's 1980 reported business income at issue was derived primarily from the sale of said stock certificates, no documentation was submitted to establish this.

17. Petitioner Joan Postel conceded that the business income reported on her 1979 Federal Schedule C was derived from real estate consulting activities.

18. During 1979 and 1980, both Mr. and Mrs. Postel derived income from a real estate consulting corporation known as Postel Development Corp. They were

the sole officers of said corporation. Mr. Postel received wage income from said corporation of \$78,892.00 (1979) and \$81,500.00 (1980). Mrs. Postel received wage income from said corporation of \$44,000.00 (1979) and \$81,500.00 (1980).

CONCLUSIONS OF LAW

A. That section 689(b) of the Tax Law provides, in pertinent part, that:

"Within ninety days...after the mailing of the notice of deficiency authorized by section six hundred eighty-one, the taxpayer may file a petition with the tax commission for a redetermination of the deficiency."

B. That 20 NYCRR 601.3(c) provides, in pertinent part, that:

"When mailed, the petition will be deemed filed on the date of the United States postmark stamped on the envelope. Where a machine metered stamp is used on the envelope, the petition shall be deemed filed upon receipt."

C. That since the petitions filed with respect to the notices of deficiency issued March 10, 1983 for personal income taxes were mailed in an envelope using a machine metered stamp, the date of receipt, June 13, 1983, is deemed to be the date such petitions were filed. Accordingly, since June 8, 1983 is the last date on which said petitions could be timely filed, the petitions filed June 13, 1983 were untimely.

D. That since the petitions filed with respect to the personal income tax deficiencies were untimely filed, the State Tax Commission does not have the authority to decide upon the issues raised herein with respect to said deficiencies. Accordingly, the two (2) notices of deficiency issued against petitioners on March 10, 1983 are sustained.

E. That petitioners have failed to sustain their burden of proof, imposed pursuant to section 689(e) of Article 22 of the Tax Law, as incorporated into Article 23 of the Tax Law by section 722(a), to show that their respective

business incomes as reported on their Federal schedules C were exempt from the imposition of unincorporated business tax.

F. That petitioners' respective business incomes for 1979 and 1980, as reported on their Federal schedules C for said years, are properly subject to unincorporated business tax within the meaning and intent of sections 703(a) and 701(a) of the Tax Law.

G. That the Notice of Deficiency issued November 4, 1983 against both petitioners herein is cancelled insofar as it applies to petitioner Joan Postel, since the deficiency asserted therein relates solely to petitioner Robert Postel (see Finding of Fact "3", supra).


H. That the petitions of Robert Postel and Joan Postel are granted to the extent provided in Conclusion of Law "G", supra, and except as so granted, said petitions are, in all other respects, denied.

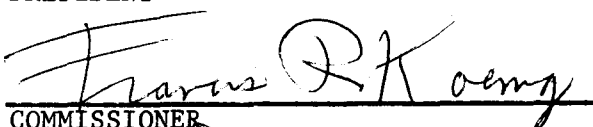
I. That except as provided in Conclusion of Law "G", supra, the two (2) notices of deficiency issued on November 4, 1983 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 28 1985


PRESIDENT


COMMISSIONER


COMMISSIONER