

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Peter & Jennie Nemiroff :

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 Year 1965. :

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 11th day of April, 1980, he served the within notice of Decision by certified mail upon Peter & Jennie Nemiroff, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter & Jennie Nemiroff

66 Roy Ave.

Massapequa, NY 11758

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  
11th day of April, 1980.

Joanne Knapp

[Signature]

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Peter & Jennie Nemiroff :

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for Redetermination of a Deficiency or a Revision :

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Personal Income Tax & UBT :

under Article 22 & 23 of the Tax Law

for the Year 1965. :

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 11th day of April, 1980, he served the within notice of Decision by certified mail upon Moe D. Karash the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

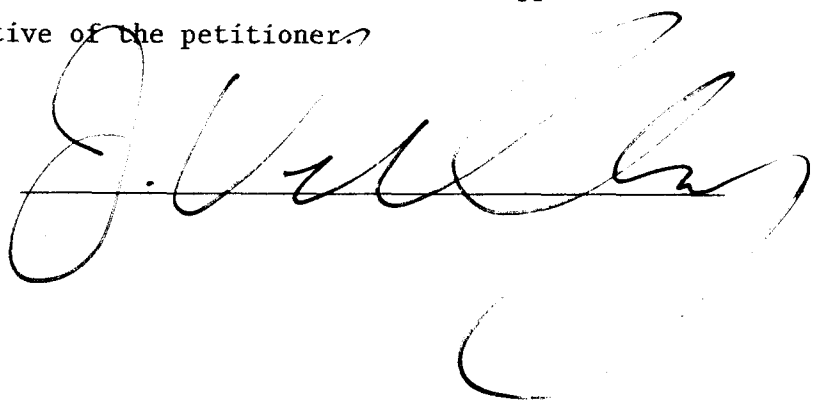
Mr. Moe D. Karash  
150 Broadway  
New York, NY 10038

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  
11th day of April, 1980.

Joanne Knapp

A large, stylized handwritten signature, likely of Jay Vredenburg, is written over a horizontal line. The signature is in dark ink and is quite fluid and cursive.

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

April 11, 1980

Peter & Jennie Nemiroff  
66 Roy Ave.  
Massapequa, NY 11758

Dear Mr. & Mrs. Nemiroff:

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  
Moe D. Karash  
150 Broadway  
New York, NY 10038  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
PETER NEMIROFF :  
for Redetermination of a Deficiency or :  
for Refund of Unincorporated Business Tax :  
under Article 23 of the Tax Law for the :  
Year 1965. :

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DECISION

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In the Matter of the Petition :  
of :  
PETER and JENNIE NEMIROFF :  
for Redetermination of a Deficiency or :  
for Refund of Personal Income Tax under :  
Article 22 of the Tax Law for the Year :  
1965. :

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Petitioners, Peter and Jennie Nemiroff, 66 Roy Avenue, Massapequa, New York 11758, filed petitions for redetermination of deficiencies or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the year 1965 (File No. 01685).

A small claims hearing was held before Philip Mercurio, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 26, 1977 at 10:45 A.M. Petitioners appeared by Moe D. Karash, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Francis Cosgrove, Esq., of counsel).

ISSUES

I. Whether the gain from an insurance recovery on a parcel of property during the year 1965 was subject to unincorporated business tax.

II. Whether a portion of the gain derived from an insurance recovery on a particular parcel of property during the year 1965 was ordinary income.

FINDINGS OF FACT

1. Petitioners, Peter and Jennie Nemiroff, filed a New York State resident income tax return for the year 1965. Petitioner Peter Nemiroff did not file an unincorporated business tax return for said year.

