

STATE OF NEW YORK

STATE **TAX** COMMISSION

In the Matter of the Petition

of

GARDNER-WAVERLY CORPORATION

DECISION

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article **9-A** of the Tax Law for the Year 1978.

Petitioner, Gardner-Waverly Corporation, 34 South Union Street, Rochester, New York 14607, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article **9-A** of the Tax Law for the year 1978 (File No. 38468).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on June 7, 1985 at 10:45 A.M., with all briefs to be submitted by October 28, 1985. Petitioner appeared by Patrick F. Kreckel, P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner adopted a plan of liquidation prior to the distribution of corporate assets.

FINDINGS OF FACT

1. On May 2, 1978, petitioner sold a building located at 40 South Union Street, Rochester, New York for \$48,500.00 and realized a gain on this sale in the amount of \$35,915.00.

2. Petitioner filed a **U.S.** Corporation Income Tax Return for the year 1978. It did not report the gain on the sale of the building on this report.

Liquidation, which reported that there was a complete liquidation of petitioner pursuant to section 337 of the Internal Revenue Code arising from the adoption of a resolution or plan of dissolution, or complete or partial liquidation in late April, 1978.

3. Petitioner filed a State of New York Corporation Franchise Tax Report for 1978 wherein it did not report the gain on the sale of the building at 40 South Union Street in Rochester, New York.

4. On March 26, 1982, the Audit Division issued a Notice of Deficiency to petitioner asserting a deficiency of corporation franchise tax for the period ended December 31, 1978 in the amount of \$3,028.20, plus interest of \$939.32, for a total amount due of \$3,967.52. The asserted deficiency was premised upon the failure to report the gain on the sale of the building.

5. Petitioner is a New York corporation which was organized in 1964. All of the corporation's outstanding stock was held, in equal amounts, by two brothers, Mr. Lewis A. Ditrinco and Mr. Vincent D. Trinker. Mr. Ditrinco and Mr. Trinker were also the corporation's only officers and directors.

6. The sole assets of petitioner were two buildings on contiguous parcels of land located at the corner of Gardner Park and Union Street in Rochester, New York. One building contained a dilapidated restaurant and bar business. Rundown apartments were located above the restaurant and bar. The restaurant and bar were operated by a corporation known as Rochester Waverly Corporation. The total stock of the Rochester Waverly Corporation was also owned, in equal amounts, by Mr. Ditrinco and Mr. Trinker. The restaurant and bar were not profitable.

7. The second building owned by petitioner was a cinderblock garage which had neither heat nor running water. The garage was vacant at the time of

the time. However, on occasion, an antique dealer would store items in the garage. The operation of the garage was not profitable.

8. On January 8, 1978, petitioner entered into a written contract to sell the building containing the restaurant and bar. Because the purchaser intended to use the building to operate a bar and restaurant, the contract was expressly contingent on the purchaser's obtaining a liquor license from the New York Division of Alcoholic Beverage Control. On April 18, 1978, the Division of Alcoholic Beverage Control issued a conditional approval for a liquor license to the purchaser.

9. After the Division of Alcoholic Beverage Control had issued its conditional approval to the purchaser, Mr. Ditrinco and Mr. Trinker agreed to liquidate petitioner and to distribute all of petitioner's remaining assets to the shareholders after the actual closing. Petitioner's stockholders decided on this course of action because they believed that there would no longer be any reason to have petitioner continue its existence since the real estate that was proposed to be sold was petitioner's principal asset.

10. On April 30, 1978, petitioner's board of directors adopted a resolution which provided, in part:

"RESOLVED, that in the judgment of the Board of Directors of the Corporation, it is deemed advisable that in view of special circumstances discussed at the meeting that the Corporation sell and convey by proper Warranty Deed, real estate which the Corporation owns at 40 South Union Street, Rochester, New York, . . .",

11. The "special circumstances" referred to above was the decision to liquidate petitioner and distribute petitioner's assets. The reason why more specific language was not used in the resolution of April 30, 1978 was because the resolution was going to be given to the purchaser's attorney for the

purpose of authorizing the sale. Consequently, Mr. Trinker had to be

necessary for the buyers to be given a detailed description of what the special circumstances were.

12. On May 2, 1978, a liquor license was issued to the purchaser of the building. On May 21, 1978, a closing of the sale of the real estate took place.

13. On April 17, 1979, Mr. Ditrinco and Mr. Trinker, as petitioner's directors, resolved to completely liquidate and distribute all of petitioner's assets. They also resolved to dissolve petitioner. On the same date, the garage and the lot on which it stood were distributed to Mr. Trinker and Mr. Ditrinco.

CONCLUSIONS OF LAW

A. That section 337 of the Internal Revenue Code sets forth the rule that if a corporation adopts a plan of complete liquidation and within a period of twelve months beginning on the date of the plan's adoption, all of the assets of the corporation are distributed. In furtherance of the plan of liquidation, less assets retained to meet the claims of the creditors of the corporation, then the corporation shall not recognize gain or loss on its sale or exchange of property within such twelve month period.

B. That section 337 of the Internal Revenue Code does not set forth whether there are any corporate formalities that must be adhered to for the adoption of a plan or whether the plan must be in some formal corporate document [~~see~~ 3A Rabkin & Johnson, Federal Income Gift and Estate Taxation, §23.10(2), p. 2375(b)]. Moreover, at least in the case of closely-held corporations, where there is a plan to liquidate at an informal meeting the Internal Revenue

Service will no longer contend that the date of the plan of liquidation is the date of the adoption of a resolution authorizing distributions of the corporation assets (Rev. Rul. 65-235, 1965-2 C.B. 88).

C. That based upon the uncontradicted testimony presented herein, it is found that petitioner adopted a plan of complete liquidation on April 30, 1978. Since petitioner distributed all of its assets within twelve months of the date of the adoption of the plan, it was not required to report the gain on the sale of its property at 40 South Union Street, Rochester, New York.


D. That the petition of Gardner-Waverly Corporation is granted and the Notice of Deficiency, issued March 26, 1982, is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER