

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of

Alexander & Joan Mollayan : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Personal Income  
Tax & UBT under Article 22 & 23 of the Tax Law for :  
the Years 1970 - 1974.

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Alexander & Joan Mollayan, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alexander & Joan Mollayan  
465 Ocean Dr.  
Miami Beach, FL 33139

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  
4th day of August, 1982.

*Annice A. Highland*

*J. Vredenburg*

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of

Alexander & Joan Mollayan :

AFFIDAVIT OF MAILING

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State of New York  
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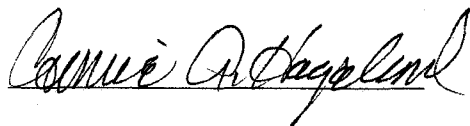
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of August, 1982, he served the within notice of Decision by certified mail upon Murry M. Weinstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

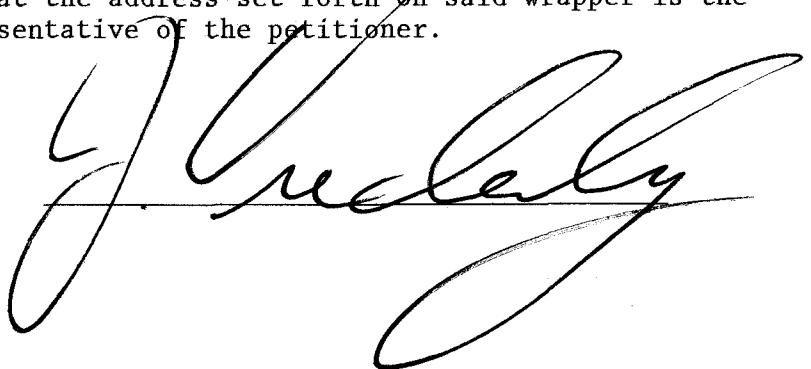
Murry M. Weinstein  
217 Broadway  
New York, NY 10007

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  
4th day of August, 1982.





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

August 4, 1982

Alexander & Joan Mollayan  
465 Ocean Dr.  
Miami Beach, FL 33139

Dear Mr. & Mrs. Mollayan:

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, 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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Murry M. Weinstein  
217 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
ALEXANDER MOLLAYAN and JOAN MOLLAYAN  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax and Unincorporated:  
Business Tax under Articles 22 and 23 of the  
Tax Law for the Years 1970 through 1974.

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DECISION

Petitioners, Alexander Mollayan and Joan Mollayan, 465 Ocean Drive, Miami Beach, Florida 33139, filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1970 through 1974 (File No. 21147).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on April 29, 1981 at 11:00 A.M. Petitioner appeared by Murray M. Weinstein, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the Statute of Limitations bars the Audit Division from assessing deficiencies of personal income tax and unincorporated business tax for the years 1972 and 1973.

II. Whether the income which petitioners derived from gains attributable to the installment sale of real property, and the interest therefrom, constituted income subject to personal income tax and unincorporated business tax.

FINDINGS OF FACT

1. For 1970, petitioners, Alexander Mollayan and Joan Mollayan, filed jointly a New York State Income Tax Nonresident Return and Alexander Mollayan

filed a New York State Unincorporated Business Tax Return. On each of the returns \$18,014.85 was reported as the gain from the sale of real property. On March 1, 1974 petitioners filed separately on one return an amended nonresident New York State Combined Income Tax Return and Alexander Mollayan filed an amended New York State Unincorporated Business Tax Return for 1970. On the amended New York State Unincorporated Business Tax Return, the gain from the sale of real property was omitted. However, the joint Federal amount reported as the sale or exchange of capital assets on the amended nonresident New York State Combined Income Tax Return was unchanged.

2. For 1971, petitioners filed separately on one return a nonresident New York State Combined Income Tax Return and Alexander Mollayan filed a New York State Unincorporated Business Tax Return. On the Unincorporated Business Tax Return Alexander Mollayan reported \$4,412.00 as the gain from the sale of real or personal business property. One-half of this amount was reported as a sale or exchange of a capital asset for each petitioner on the combined New York State Income Tax Return. Subsequently, petitioners executed an amended nonresident New York State Combined Income Tax Return and Alexander Mollayan executed an amended New York State Unincorporated Business Tax Return for 1971. On the amended Unincorporated Business Tax Return the foregoing amount reported as the gain from the sale of real or personal business property was omitted. However, the amounts reported as the sale or exchange of capital assets on the amended nonresident New York State Combined Income Tax Return were unchanged.