2. The Income Tax Bureau issued a Statement of Audit Changes against petitioners, Peter and Jennie Nemiroff, on the grounds that a portion of gain attributable to depreciation allowed for periods after December 31, 1961 was considered ordinary income for personal income tax purposes in accordance with section 1245 of the Internal Revenue Code. Depreciation taken from January 1, 1962 to the date of a fire loss amounted to \$5,389.30. The Bureau claimed that fifty percent of said amount, \$2,694.65, was included as capital gain. Accordingly, the balance of \$2,694.65 represented additional taxable income. On April 11, 1969, the Income Tax Bureau issued a Notice of Deficiency imposing \$269.47 in personal income tax, \$48.35 in interest, for a total due of \$317.82.

3. The Income Tax Bureau issued a Statement of Audit Changes against petitioner Peter Nemiroff, on the grounds that the business activities reported constituted the carrying on of an unincorporated business and the net income derived therefrom, including the gain on insurance recovery, represented income subject to unincorporated business tax. In addition, it was claimed that under the law, the entire gain was subject to tax, since there was no provision for treating this gain under the net capital gains provision of the personal income tax law. Accordingly, on April 11, 1969, it issued a Notice of Deficiency imposing \$2,028.08 in unincorporated business tax, \$363.90 in interest, for a total due of \$2,391.98.

4. During the year 1941, petitioner Jennie Nemiroff purchased land and property located in Amityville, New York. The title to said property was in the name of petitioner Jennie Nemiroff. Petitioners, Peter and Jennie Nemiroff, resided and maintained permanent living quarters on said property.

5. Shortly after the purchase of the aforesaid property, petitioner Peter Nemiroff opened and operated a hotel and restaurant on the premises under the trade name of "Shangri-La".

6. Petitioner Peter Nemiroff and his wife petitioner Jennie Nemiroff entered into a lease agreement on April 1, 1956, which provided that he would lease the business premises and equipment from his wife for a period of five years, commencing April 1, 1956.

7. Petitioner Peter Nemiroff contended that subsequent to the period covered by the aforesaid lease a second agreement between the petitioners, Peter and Jennie Nemiroff, was entered into, whereby petitioner Peter Nemiroff would pay for the expenses relating to the property in lieu of paying rent. However, the petitioners did not submit a copy of said agreement.

8. During the year 1965, the property in question was destroyed by fire. The property was covered by insurance and the insured property included a building, business equipment, household furniture and personal property.

9. On the copy of petitioners Peter and Jennie Nemiroff's 1964 schedule C, deductions were taken for depreciation of building improvements and equipment. Petitioner Peter Nemiroff did not claim a business deduction for rent expenses, nor did petitioner Jennie Nemiroff claim any rental income or expenses for said year. No similar documentary evidence was introduced for the year 1965.

10. Petitioner Jennie Nemiroff maintained that since the insurance recovery from the fire loss arose from property owned by her, and since she did not own nor conduct the business known as "Shangri-La", and that since the ownership of the property was that of a capital asset, the gain involved is thus treated as a capital gain.

11. Petitioner Peter Nemiroff maintained that he was not liable for unincorporated business tax on the insurance recovery, since he did not own the property in question, nor was he the insurance beneficiary.

CONCLUSIONS OF LAW

A. That petitioner Jennie Nemiroff did not conduct, nor was connected with, the business known as "Shangri-La", and that the insurance recovery from the fire loss arose from property solely owned by her. Therefore, the gain realized from the insurance recovery is not subject to unincorporated business tax in accordance with section 705(a) of the Tax Law.

B. That the property in question was rental property held for the production of income and said property was or had been property of a character subject to the allowance for depreciation as provided in section 167 of the Internal Revenue Code. Therefore, the gain attributable to depreciation allowed for periods after December 31, 1961 is considered ordinary income for personal income tax purposes in accordance with section 1245 of the Internal Revenue Code.

C. That the petition of Peter Nemiroff is granted and the Notice of Deficiency issued on April 11, 1969 in the sum of \$2,319.98 is cancelled.

D. That the petition of Peter and Jennie Nemiroff is denied and the Notice of Deficiency issued April 11, 1969 in the sum of \$317.82 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

APR 11 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER