

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herman Levee :
: 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 14th day of August, 1981, he served the within notice of Decision by certified mail upon Herman Levee, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

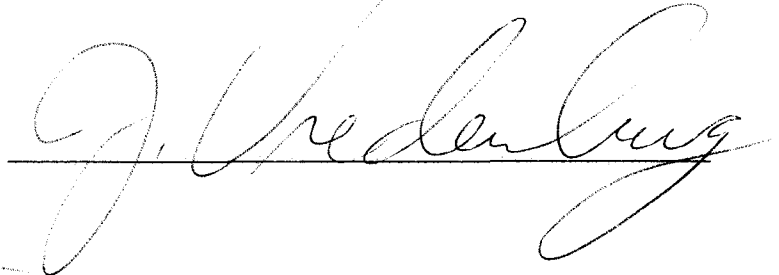
Herman Levee
c/o Calhoun M.E.B.A. Engineering School
Route 5
Easton, MD 21601

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
14th day of August, 1981.


Annie R. Hagelund


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herman Levee :
: 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 14th day of August, 1981, he served the within notice of Decision by certified mail upon Seymour S. Lane the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Seymour S. Lane
85 W. Hawthorne Ave.
Valley Stream, NY 11580

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
14th day of August, 1981.

Constance P. Hagelund

Jay Vredenburg

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

August 14, 1981

Herman Levee
c/o Calhoun M.E.B.A. Engineering School
Route 5
Easton, MD 21601

Dear Mr. Levee:

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
Seymour S. Lane
85 W. Hawthorne Ave.
Valley Stream, NY 11580
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HERMAN LEVEE	:	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, Herman Levee, c/o Calhoun M.E.B.A. Engineering School, Route 5, Easton, Maryland 21601, 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. 18781).

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 January 9, 1981 at 10:45 A.M. Petitioner appeared with Seymour S. Lane, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

Whether a capital gain derived from the sale of a parcel of land is subject to the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Herman Levee (hereinafter petitioner) filed a joint New York State Income Tax Resident return with his wife, Marilyn Levee (deceased 1974) for the year 1973. He 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 unincorporated business tax was imposed on the aggregate of various sources of income reported as follows:

A - Income from Kennel operation	\$17,575.54
B - 100% of the gain derived from the installment sale of a parcel of land	24,359.88
C - Loss on farm operation	<u>(11,299.80)</u>
TOTAL BUSINESS INCOME	<u>\$30,635.62</u>

Additionally, minimum income tax of \$211.01 was imposed on the portion of the gain derived from the land sale which constituted an item of tax preference, but since such tax was conceded to and paid prior to the hearing, it is not at issue herein. Accordingly, a Notice of Deficiency was issued against petitioner under the same date asserting additional personal income tax of \$211.01 (previously resolved), unincorporated business tax of \$1,134.96, plus interest of \$306.44, for a total due of \$1,652.41.

3. The only adjustment contested by petitioner was the imposition of unincorporated business tax on the gain derived from the sale of a parcel of land which the Audit Division maintained was an asset used in petitioner's unincorporated business.

4. During the late 1960's petitioner purchased 91.32 acres of land located in Campbell Hall, New York. Said land was divided into three parcels with separate lot and block number designations. Parcels "A" and "B" were physically separated from parcel "C" by a country road. Parcels "A" and "B", which were the properties sold in 1973, the gain of which is at issue herein, consisted of 55.48 acres of unimproved brush and timberland. Parcel "C" constituted 35.84 acres which contained petitioner's residential farm house, the dog kennel operation and some acreage used for crop growing.

5. Petitioner operated a boarding kennel for dogs on parcel "C" which was also used to train field dogs. Parcels "A" and "B" were not used in connection with petitioner's kennel or farming operation. He contended that said property was purchased solely for investment purposes.

CONCLUSIONS OF LAW

A. That section 705(a) provides in pertinent part that:

Unincorporated business gross income of an unincorporated business means the sum of the items of income and gain of the business, of whatever kind and in whatever form paid ----- including income and gain, from any property employed in the business.

Since parcels "A" and "B" were not used in petitioner's business operations, the gain derived from the sale of such property is not properly includable in petitioner's unincorporated business gross income.

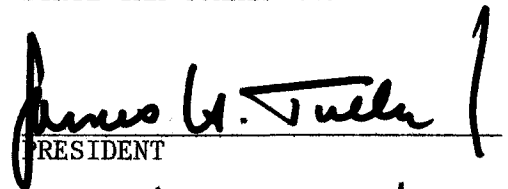
B. That removal of such gain from petitioner's unincorporated business gross income reduces such income to an amount too nominal to produce an unincorporated business tax liability.

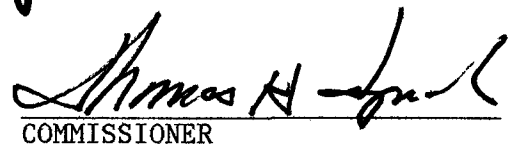
C. That the petition of Herman Levee is granted and the Notice of Deficiency dated March 28, 1977 is hereby cancelled.

DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION


RESIDENT


COMMISSIONER


COMMISSIONER