3. For 1972 and 1973, petitioners filed separately on one return a nonresident New York State Combined Income Tax Return and Alexander Mollayan filed a New York State Unincorporated Business Tax Return. The income tax returns contained a schedule encaptioned "Installment Sales" which listed the sale of "Real Estate N.Y.C. Tennis Courts". This schedule reported a net gain on the installment sale for 1972 and 1973 of \$8,824.00 resulting in a long-term

capital gain of \$4,412.00. Each petitioner reported \$2,206.00 as the New York State amount of the gain from the sale or exchange of a capital asset. Alexander Mollayan did not report any gain from the sale of real or personal property on the attached New York State Unincorporated Business Tax Returns.

4. For 1974, petitioners filed separately on one return a nonresident New York State Combined Income Tax Return and Alexander Mollayan filed a New York State Unincorporated Business Tax Return. On the nonresident New York State Combined Income Tax Return each petitioner reported \$15,625.00 as his or her share of fifty percent of the realized gain on an installment sale. Alexander Mollayan did not report any gain from the sale of real or personal property on the New York State Unincorporated Business Tax Return.

5. On April 20, 1977 the Audit Division issued a Statement of Audit Changes for the years 1970 through 1974. The Statement of Audit changes advised petitioners that their election to change from a joint return to a separate return was being permitted and that the gain from the installment sale as originally reported for unincorporated business tax purposes and personal income tax purposes was being accepted as correct. To the extent relevant herein, the Statement of Audit Changes further provided that since the installment sale was considered connected with the unincorporated business, interest received in the years 1970 through 1974 must be reported for both unincorporated business tax and personal income tax.

6. The amount asserted as a deficiency of reported personal income tax and unincorporated business tax for the years 1972 and 1973 exceeded respectively twenty-five percent of petitioners' reported adjusted gross income and Alexander Mollayan's reported unincorporated business gross income.

7. On October 31, 1977 the Audit Division issued a Notice of Deficiency for the years 1972 through 1974 of \$5,467.62 plus interest of \$1,327.68 for a total of \$6,795.30. The deficiency was footnoted indicating that amount due was to be reduced by the 1970 and 1971 overpayments of \$510.47 and \$55.00, respectively, plus interest of \$218.72.

8. Petitioner, Alexander Mollayan, has been in the business of constructing tennis courts and maintaining them for country clubs since 1933. During the years in issue this business operated under the name of "Alex's Tennis Courts".

9. From 1952 to 1957 Alexander and Joan Mollayan purchased property in Edgemere, Queens. Eventually, petitioners owned an entire city block. Each petitioner contributed equally towards the purchase and maintenance of the land. This land was held in the name of both petitioners.

10. In 1957 Alexander Mollayan built tennis courts on the land in Edgemere which he and Joan Mollayan purchased. Originally six courts were constructed. Later four additional courts were added. Alexander Mollayan operated and paid all of the expenses of maintaining the tennis courts including taxes and insurance. Joan Mollayan was not involved in the tennis court business. However, Alexander Mollayan did not feel he could use this property in any manner he wished without consulting his wife.

11. From 1957 through 1970 petitioners lived in Florida during the winter and lived in New York during the remaining months in a building on the site where the tennis courts are located. This building contained a bedroom, kitchen, men's room, and ladies' room.

12. Alexander Mollayan utilized the building on the site of the tennis courts as the headquarters for his tennis court construction and maintenance

business. Alexander Mollayan would receive building materials, such as clay bags, at this site.

13. In 1970 petitioners sold the property on an installment basis for \$170,000.00. The purchasers of the land intended to use the site to construct a nursing home.

14. Although Alexander Mollayan maintained that the tennis court business paid rent to himself and Joan Mollayan for the use of the land, the New York State Unincorporated Business Tax Return signed by Alexander Mollayan for the 1970 taxable year does not reveal a rental payment. This return, however, has a deduction for certain real estate taxes.

15. In 1975 petitioner's accountant filed unsigned partnership returns for the years in issue in support of petitioners' position that Alexander Mollayan and Joan Mollayan were joint owners and joint venturers in land as a business which was separate from Alexander Mollayans' tennis court construction and maintenance business.

