

BUREAU OF LAW

MEMORANDUM

*Income Tax Determinations**A-2**Estivo, John and Mary*

TO: Commissioners Murphy and Macduff and Conlon

FROM: Vincent P. Molineaux, Hearing Officer

SUBJECT: John and Mary Estivo
Frank and Donata Estivo
 Connie Cleaners
 Application for Revision

A hearing on the above matter was held before me at 80 Centre Street, New York, New York on June 30, 1965.

The question involved herein is whether the petitioners, who operate a retail dry cleaning establishment as a partnership, are entitled to deduct as a business expense payments of \$1,300 a year made to their mother, a former partner, for a covenant not to compete. The agreement dated December 31, 1959 (STC ex. 16-A), by which the sons purchased their mother's interest, specifically provides payment for the agreement not to compete for five years.

It is claimed by the Income Tax Bureau that the payments to the mother were for good will, and that since the mother is more than 65 years of age the covenant not to compete was a subterfuge for a tax deduction.

The payment to the mother was book value, plus the amount of the covenant. If the amount of the covenant was simply another name for good will, there must be some indication that the business had good will in which the mother shared. Good will is indicated by a probability of earnings in excess of what might be considered normal from the investment in tangible assets and the work, labor and services of the owners and their employees. The report for the year in question shows a capital investment of \$55,000 plus salaries and wages to other than the partners of \$23,000, plus rental and materials and other expenses, not including depreciation and the covenant not to compete, of \$13,000 making a total investment of over \$90,000 on which the return to the partners of \$8,000 each hardly paid them for more than their actual services. There would appear to be no element of good will and that the covenant not to compete was justified by showing at the hearing (page 9) that another brother, Anthony, was also in the cleaning business in Great Neck and the mother might be persuaded to assist such other brother. The mother's long association with the business (page 8) and acquaintance with the customers made this a possibility.

It is my opinion that under the circumstances outlined, the covenant not to compete was a reasonable business expense and the proposed determinations direct cancellation of the assessments.

For the reasons stated, I recommend that the determinations of the State Tax Commission in this matter be substantially in the form submitted herewith.

Vincent P. Robinson
Hearing Officer

January 13, 1967

VPM:lb/kon (Jan. 19, 1967)

Encs.

Martin Schapira
Approved

Sam Heshelman
Approved

**STATE OF NEW YORK
STATE TAX COMMISSION**

IN THE MATTER OF THE APPLICATION

OF

JOHN AND MARY ESTIVO

**FOR REVISION OR REFUND OF PERSONAL
INCOME TAXES UNDER ARTICLE 22 OF THE
TAX LAW FOR THE YEAR 1960**

The petitioners having filed an application for revision or refund of personal income taxes assessed under Article 22 of the Tax Law for the year 1960, and a hearing having been held in connection therewith, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the petitioners filed a resident return of income tax under Article 22 of the Tax Law for the year 1960 and the amount shown to be due thereon was paid.

(2) That assessment # 002915 in the amount of \$26.32 for the year 1960 was issued March 21, 1962 showing an additional amount due based upon additional partnership reportable income of Connie Cleaners, of which John Estivo is a partner, by reason of the disallowance of a deduction of \$1,300 on the partnership return for the year 1960, and petitioners filed an application for revision or refund of personal income tax July 10, 1962.

(3) That the partnership, Connie Cleaners, 84 Middle-
rock Road, Great Neck, New York, formerly consisted of partners
Frank S. Estivo, a brother, John Estivo, and their mother,
Louise Estivo; that John and Frank Estivo executed a contract

with Louise Estivo transferring her one-third interest in Connie Cleaners to the two sons, in return for which she was to receive \$4,615.16 payable \$25.00 a week and a further payment of \$25.00 a week for a covenant not to compete for five years or during the remainder of her life, whichever was shorter.

(b) That due to the existence of a similar business operated by another son of Louise Estivo, the covenant not to compete was a reasonable business expense.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby
DETERMINES:

(A) That the deduction of \$1,300 as a business expense was a proper deduction.

(B) That assessment # 002915 for 1960 dated March 21, 1962 was incorrectly issued and is cancelled in full

AND IT IS SO ORDERED.

Dated: Albany, New York the 30th day of January , 1967 .

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

PRESIDENT

/s/

JAMES R. MACDUFF

COMMISSIONER

/s/

WALTER MACLYN CONLON

COMMISSIONER