

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Evelyn Dunning, As Executrix
Est. of Edward M. Dunning (dec'd.) : 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 :
Years 1971 & 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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Evelyn Dunning, As Executrix, Est. of Edward M. Dunning (dec'd.) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Evelyn Dunning, As Executrix
Est. of Edward M. Dunning (dec'd.)
c/o Bollam, Sheedy et al
5 Computer Dr. W.
Albany, NY 12205

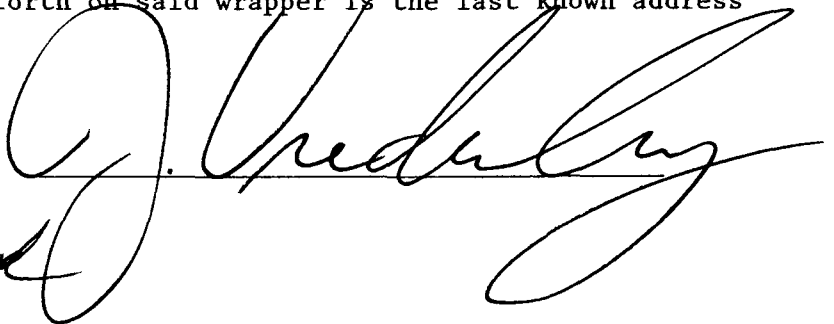
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
29th day of January, 1982.



Annie A. Hegeland



Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Evelyn Dunning, As Executrix :
Est. of Edward M. Dunning (dec'd.) :

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:
Years 1971 & 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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Joseph A. Torani the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph A. Torani
Bollam, Sheedy, Sherman & Torani
Five Computer Dr. W.
Albany, NY 12205

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
29th day of January, 1982.

Annice A. Hayslund

J. Vredenburg

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

January 29, 1982

Evelyn Dunning, As Executrix
Est. of Edward M. Dunning (dec'd.)
c/o Bollam, Sheedy et al
5 Computer Dr. W.
Albany, NY 12205

Dear Mrs. Dunning:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Joseph A. Torani
Bollam, Sheedy, Sherman & Torani
Five Computer Dr. W.
Albany, NY 12205
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EVELYN DUNNING, AS EXECUTRIX OF THE	:	
ESTATE OF EDWARD M. DUNNING, DECEASED	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax and	:	
Unincorporated Business Tax under	:	
Articles 22 and 23 of the Tax Law for	:	
the Years 1971 and 1972.	:	

Petitioner, Evelyn Dunning, Executrix of the Estate of Edward M. Dunning, deceased c/o Joseph A. Torani, Bollam, Sheedy, Sherman & Torani, Five Computer Drive, W., Albany, New York 12205, filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1971 and 1972 (File No. 25390).

Petitioner has requested that this matter be submitted to the State Tax Commission for a decision without the necessity of a formal hearing. Based on the record as it is presently constituted, the State Tax Commission renders the following decision.

ISSUES

I. Whether a gain resulting from the receipt of the proceeds of a fire insurance policy was subject to unincorporated business tax.

II. Whether certain land condemned by the State of New York was an asset used in the business of Edward M. Dunning.

III. Whether or not the character of the aforesaid land changed from a business to a personal use for investment purposes.

IV. Whether the gain as a result of the condemnation award was subject to unincorporated business tax.

V. Whether the Notice of Deficiency issued on June 13, 1979 was barred by the statutory period of limitation on assessment.

FINDINGS OF FACT

1. Edward M. and Evelyn Dunning filed Forms IT-208 (for resident married persons filing a joint Federal return who elect to file separate New York State returns) for the years 1971 and 1972. Edward M. Dunning also filed unincorporated business tax returns for the years 1971 and 1972.

2. The 1971 and 1972 Federal tax returns of Edward M. and Evelyn Dunning were audited by the Internal Revenue Service in 1974. As a result of the audit, a capital gain adjustment was made for 1971 and adjustments were made for 1972. The Dunnings failed to file with the New York State Department of Taxation and Finance a notice of Federal changes for the years in issue.

3. On July 16, 1976, the Audit Division issued a Statement of Audit Changes against Edward M. Dunning imposing additional personal income tax for the years 1971 and 1972 in the amount of \$7,640.87 and additional unincorporated business tax in the amount of \$5,136.63, with interest of \$3,253.02, for a total of \$16,030.52. A payment of \$2,590.76 was made on August 2, 1976.

4. On August 2, 1976, Edward M. and Evelyn Dunning filed an amended New York State Combined Income Tax Return (Form IT-208) for 1971. Edward M. Dunning also filed an amended unincorporated business tax return for 1971.