#### CONCLUSIONS OF LAW

A. That, with certain exceptions, an assessment of personal income tax or unincorporated business tax must be made within three years after a return is filed (Tax Law §§ 683(a); 722).

B. That Tax Law §683(d) provides, in pertinent part, that:

"The tax may be assessed at any time within six years after the return was filed if-

"(1) an individual omits from his New York adjusted gross income or the sum of his items of tax preference an amount properly includible therein which is in excess of twenty-five per cent of the amount of New York adjusted gross income or the sum of the items of tax preference stated in the return....

\* \* \*



For purposes of this subsection there shall not be taken into account any amount which is omitted in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the tax commission of the nature and amount of the item of income or tax preference."

C. That although Alexander Mollayan omitted from his 1972 and 1973 unincorporated business gross income an amount properly includible therein (Conclusion of Law "E") which is in excess of twenty-five percent of the amount of his reported unincorporated business gross income, this amount was disclosed in statements attached to the 1972 and 1973 unincorporated business tax returns [Tax Law §683(d)]. Therefore, the Notice of Deficiency issued October 31, 1977 was untimely as to unincorporated business tax for the years 1972 and 1973 since it was not issued within three years of the filing of the return [Tax Law §683(a)].

D. That although petitioners omitted from their 1972 and 1973 New York adjusted gross income an amount properly included therein (Conclusions of Law "F" and "G") which is in excess of twenty-five percent of the amount of their reported New York adjusted gross income, this amount was disclosed in statements attached to the tax returns [Tax Law §683(d)]. Therefore, the Notice of Deficiency issued October 31, 1977 was untimely as to petitioners' personal income tax for the years 1972 and 1973 since it was not issued within three years of the filing of the return.

E. That section 705(a) of the Tax Law provides that the "...Unincorporated business gross income of an unincorporated business means the sum of the items of income and gain of the business...includible in gross income for the taxable year for Federal income tax purposes, including income and gain from any property employed in the business...". Since petitioner Alexander Mollayan used the real property in his business of constructing and maintaining tennis

courts as well as the operation of his own tennis courts and since he deducted real estate taxes on the land on his New York State Unincorporated Business Tax Return for 1970, the sale of the land was connected with petitioner Alexander Mollayan's business. Accordingly, the gain and interest income derived from the installment sale thereof is subject to unincorporated business tax.

F. That the gain received from the installment sale constitutes income from New York sources within the meaning and intent of section 632(b)(1)(A) of the Tax Law and 20 NYCRR 131.3. Accordingly, such payments are subject to New York State personal income tax (Matter of George Rapoport [Deceased] and Mildred Rapoport, State Tax Comm., July 25, 1980, determination confirmed sub nom. Matter of Epstein et. al. v. State Tax Comm., Misc. 2d (March 17, 1981)).

G. That section 632(b)(2) of the Tax Law provides that:

"Income from intangible personal property, including annuities, dividends, interest and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession or occupation carried on in this State."

H. That the interest income received on the note from the installment sale of the property in Edgemere, Queens constituted income derived from intangible personal property attributable to the sale of real property employed in a business carried on in New York within the meaning of section 632(b)(2) of the Tax Law. Accordingly, such income is also subject to New York State personal income tax (Matter of Epstein et. al. v. State Tax Comm., supra; Matter of Edward J. Zeitlin and Bessie Zeitlan, State Tax Comm., August 14, 1981).

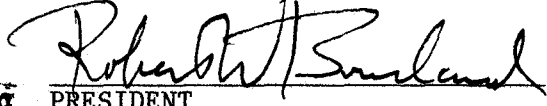
I. That the petition of Alexander Mollayan and Joan Mollayan is granted to the extent indicated by Conclusions of Law "C" and "D"; that the Audit

Division is hereby directed to cancel petitioners' deficiencies of personal income tax and unincorporated business tax for the years 1972 and 1973 together with such interest as may be owing thereon; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

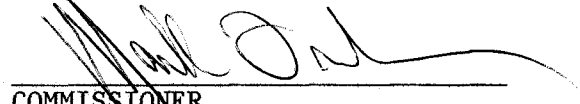
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STATE TAX COMMISSION

  
PRESIDENT

ACTING

  
COMMISSIONER

  
COMMISSIONER