

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alfred A. & Lucie Giardino :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for :
Refund of NYS Personal Income Tax under :
Article(s) 22 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 1977, 1978 and 1979. :

State of New York :

ss.:

County of Albany :

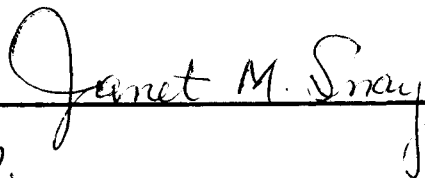
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of June, 1986, he/she served the within notice of Decision by certified mail upon Alfred A. & Lucie Giardino the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

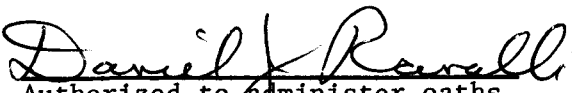
Alfred A. & Lucie Giardino
4600 Fieldston Rd.
Bronx, NY 10471

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
12th day of June, 1986.




Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of
Alfred A. & Lucie Giardino :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for :
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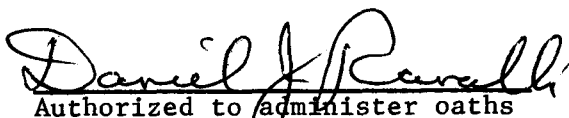
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of June, 1986, he served the within notice of Decision by certified mail upon Milton B. Braun, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

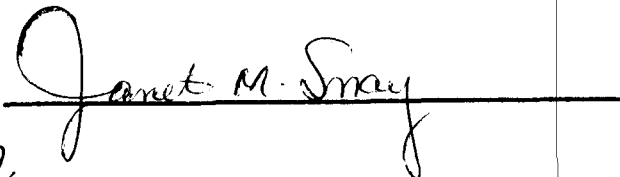
Milton B. Braun
225 Broadway
New York, NY 10007

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
12th day of June, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



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

June 12, 1986

Alfred A. & Lucie Giardino
4600 Fieldston Rd.
Bronx, NY 10471

Dear Mr. & Mrs. Giardino:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Milton B. Braun
225 Broadway
New York, NY 10007

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ALFRED A. AND LUCIE GIARDINO	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 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 1977, 1978 and 1979.	:	

Petitioners, Alfred A. and Lucie Giardino, 4600 Fieldston Road, Bronx, New York 10471, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 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 1977, 1978 and 1979 (File Nos. 38488/38659/42066).

Petitioners waived a hearing and submitted their case for decision based upon the entire file, with all briefs to be submitted by September 12, 1985. After due consideration of the file, the State Tax Commission renders the following decision.

ISSUE

Whether, for the years 1977, 1978 and 1979, petitioners may use an adjusted basis for New York City income tax purposes which is different from that used for New York State income tax purposes in computing a capital gain derived from a disposition of property during 1970, where such gain was reported using the installment method.

FINDINGS OF FACT

1. By agreement executed by the parties hereto, the following facts have been stipulated in this matter:

(a) In the early 1950's, the petitioners purchased a stock interest in Royston Motors, Inc., a retail auto dealer of foreign cars located in Philadelphia, Pennsylvania.

(b) In the years that followed, the company grew and became a major distributor of foreign cars selling to dozens of dealers in a geographic area covering seven states.

(c) In 1970, Royston Motors, Inc. was sold to a publicly-held corporation, Alco Standard Co., and the stockholders of Royston received restricted preferred shares of Alco Standard Co. which were restricted to annual redemptions of \$400,000 after six years.

(d) The restricted preferred shares were debt instruments in registered form and were not readily tradeable in an established securities market.

(e) The petitioners disposed of the redeemable shares and reported the annual installments of \$400,000 in 1977, 1978 and 1979 on their New York State and City income tax returns.

(f) For New York City tax purposes, the installment gains reported by the petitioners were based upon fair market value at the inception of the New York City income tax laws as of July 1, 1966.

(g) The Federal tax method for reporting gains from installment sales was adopted by New York State and New York City.

(h) The Audit Division, which was administering the New York City income tax law, held that the cost basis for New York City income tax

purposes should be the original purchase cost basis of the early 1950's and not the fair market value on July 1, 1966.

(i) The Audit Division assessed an additional tax of \$11,182.97 for 1977, \$11,492.74 for 1978 and \$6,726.57 for 1979.

(j) The total additional taxes assessed of \$29,402.28 plus interest thereon were paid under protest and the petitioners applied for refunds which were denied.

