

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
James (dec'd.) & Rena McCann
and The Humidor/James McCann (dec'd.) : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1972 & 1973.

State of New York
County of Albany

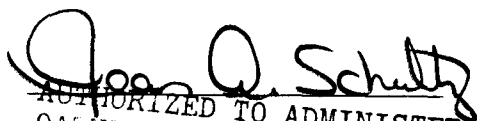
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 10th day of August, 1983, she served the within notice of Decision by certified mail upon James (dec'd.) & Rena McCann and The Humidor/James McCann (dec'd.) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James (dec'd.) & Rena McCann
and The Humidor/James McCann (dec'd.)
37 Hayes St.
Binghamton, NY 13903

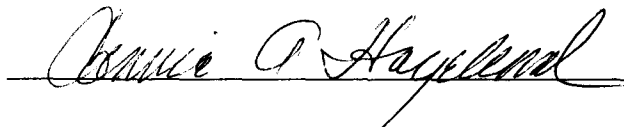
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
10th day of August, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
James (dec'd.) & Rena McCann :
and The Humidor/James McCann (dec'd.) :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1972 & 1973.

State of New York
County of Albany

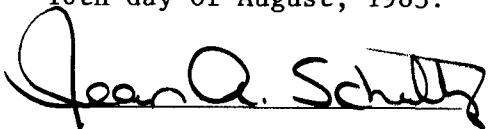
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 10th day of August, 1983, she served the within notice of Decision by certified mail upon Brian M. Prew the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Brian M. Prew
53 Front St., Box 1046
Binghamton, NY 13902

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
10th day of August, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

August 10, 1983

James (dec'd.) & Rena McCann
and The Humidor/James McCann (dec'd.)
37 Hayes St.
Binghamton, NY 13903

Dear Mrs. McCann:

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 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 Law 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
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Brian M. Prew
53 Front St., Box 1046
Binghamton, NY 13902
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JAMES (DECEASED) AND RENA McCANN	:	
and THE HUMIDOR/JAMES McCANN (DECEASED)	:	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 1972 and 1973.	:	

Petitioners, James (Deceased) and Rena McCann and The Humidor/James McCann (Deceased), 37 Hayes Street, Binghamton, New York 13903, 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 years 1972 and 1973 (File Nos. 13759 and 14073).

A small claims hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on February 8, 1983 at 9:15 A.M. Petitioners appeared by Brian Prew, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (James F. Morris, Esq., of counsel).

ISSUES

I. Whether reported gambling earnings of a business partner should be attributed in a similar amount to petitioner James McCann for personal income tax purposes as unreported income.

II. Whether the alleged unreported income referred to in Issue I, together with the reported gambling earnings of the business partner, should be considered additional partnership income subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner James McCann (Deceased), (hereinafter petitioner), along with his business partner Samuel Brown, owned and operated a small cigar store called The Humidor. The Humidor filed IT-204 New York State partnership returns for tax years 1972 and 1973. On these returns The Humidor reported income, expenses, etc. as pertaining to the business of operating the cigar store. Petitioners, James and Rena McCann, filed an IT-201 New York State Income Tax Resident Return for tax year 1973. There is no record of petitioners, James and Rena McCann, filing a personal income tax return for tax year 1972, presumably because the income for tax year 1972 was not sufficient to result in a tax liability.

2. On Wednesday, July 18, 1973, there appeared in a local newspaper, The Evening Press, a news article reporting that someone stole from petitioner James McCann's home the amount of \$15,000.00 in \$50.00 and \$100.00 bills which was kept in a metal cabinet in a bedroom. The news article also indicated that an undetermined amount of money in new \$20.00 bills and a number of gold and antique coins were also stolen.

3. Subsequent to the publishing of the news article, it was learned by the Audit Division that petitioner's partner, Samuel Brown, had reported gambling income on his Federal and New York State personal income tax returns in the amounts of \$9,500.00 and \$9,000.00 for 1972 and 1973 respectively. These figures were labeled, on the returns, as gambling income and were reported on separate Federal Schedules C filed with Mr. Brown's Federal personal income tax returns.

4. The Audit Division, through one of their local auditors in the Binghamton office, visited the cigar store and reviewed the records of the business.

Among these were bank statements, cancelled checks and a day book which showed cash payments, sales and revenue by category. The review of the records of the cigar store did not indicate that the partnership had any additional income from the operation of the cigar store.

