

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Earl & Mildred Rogers

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 1968 & 1969.

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 5th day of February, 1982, he served the within notice of Decision by certified mail upon Earl & Mildred Rogers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Earl & Mildred Rogers
Olean Portville Rd.
Olean, NY 14760

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
5th day of February, 1982.

Bernie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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& UBT under Article 22 & 23 of the Tax Law for the :
Years 1968 & 1969 :

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 5th day of February, 1982, he served the within notice of Decision by certified mail upon Robert E. Murrin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert E. Murrin
Murrin & DeRose
613 Bank of New York Bldg.
Olean, NY 14760

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
5th day of February, 1982.

Frank G. Haglund

J. Vredenburg

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

February 5, 1982

Earl & Mildred Rogers
Olean Portville Rd.
Olean, NY 14760

Dear Mr. & Mrs. Rogers:

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
Robert E. Murrin
Murrin & DeRose
613 Bank of New York Bldg.
Olean, NY 14760
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
EARL ROGERS and MILDRED ROGERS	:	DECISION
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 Years 1968 and 1969.	:	

Petitioners, Earl Rogers and Mildred Rogers, Olean Portville Road, Olean, New York 14760, filed petitions 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 years 1968 and 1969 (File Nos. 10744 and 10745).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, 1 West Genesee Street, Buffalo, New York, on July 7, 1980 at 9:15 A.M. and continued on September 29, 1980 at 2:45 P.M. Petitioner Earl Rogers appeared with Robert E. Murrin, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh and Paul A. Lefebvre, Esqs., of counsel).

ISSUE

Whether or not the gain from the sale of timberland is subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Earl Rogers and Mildred Rogers, filed New York State personal income and unincorporated business tax returns for 1968 and 1969.

2. On January 28, 1974, the Income Tax Bureau issued two notices of deficiency. One notice imposed additional personal income tax of \$628.07 (mathematical error in addition, correct deficiency is \$569.46) for 1968 and 1969 against petitioners based on Federal audit changes which petitioners are no longer contesting and, therefore, said notice is not at issue. The second notice imposed unincorporated business tax of \$967.34 for 1968 and 1969 against petitioner Earl Rogers so as to conform with the Federal audit adjustments and to include the capital gains from the sale of land and timber.

3. Prior to 1965, petitioner Earl Rogers had an unincorporated timber mill business. In 1965, petitioner started Portville Forest Products, Inc. and turned over all the assets of the unincorporated business in favor of stock of Portville Forest Products, Inc. Subsequently, both the corporation and petitioner had liquidity problems. To obtain timber for the corporation, the corporation and petitioner would pool their assets and purchase timberland, with the land being deeded to petitioner Earl Rogers. Petitioner Earl Rogers paid the seller for the value of the land, and the corporation paid the seller for the value of the timber which it cut. Petitioner contended the land he purchased was an investment in his own account; therefore, the gain from the sale of the land, minus the original timber, should not be subject to unincorporated business tax. Petitioner Earl Rogers further contended he would not have sold the land if it were not for the high land taxes and his need for money to purchase more timberland.

4. Petitioner Earl Rogers further argued that these transactions between himself and the corporation were not a joint venture since the participants had different purposes for entering into the purchases of the timberland.

CONCLUSIONS OF LAW

A. That the whole undertaking of purchasing of timberland was, in fact, an elaborate way of supplying the needed raw material to the corporation, and the action of both participants was to that aim. Therefore, petitioner Earl Rogers and the corporation, Portville Forest Products, Inc., were carrying on an unincorporated business in the form of a joint venture and subject to unincorporated business tax in accordance with section 701 of the Tax Law.

B. Accordingly, such Notice of Deficiency issued on January 28, 1974 in the name of Earl Rogers is hereby cancelled and the petition of Earl Rogers is granted.

C. That, in accordance with the decision rendered herein, the Audit Division is directed to recompute the unincorporated business tax together with applicable interest and to proceed with the issuance of a Notice of Deficiency to the proper taxpayer, the joint venture.

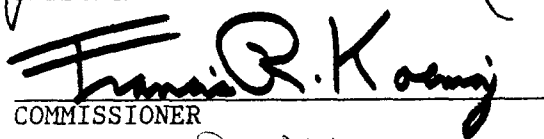
D. That the petition of Earl Rogers and Mildred Rogers is denied and the Notice of Deficiency issued on January 28, 1974 asserting personal income tax of \$569.46 (corrected for a mathematical error) is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

FEB 5 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER