

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

October 9, 1979

Julius & Marguerite Westheimer
Middleburgh, NY 12122

Dear Mr. & Mrs. Westheimer:

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

Sincerely,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Julius & Marguerite Westheimer :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income & UBT :
under Article 22 & 23 of the Tax Law
for the Year 1972. :

State of New York
County of Albany

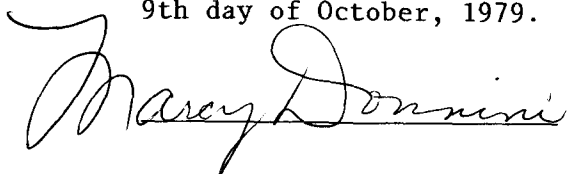
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1979, he served the within notice of Decision by certified mail upon Julius & Marguerite Westheimer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

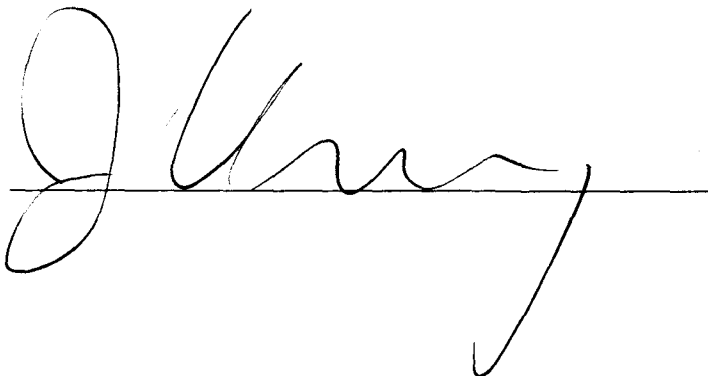
Julius & Marguerite Westheimer

Middleburgh, NY 12122
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
9th day of October, 1979.


Nancy Donnini



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JULIUS WESTHEIMER and	:	DECISION
MARGUERITE WESTHEIMER	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income and	:	
Unincorporated Business Taxes under	:	
Articles 22 and 23 of the Tax Law for	:	
the Year 1972.	:	

Petitioners, Julius and Marguerite Westheimer, Middleburgh, New York 12122, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the year 1972 (File No. 15849).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on December 1, 1978 at 11:00 A.M. Petitioners appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (Martin Condon, Esq., of counsel).

ISSUES

I. Whether the gains received from a condemnation award on parcels of land, as well as the interest income received from the condemnation award, were properly included in petitioners' New York State personal income for 1972.

II. Whether the income received from the condemnation award is subject to New York State unincorporated business tax for 1972.

FINDINGS OF FACT

1. Petitioners, Julius and Marguerite Westheimer, filed a New York State

Income Tax Resident Return for 1972. They reported the results of their calculations for the condemnation award, including the interest received, as a long-term capital gain on said tax return. They did not file an unincorporated business tax return for said year.

2. The Income Tax Bureau recomputed the capital gain and interest received on the condemnation award and added it to the total New York income which was previously reported. Based on the recomputation of the award, the Income Tax Bureau found petitioners subject to the New York State minimum income tax. The Income Tax Bureau also contended that the income received from expropriation of the farm land was subject to unincorporated business tax. On April 12, 1976, a Notice of Deficiency was issued against petitioners for 1972 in the amount of \$1,073.39 in personal income tax and \$527.52 in unincorporated business tax, plus interest of \$359.21, for a total due of \$1,960.12.

3. On June 25, 1976, petitioners filed an amended return and paid an additional personal income tax of \$43.65. The payment was applied against the Notice of Deficiency issued on April 12, 1976.

4. For many years prior to 1956, petitioners owned and operated a dairy farm. In 1956 they sold the cattle and dairy equipment, dismantled a barn and discontinued the dairy farm operation. After discontinuing the dairy operation, petitioners' real property consisted of three houses, farm buildings and land. From 1956 to 1964, petitioner and his son operated a farm on the land; thereafter, it was held as rental property. Petitioners were not engaged in the business of farming during the year at issue.

5. Petitioners filed Federal Schedule "E" (Supplemental Income Schedule), showing net rental income for the farm properties of \$1,649.94 for 1972.

6. In 1969 New York State expropriated a portion of petitioners' rental property which consisted of a few acres of land running along the road, plus

two of the houses. The remaining house and farmland were held as rental property.

7. Petitioners realized a capital gain of \$11,245.24 (50% taxable) and interest income of \$3,547.88 from the condemnation award during 1972. In addition to these amounts, petitioners had income of \$1,786.67 in dividends, \$4,300.32 in interest income and \$1,649.94 in rental income, as well as a net short-term capital loss of \$6.70. This income, together with the New York State 20% capital gains modification of \$1,123.85, resulted in a total New York income of \$18,027.93.

8. Petitioners are entitled to New York itemized deductions of \$8,314.55 and exemptions of \$2,600.00, leaving a New York taxable income of \$7,113.38.

9. Petitioners have paid \$255.70 in New York State personal income taxes for 1972.

CONCLUSIONS OF LAW

A. That the 1972 New York State personal income tax of petitioners, Julius and Marguerite Westheimer, shall be recomputed in accordance with Findings of Fact "7", "8" and "9".

B. That petitioners were not engaged in the carrying on of an unincorporated business in 1972, within the meaning and intent of section 703(a) of the Tax Law. The property had changed in character from farming to rental prior to 1972. Petitioners were merely holding, leasing or managing real property, and are not to be deemed engaged in an unincorporated business by virtue of section 703(e) of the Tax Law; therefore, the income realized from the condemnation award is not subject to unincorporated business tax.

C. That the Income Tax Bureau is directed to recompute the Notice of Deficiency issued on April 12, 1976, in accordance with Conclusion of Law "A". The unincorporated business tax asserted against petitioners for said years is

cancelled and the Income Tax Bureau is hereby directed to modify the Notice of Deficiency issued on April 12, 1976.

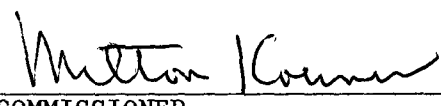
D. That the petition of Julius and Marguerite Westheimer is granted to the extent indicated in Conclusion of Law "C" and that, except as so granted, the petition is in all other respects denied.

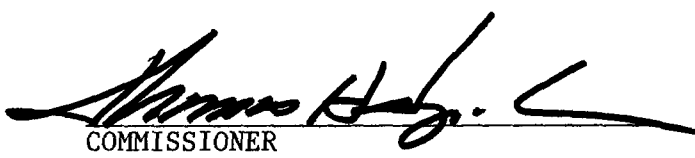
DATED: Albany, New York

STATE TAX COMMISSION

OCT 9 1979


PRESIDENT


COMMISSIONER


COMMISSIONER