(k) Petitioners have petitioned for a refund of the income taxes and interest thereon which were asserted and paid and also seek interest thereon.

(l) Petitioners allege that imposition of a personal income tax by New York City on the portion of a capital gain which had increased prior to the enactment of the law on July 1, 1966 was arbitrary, discriminatory, unjust and contrary to law, and that the determination of the Audit Division is an arbitrary determination and deprives them of due process of law contrary to the United States and New York State Constitutions.

2. Petitioners timely filed a refund claim for each of the relevant years. The Audit Division gave notice of denial of petitioners' refund claims for the years 1977, 1978 and 1979 on August 25, 1980, October 21, 1982 and July 25, 1983, respectively. Petitioners timely protested each denial of refund claim and subsequently filed a perfected petition, dated February 27, 1984, with respect to each such denial.

3. In addition to the claimed refunds with respect to petitioners' New York City income tax, petitioners also filed refund claims for the years at issue with respect to their New York State income tax. These claims were also based upon the Audit Division's treatment, for state income tax purposes, of

the installment payments referred to in Finding of Fact "1(e)" received by petitioners during each of the years at issue. Petitioners have withdrawn their refund claims with respect to New York State income tax due for the years at issue. Consequently, only the City income tax remains at issue.

CONCLUSIONS OF LAW

A. That in 1970, the year of the exchange referred to in Finding of Fact "1(c)", section 12.0(c)(9) of Chapter 46, Title T of the Administrative Code of the City of New York specified certain allowable reductions in a taxpayer's adjusted gross income for New York City income tax purposes with respect to gain derived from the sale or other disposition of property acquired prior to July 1, 1966. The relevant section allowed a taxpayer, within certain limitations, a step up in adjusted basis for property acquired prior to July 1, 1966 to the fair market value of such property on July 1, 1966.

B. That Chapter 46, Title T of the Administrative Code of the City of New York was superseded by Article 30 of the Tax Law as of January 1, 1976 (L. 1975, 882). Commencing January 1, 1977 and for the years thereafter, section 4 of Chapter 882, Laws of 1975, enabled the City to impose a personal income tax for the years subsequent to 1976. By Local Law 36, Laws of 1976, the City imposed such a tax through the enactment of new Chapter 46, Title T of the Administrative Code of the City of New York. This new Chapter 46, Title T was identical to Article 22 of the Tax Law and did not contain the provision referred to in Conclusion of Law "A" herein.

C. That during the years at issue herein, section 1303 of the Tax Law provided, in pertinent part:

"The city taxable income of a city resident individual shall mean and be the same as his New York taxable income..."

D. That with respect to installment reporting of income it is firmly established that the law in effect at the time payments are received, not at the time of the sale or exchange, determines the nature and effect of the tax consequences resulting from the transaction. See Piccione v. Commissioner, 440 F.2d 170 (1st Cir. 1971); Snell v. Commissioner, 97 F.2d 891 (5th Cir. 1938); Rosenblatt v. State Tax Commission, 85 A.D.2d 770 (3rd Dept. 1981). While the above-cited cases dealt with issues of changes in the tax rate and changes in the nature of gains as opposed to changes affecting the amount of gain recognized on a sale or other disposition of property as is at issue herein, these differences are not "such as to invite departure from the principle that one of the risks a taxpayer takes when he elects installment reporting is that the tax law may undergo change (Matter of Kearns v. Commissioner of Internal Revenue, 73 USTC 1223)." Rosenblatt v. State Tax Commission, supra at 771. Accordingly, the applicable law herein is Chapter 46, Title T of the Administrative Code of the City of New York as amended for the years 1977, 1978 and 1979.

E. That the applicable statutory authorities for the years at issue make no provision for the modification in adjusted gross income for City income tax purposes as sought by petitioners herein. Moreover, in view of the enactment of section 1303 of the Tax Law and new Chapter 46, Title T of the New York City Administrative Code, it is clear that the legislature intended to remove said provision from the Tax Law. It must be concluded, therefore, that the actions of the Audit Division in denying petitioners' refund claims were proper.

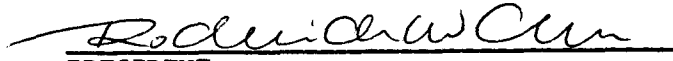
F. That with respect to petitioners' due process claims, the constitutionality of the laws of New York State is presumed at the administrative level.

G. That the petition of Alfred A. and Lucie Giardino is denied and the notices of denial of refund dated August 25, 1980, October 21, 1982 and July 25, 1983 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER