

STATE OF NEW YORK
STATE TAX COMMISSION

PERS. INC. 22
1960

In the Matter of the Petition

of

HYMAN & JEANNE BRAUNSTEIN

For a Redetermination of a Deficiency or
a Refund of Personal Income
Taxes under Article(s) 22 of the
Tax Law for the (Year(s) 1960

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

Martha Funaro , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 9th day of May , 1972 , she served the within
Notice of Decision (or Determination) by (certified) mail upon Hyman & Jeanne
Braunstein (representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Hyman & Jeanne Braunstein
Baron DeHirsh Road
Crompond, Westchester, New York
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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) 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

9th day of May , 1972

Rae Zimmerman

Martha Funaro

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

HYMAN & JEANNE BRAUNSTEIN

For a Redetermination of a Deficiency or
a Refund of PERSONAL INCOME
Taxes under Article(s) 22 of the
Tax Law for the (Year(s) 1960

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

Martha Funaro , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 9th day of May , 19 72, she served the within
Notice of Decision (or Determination) by (certified) mail upon Jacob S. Weiss

(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid

wrapper addressed as follows: Jacob S. Weiss
82-49 212 Street
Queens Village, New York 11427

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) 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

9th day of May , 1972

Paul J. Janssen

Martha Funaro



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

NORMAN F. GALLMAN, PRESIDENT
A. BRUCE MANLEY
MILTON KOERNER

BUILDING 9, ROOM 214A

STATE CAMPUS
ALBANY, N. Y. 12227

AREA CODE 518
457-2655, 6, 7

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

Dated: Albany, New York

May 9, 1972

**Hyman & Jeanne Braunstein
Baron DeHirsh Road
Crompond, Westchester, New York**

Dear Sir and Madam:

Please take notice of the **DECISION** of
the State Tax Commission enclosed herewith.

Please take further notice that pursuant to section(s)
690 of the Tax Law any proceeding
in court to review an adverse decision must be commenced
within **4 Months** after the date of this notice.

Any inquiries concerning the computation of tax due or
refund allowed in accordance with this decision or
concerning any other matter relating hereto may be
addressed to the undersigned. These will be referred
to the proper party for reply.

Very truly yours,

Nigel O. Wright

Hearing Officer

cc Petitioner's Representative
Law Bureau

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HYMAN AND JEANNE BRAUNSTEIN	:	DECISION
for a Redetermination of a Deficiency	:	
or for Refund of Personal Income Taxes	:	
under Article 22 of the Tax Law for the	:	
Year 1960	:	

Taxpayers having filed a petition pursuant to Section 689 (b) of the Tax Law for a redetermination of a deficiency determined under date of March 15, 1965 of personal income taxes due under Article 22 of the Tax Law for the year 1960, and a hearing having been duly held on February 5, 1970 before Nigel G. Wright, Hearing Officer, and the record having been duly examined and considered

The State Tax Commission hereby

FINDS:

1. The issues herein are the alleged timeliness of a notice of deficiency issued under Tax Law Section 683 (d)(1) where there is an alleged omission from New York adjusted gross income amounting to 25% of the amount thereof stated in the return and the further issue of whether or not the amount received for a certain covenant not to compete is taxable at ordinary income or at capital gain rates.

2. The deficiency amounts to \$900.00 plus interest.

3. The deficiency is based upon the characterization as ordinary income of \$20,000 the taxpayer received in payment for a restrictive covenant upon the sale of a business when such amount had been reported on the return as a capital gain of \$10,000.

4. The \$20,000 item in question was the taxpayers one half distributive share of \$40,000 received by the Osborne Fuel Oil

Company in payment for a restrictive covenant. This was part of the sale of the entire business.

5. The taxpayers filed a return (IT-201) for 1960 on or before April 15, 1961. The New York adjusted gross income reported thereon was \$35,756.00. The taxpayer's occupation was described as a "partner" and a reference was made on the return to income from a "N.Y. Unincorporated Business". The sum of \$10,604 was shown as income from partnerships. The name of the partnership - the Osborne Fuel Company - appears nowhere on the return. The sum of \$14,929.00 is shown as a detail of Federal adjusted gross income (page 2, Sched. C, line 6) and was identified (at line 6b) as a net long-term gain or loss.

6. The \$14,929 of capital gain shown on the return was derived from \$29,858 reported on the partnership return as taxpayers distributive share of a \$59,715.00 gain. That was made up of \$6,715 allocated to the sale of trucks, \$13,000 allocated to good will and the \$40,000 allocated to the restrictive covenant in question.

Upon the foregoing findings and all the evidence in the case the State Tax Commission hereby

DECIDES:

A. The extended statute of limitations found in Section 683 (d) of the Tax Law must be interpreted in a similar manner as Section 373 (1) of Article 16 of the Tax Law which in turn has been interpreted in a similar manner to Internal Revenue Code Section 6501 (e), and its predecessor Section 275 (c) of the 1939 Internal Revenue Code from which both were derived. The United States Supreme Court has said of such provisions:

"We think that in enacting Section 275 (c) Congress manifested no broader purpose than to give the Commissioner an additional two years to investigate tax returns in cases where, because of a

taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item. On the other hand, when, as here, the understatement of a tax arises from an error in reporting an item disclosed on the face of the return the Commissioner is at no such disadvantage...." (Colony v. Commissioner, 1958, 357 U.S. 28 at 36).

B. Where, as here, a taxpayer shows on his return a Federal "long term gain" he necessarily implies that he received twice the amount shown thereon and that the Federal deduction from gross income provided in Section 1202 of the Internal Revenue Code was taken before reaching Federal adjusted gross income (I.R.C. 62(3)). Although such deduction reduced New York adjusted gross income such a reduction is not an "omission" from New York adjusted gross income. An "omission" from a return occurs only when some positive amount of income is not reported and not where a mere reduction is erroneous in whole or in part (see Davis v. Hightower 230 F2d 549; Uptegrove Lumber Co. v. Comm. 204 F2d 570 construing the meaning "omission from gross income"). The addition in 1954 of the language of I.R.C. Section 6501(e) (a) (ii) to the Federal statute and of similar language in 1960 to Tax Law Section 683 (d) requires the same result see lxta J. Morris 1969 T.C.M. No. 245).

C. There has been no omission from adjusted gross income and the deficiency in question is barred by the three year statute of limitations as mandated in Tax Law Section 683 (a).

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D. The petition is granted and the deficiency is found invalid in its entirety.

DATED: Albany, New York
May 9, 1972

STATE TAX COMMISSION

COMMISSIONER

Bruce Stanley

COMMISSIONER

Melvin Korne

COMMISSIONER