5. On October 26, 1976, the Audit Division withdrew its Statement of Audit Changes dated July 16, 1976 for 1971 and 1972 and issued a Statement of Audit Changes imposing additional personal income tax for 1971 and 1972 and unincorporated business tax for 1972 against Edward M. Dunning. The additional

personal income tax amounted to \$1,221.02 and the additional unincorporated business tax amounted to \$3,584.79, with interest of \$1,944.65, for a total of \$6,750.46.

6. Edward Dunning died in the latter part of 1976 and his wife Evelyn Dunning was appointed Executrix of his estate.

7. On January 15, 1979, a Notice of Deficiency was issued against Evelyn Dunning, Executrix of the Estate of Edward M. Dunning for the years 1971 and 1972 in the amount of \$4,805.81, with interest of \$2,730.49, for a total of \$7,536.30. On February 7, 1979, Evelyn M. Dunning, Executrix of the estate of Edward M. Dunning, filed a protest to the Notice of Deficiency.

8. On June 13, 1979, the Audit Division asserted a greater deficiency than that asserted against Edward M. Dunning in the Notice of Deficiency dated January 15, 1979, in accordance with the provisions of section 689(d)(1) of the Tax Law. Additional unincorporated business tax for 1971 was imposed in the amount of \$1,943.11 based on a correction of the net operating loss carryback deduction claimed on the amended 1971 unincorporated business tax return. The gain as a result of receipt of the fire insurance proceeds more fully set forth in paragraph "9", infra, was computed on the full amount of the capital gain as reported by Mr. Dunning. On May 19, 1980, Mrs. Dunning as Executrix filed a perfected petition.

9. Edward M. Dunning operated an auto dealership at 913 New Loudon Road, Latham, New York. The property was owned by Mr. Dunning and used in the business until May 23, 1971, when a fire completely destroyed the building and improvements. As a result of the fire, insurance proceeds of \$120,000.00 were received in 1971. Since the building which had been used in the business of Edward Dunning had been substantially depreciated, there was a gain of \$95,140.72.

This gain was postponed under section 1033 of the Internal Revenue Code but the tax was later paid when it was determined that the proceeds would not be reinvested. The gain was not reported either on the original personal income tax return or the unincorporated business tax return.

10. On March 13, 1972, the business incorporated under the name "Dunning Buick, Inc." and conducted business at 2350 Sixth Avenue, Troy, New York. The land on New Loudon Road in Latham, which was previously used in the auto dealership until the fire in 1971, was retained by Mr. Dunning who did not advertise the land for sale.

11. In 1972, the State of New York condemned the land located in Latham, New York and paid Mr. Dunning \$131,386.66 on November 22, 1972. The original cost of the said land was \$30,000.00.

CONCLUSIONS OF LAW

A. That the gain of \$95,140.72 constituted gain from the sale or exchange of an asset used in the business of Edward M. Dunning and was therefore subject to unincorporated business tax.

B. That although the land located in Latham, New York was used in the business of Edward M. Dunning and was an asset of the business, it was not used after the occurrence of the fire in May, 1971. The land, which was condemned 1½ years after the occurrence of the fire, was held for investment purposes and was, in effect, a return of capital. Therefore, the gain as a result of the condemnation award was not subject to the imposition of unincorporated business tax.

C. That the disallowance of part of the net operating loss deduction claimed on the 1971 unincorporated business tax return was not time barred since petitioner Edward M. Dunning (deceased) failed to report to New York

State the changes made to Federal taxable income pursuant to section 659 of the Tax Law. Therefore, unincorporated business tax may be assessed at any time pursuant to sections 722 and 683(c)(1)(C) of the Tax Law.

D. That the burden of proof is on the State Tax Commisison when a greater deficiency has been asserted except when such increase is the result of a change or correction of federal taxable income required to be reported under section 659, and which change or correction the Commission had no notice at the time it mailed the Notice of Deficiency (section 689(e)(3) of the Tax Law). Therefore, the Notice dated June 13, 1979, showing a greater deficiency for 1971 than that asserted on January 15, 1979, was not time barred.

E. That the petition of Evelyn Dunning, Executrix of the Estate of Edward M. Dunning, is granted to the extent shown in Conclusion of Law "B" supra; and that, except as so granted, the Notice of Deficiency issued against Edward M. Dunning (deceased) on January 15, 1979 as increased on June 13, 1979, is sustained, together with such additional interest as may be lawfully owing.

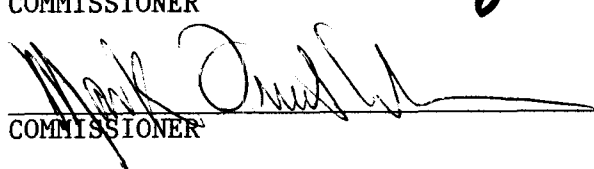
DATED: Albany, New York

JAN 29 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER