

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Estate of Everett Orsini	:	
Orlena B. Orsini, Executrix	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision	:	
of a Determination or Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1974.	:	

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 1st day of June, 1984, he served the within notice of Decision by certified mail upon Estate of Everett Orsini, Orlena B. Orsini, Executrix, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Everett Orsini
Orlena B. Orsini, Executrix
157 Penn Lane
Rochester, NY 14625

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
1st day of June, 1984.

David Parchuck

James A. Deane
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Estate of Everett Orsini	:	
Orlena B. Orsini, Executrix	:	AFFIDAVIT OF MAILING
	:	
for Redetermination of a Deficiency or Revision	:	
of a Determination or Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1974.	:	

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 1st day of June, 1984, he served the within notice of Decision by certified mail upon Richard E. Regan, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard E. Regan
504 Powers Bldg.
Rochester, NY 14614

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
1st day of June, 1984.

David Parhusip

Bruce A. Hayward
Authorized to administer oaths
pursuant to Tax Law section 174

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

June 1, 1984

Estate of Everett Orsini
Orlena B. Orsini, Executrix
157 Penn Lane
Rochester, NY 14625

Dear Mrs. Orsini:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Richard E. Regan
504 Powers Bldg.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ESTATE OF EVERETT ORSINI,	:	DECISION
ORLENA B. ORSINI, EXECUTRIX	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1974.	:	

Petitioner, Estate of Everett Orsini, Orlena B. Orsini, Executrix, 157 Penn Lane, Rochester, New York 14625, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1974 (File No. 22497).

A formal hearing was commenced before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on April 27, 1983 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel). The formal hearing was continued to conclusion before Frank W. Barrie, Hearing Officer, at the same location on September 12, 1983 at 2:45 P.M. Petitioner appeared by Richard E. Regan, Esq. and the Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel) at the continued hearing. All briefs were to be submitted by November 4, 1983.

ISSUES

I. Whether the Audit Division properly determined that the partnership of Orsini & Earl had additional income during the period at issue and whether one-half of such additional income was properly attributable to petitioner for purposes of determining its personal income tax liability.

II. Whether the Audit Division sustained its burden of proof in asserting an increased deficiency at the hearing.

FINDINGS OF FACT

1. On April 12, 1978, the Audit Division issued a Notice of Deficiency against petitioner, Estate of Everett Orsini, Orlena B. Orsini, Executrix, alleging additional personal income tax due for 1974 of \$5,274.20 plus interest. Attached thereto was a Statement of Audit Changes explaining that the deficiency was based upon additional income of \$47,028.00 as per an audit of the partnership of Orsini & Earl (hereinafter, "the partnership").

2. The partnership conducted a construction business and during the year at issue its major project was the completion of a contract to construct Hubb House restaurants. Gerald W. Earl and Everett Orsini were equal partners, both with a one-half interest in the profit and loss of the partnership.

3. The partnership reported its income on the completed contract basis, i.e., when a contract was completed, the partnership reported its income and expenses relating to the particular contract.

4. The partnership maintained no books and records and did not have a partnership checking account. Rather, all partnership income was apparently deposited in Gerald W. Earl's personal checking account which was also used to write checks on behalf of the partnership.

5. The auditor reconstructed the partnership's income by using the net worth method. He computed the partnership's assets and liabilities for the beginning of 1973 and 1974 to determine the net worth of the partnership at the beginning of each such year. He then compared these figures to the end of the year net worth for 1973 and 1974 to arrive at an increase or decrease in net worth. By such method, the Audit Division determined that the partnership had

a decrease in net worth during 1973 of \$38,034.00 and an increase in net worth during 1974 of \$94,056.00 and treated these amounts as loss and income for the partnership's 1973 and 1974 tax years, respectively. The Audit Division allocated one-half of the reconstructed partnership income of \$94,056.00 for 1974 to Everett Orsini.¹

6. At the hearing herein, the Audit Division alleged that the partnership had additional income of \$121,523.00 rather than \$94,056.00 for the 1974 tax year, and that one-half of the revised additional income, or \$60,761.50, is allocable to petitioner.

7. The auditor testified that at a pre-hearing conference involving the partnership's liability for unincorporated business tax, "the partnership furnished additional information, and based on that, we had to revise our net worth statement previously shown". According to the auditor's testimony, the additional information prompted the Audit Division to shift income from 1973 to 1974 so that partnership returns for 1973 were accepted as filed and in 1974 partnership income was increased from \$94,056.00 to \$121,523.00. Consequently, the Audit Division asserted at the hearing herein an increased deficiency against petitioner of \$7,334.15 plus interest instead of \$5,274.20 plus interest as noted in Finding of Fact "1", supra.

8. However, the auditor's testimony that the increased deficiency resulted from the shifting of income from 1973 to 1974 is inconsistent with the underlying workpapers. Rather, according to the workpapers the increased deficiency was based on an alleged increase in assets in the year at issue and not the shifting of income from 1973 to 1974.

¹ Everett Orsini died on December 13, 1973. The petitioner herein is his estate, with his wife, Orlena B. Orsini, as executrix of the estate.

9. During 1974, petitioner did not receive any money from the partnership.

10. Petitioner offered no evidence challenging the net worth audit.

Orlena Orsini testified, "I have nothing to go on, because I knew nothing of his (Everett Orsini's) business."

CONCLUSIONS OF LAW

A. That in the Matter of Orsini & Earl, State Tax Commission, May 6, 1983, we found that the partnership of Orsini & Earl had unreported partnership income of \$121,523.00 for 1974. However, petitioner is not collaterally estopped from relitigating herein such finding (see Emmons v. Hirschberger, 69 N.Y.S.2d 401).

B. That the partnership's inadequate record keeping, as noted in Finding of Fact "4", supra, justified the use of the net worth audit method. Matter of Orsini & Earl, supra. Furthermore, petitioner has failed to sustain its burden of proof under Tax Law §689(e) to show any error in the net worth audit described in Finding of Fact "5", supra.

C. That "(a)lthough a partner's death dissolves the partnership, it remains in existence and may be continued for a reasonable time by the surviving partners for the purpose of winding up the business affairs." 16 NY Jur 2d, Business Relationship §1425 cited in Matter of Orsini & Earl, supra. Therefore, although Everett Orsini died on December 13, 1973, the Audit Division properly determined that the partnership remained in existence in 1974 to wind up its business affairs, in particular, the completion of its contract to construct the Hubb House restaurants.

D. That if a partnership has income, it is irrelevant that one of the partners is unaware of such income even when the partnership income has been purposely concealed from him. The partner unaware of the income is still

taxable on his distributive share. Jack Starr, 17 T.C.M. 253 (1958), aff'd, 267 F.2d 148 (7th Cir. 1959). Therefore, it is irrelevant that petitioner's executrix failed to receive any money or any other asset from the partnership during the year in issue and that she had no knowledge concerning the partnership's 1974 income.

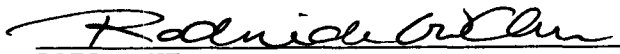
E. That the Audit Division has failed to sustain its burden of proof under Tax Law §689(e)(3) to show that petitioner is liable for the increased deficiency which it asserted at the hearing herein. The basis for such increased deficiency is unclear, especially in light of the fact that the auditor's testimony appears to be inconsistent with the workpapers, as noted in Finding of Fact "8", supra. Therefore, the Audit Division may not impose an increased deficiency upon petitioner.

F. That the petition of the Estate of Everett Orsini, Orlena B. Orsini, Executrix is denied and the Notice of Deficiency dated April 12, 1978 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 01 1984


PRESIDENT


COMMISSIONER


COMMISSIONER