

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Anthony C. Vilardi :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Unincorporated Business Tax :
under Article 23 of the Tax Law
for the Year 1973. :

State of New York

County of Albany

Jay Vredenburg, 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 19th day of September, 1980, he served the within notice of Decision by certified mail upon Anthony C. Vilardi, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

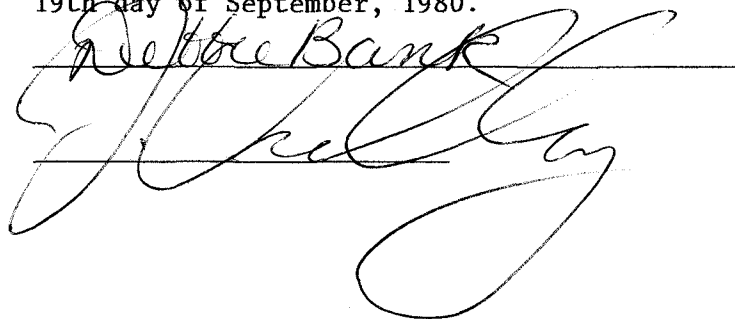
Anthony C. Vilardi
123 Valentine La., Apt. 6
Yonkers, NY 10705

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

19th day of September, 1980.


Robert Bank

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Anthony C. Vilardi :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Unincorporated Business Tax :

under Article 23 of the Tax Law

for the Year 1973. :

State of New York

County of Albany

Jay Vredenburg, 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 19th day of September, 1980, he served the within notice of Decision by certified mail upon Daniel Zimmer the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

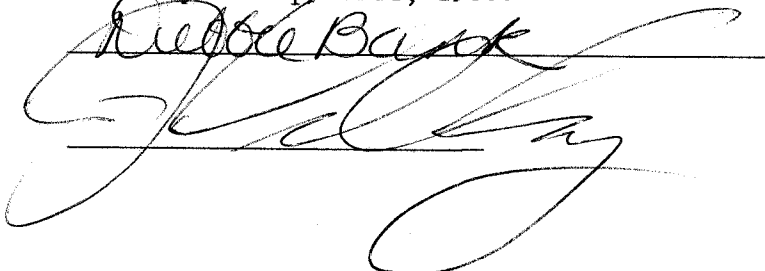
Mr. Daniel Zimmer
1115 Main St.
Bridgeport, CT 06604

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

19th day of September, 1980.



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

September 19, 1980

Anthony C. Vilardi
123 Valentine La., Apt. 6
Yonkers, NY 10705

Dear Mr. Vilardi:

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) 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Daniel Zimmer
1115 Main St.
Bridgeport, CT 06604
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ANTHONY C. VILARDI	:	DECISION
for Redetermination of a Deficiency	:	
or for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Year 1973.	:	

Petitioner, Anthony C. Vilardi, 123 Valentine Lane, Yonkers, New York 10705, 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 1973 (File No. 19231).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 30, 1979 at 9:15 A.M. Petitioner appeared by Daniel Zimmer, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether gain derived by petitioner from the sale of an option to purchase real property was related to his real estate brokerage business and subject to the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Anthony C. Vilardi, timely filed a New York State Combined Income Tax Return with his wife, Lucy Vilardi, for the year 1973, wherein he reported a loss of \$641.25 from his real estate brokerage business.

Attached thereto was a copy of Federal Schedule D, on which an installment gain of \$50,081.45 was reported for the year 1973, said gain being derived from the sale of a real estate option. Petitioner did not file an unincorporated business tax return for said year.

2. On March 28, 1977, the Audit Division issued a Statement of Audit Changes to petitioner wherein it increased his total income reported by the 20 percent long-term capital gain modification required pursuant to section 612(b)(11) of the Tax Law, and imposed minimum income tax on that portion of said gain which was determined to be an item of tax preference. Additionally, it imposed unincorporated business tax on the income derived from the aforementioned sale of the real estate option. Accordingly, the Audit Division issued a Notice of Deficiency against the petitioner, under the same date, asserting additional personal income tax of \$704.61, minimum income tax of \$922.44, unincorporated business tax of \$2,168.10, and interest of \$864.04, for a total due of \$4,659.19.

3. On April 10, 1979, as the result of a pre-hearing conference, petitioner, Anthony C. Vilardi, withdrew his petition with respect to issues concerning personal income tax and minimum income tax. Accordingly, the sole remaining issue to be decided was whether the gain derived from the sale of the real estate option was subject to the imposition of unincorporated business tax.

4. Petitioner contended that the purchase and sale of the option at issue was for personal investment purposes and was not connected with his real estate brokerage business.

5. On August 26, 1968, petitioner's brother, D. Daniel Vilardi, entered into an agreement to purchase tracts of land in Poughkeepsie, New York, from 820 South Road Corp., 21 Davis Avenue, Poughkeepsie, New York. Petitioner

contended that it was his brother's intention to build a shopping center on this land for the production of rental income from the commercial enterprises which would be located there.

6. On October 26, 1968, petitioner, Anthony C. Vilardi, entered into a partnership agreement with D. Daniel Vilardi and Leandra Vilardi. Under the terms of said agreement, petitioner was given a 25 percent interest in the real estate option at issue. Petitioner contended that the partnership was created since his brother, D. Daniel Vilardi, was unable to acquire sufficient funds on his own to purchase said real estate.

7. On January 14, 1970, the option was sold to Lehigh Associates, Inc. Petitioner contended that the only reason the option was sold was that the partnership was unable to obtain mortgage financing.

8. During the year 1973, petitioner received \$55,938.87 from the sale, which when multiplied by his gross profit percentage of .89521, yielded a profit of \$50,081.45. This profit was reported as a long-term capital gain for personal income tax purposes, but was not reported as income for unincorporated business tax purposes.

9. Petitioner maintained an office for his real estate brokerage business at 51 East 42nd Street, New York City. Said business operated under the name of Anthony C. Vilardi.

10. Petitioner reported no real estate brokerage transactions for the years 1970, 1971 and 1972.

11. The Notice of Deficiency issued March 28, 1977 was based in part on a computation showing petitioner's New York taxable income to be \$25,657.00. This computation contained a subtraction error of \$200.00 and the correct taxable income is \$25,457.00.

CONCLUSIONS OF LAW

A. That petitioner, Anthony C. Vilardi, was a partner in the partnership of D. Daniel Vilardi, Anthony Vilardi and Leandra Vilardi, whose sole activity was the holding of real property with the intent of producing rental income; that the gain derived from the sale of said property constituted partnership income and was not related to, or incidental to, his activities as a real estate broker. Therefore, said gain was not subject to the imposition of unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

B. That the Audit Division is hereby directed to modify the Notice of Deficiency issued March 28, 1977 by cancelling the unincorporated business tax and recomputing the personal income tax and minimum income tax due to the mathematical error indicated in Finding of Fact "11", supra.

C. That the petition of Anthony C. Vilardi is granted to the extent indicated in Conclusion of Law "B", supra, and is in all other respects denied.

DATED: Albany, New York

SEP 19 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

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