5. Petitioner had a reputation as a gambler and had previously been convicted on gambling related charges. However, none of the convictions were for charges in the years at issue herein.

6. Due to petitioner's gambling reputation, the large amount of money stolen from his home and his style of living, it was determined by the Audit Division that petitioner probably had income other than that earned from the operation of the cigar store.

7. In order to determine the audited income for petitioners, James and Rena McCann, for tax years 1972 and 1973 for personal income tax purposes, petitioner's share of the partnership income from the operation of the cigar store was added to estimated gambling income of petitioner in the amounts of \$8,000.00 for 1972 and \$7,500.00 for 1973. These figures were estimated by the Audit Division as \$1,500.00 per year less than the gambling income reported by Samuel Brown on his Federal and New York State personal income tax returns as it was felt that Mr. Brown, through reputation, had been in the gambling business for a longer period of time than petitioner. As a result of the above adjustments, on July 24, 1975, two statements of audit changes were issued. One was issued for tax year 1972 reflecting tax due of \$221.02 plus penalty and interest. The second was for tax year 1973 and resulted in additional tax due of \$310.97 plus interest. On January 26, 1976, a Notice of Deficiency was issued to petitioners, James and Rena McCann, for tax years 1972 and 1973 indicating total personal income tax due for both years of \$531.99, penalty of

\$87.33 and interest of \$87.74, for a total of \$707.06. The jurisdictional papers and the entire record are void of any information concerning the section(s) of law under which the penalty was imposed.

8. The Audit Division also determined that both the gambling winnings reported for personal income tax purposes by Samuel Brown and the estimated gambling winnings determined as income of petitioner were carried on as part of the partnership's business in addition to the operation of the cigar store. Therefore, the gambling income and the cigar store income were combined, and on July 24, 1975, a Statement of Audit Changes was issued to James McCann and Samuel Brown, individually and as partners doing business under the firm name and style of The Humidor. This Statement reflected additional unincorporated business tax of \$682.51 for 1972 and \$733.87 for 1973. On January 26, 1976, a Notice of Deficiency was issued to The Humidor and asserted additional unincorporated business tax of \$1,416.38 for tax years 1972 and 1973, and combined interest for both tax years in the amount of \$240.64, for a total of \$1,657.02.

9. The auditor did not ask the petitioner at the time of the audit how he acquired the \$15,000.00 that was reported in the newspaper as stolen as it was not the policy of the Audit Division to tell the petitioner the source of the audit information. The auditor did not remember whether or not he discussed the proposed audit adjustments with the petitioner.

10. There was nothing presented to the auditor to indicate that Samuel Brown and petitioner shared the gambling revenue of Mr. Brown. All records reviewed and made available showed that Samuel Brown and petitioner were partners only in the cigar store.

11. The auditor did not know the nature of Mr. Brown's gambling winnings. That is, he did not know if the winnings were from horse races, a lottery, or

from gambling in Las Vegas, as opposed to carrying on a gambling operation at the cigar store. Samuel Brown's gambling winnings were reported just as that, gambling winnings.

12. The auditor's workpapers and audit report were not available at the hearing as they are contaminated with a dangerous chemical as the result of an explosion which took place at the State Office Building in Binghamton.

CONCLUSIONS OF LAW

A. That petitioner James McCann did not have gambling income in the amounts of \$8,000.00 and \$7,500.00 for tax years 1972 and 1973; that petitioner James McCann did not share in the gambling winnings of his business partner, Samuel Brown.

B. That in view of Findings of Fact "3" and "4" and Conclusion of Law "A" supra, the partnership did not have additional income subject to unincorporated business tax for tax years 1972 and 1973.


C. That the petitions of James (Deceased) and Rena McCann and The Humidor/James McCann (Deceased) are granted and the notices of deficiency dated January 26, 1976 are cancelled.

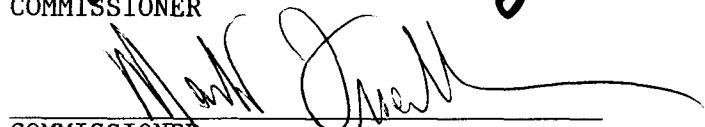
DATED: Albany, New York

STATE TAX COMMISSION

AUG 10 1983


PRESIDENT


COMMISSIONER


COMMISSIONER