

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Walter H. Schwedler, Dec'd :
& Mildred C. Schwedler, Ind. & Exec. :
Walters Electric - The House of Light : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income & :
UBT under Article 22 & 23 of the Tax Law for the :
Years 1968 - 1971. :
_____ :

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Walter H. Schwedler, Dec'd & Mildred C. Schwedler, Ind. & Exec., Walters Electric - The House of Light, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Walter H. Schwedler, Dec'd
& Mildred C. Schwedler, Ind. & Exec.
Walters Electric - The House of Light
c/o Mildred Schwedler
250 So. Ocean Blvd. - Apt. 118H
Boca Raton, FL 33432

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
18th day of January, 1984.

David Parchuck

James A. Hays, Jr.
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Walter H. Schwedler, Dec'd :
& Mildred C. Schwedler, Ind. & Exec. :
Walters Electric - The House of Light : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
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& UBT under Article 22 & 23 of the Tax Law for :
the Years 1968 - 1971. :

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Ronald P. Cima, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ronald P. Cima
Rogers & Wells
200 Park Avenue
New York, NY 10166

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
18th day of January, 1984.

David Parchuck

William P. Depina
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Walter H. Schwedler, Dec'd &
Mildred C. Schwedler, Ind. & Exec.
Walters Electric - The House of Light
c/o Mildred Schwedler
250 So. Ocean Blvd. - Apt. 118H
Boca Raton, FL 33432

Dear Mrs. Schwedler:

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, 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
Ronald P. Cima
Rogers & Wells
200 Park Avenue
New York, NY 10166
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
WALTER H. AND MILDRED C. SCHWEDLER,	:	DECISION
WALTER'S ELECTRIC - THE HOUSE OF LIGHT	:	
	:	
for Redetermination of Deficiencies or for	:	
Refunds of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of	:	
the Tax Law for the Years 1968 through 1971.	:	

Petitioners, Walter H. and Mildred C. Schwedler, Walter's Electric - The House of Light, c/o Mildred C. Schwedler, 250 South Ocean Boulevard, Apartment 118H, Boca Raton, Florida 33432, filed petitions for redetermination of deficiencies or for refunds of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1968 through 1971 (File Nos. 13885, 13886 and 15191 through 15195).

A formal hearing was commenced before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on November 30, 1977 at 9:15 A.M. The hearing was continued to conclusion before Robert F. Mulligan, Hearing Officer, at the same offices on May 26, 1983 at 9:15 A.M. Petitioners appeared at the first hearing by Rogers & Wells, Esqs. (Norman Wise, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Francis Cosgrove, Esq., of counsel). At the second hearing, the petitioners appeared by Rogers & Wells, Esq. (Ronald P. Cima, Esq., of counsel) and the Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the gain on the sale of buildings owned by Walter H. and Mildred C. Schwedler as joint tenants was subject to unincorporated business tax, where the business which they owned and operated as partners was a tenant in said buildings.

II. Whether the Audit Division's determination of the amount of gain derived from the sale of goodwill was correct.

FINDINGS OF FACT

1. Petitioners Walter H. and Mildred C. Schwedler filed separate New York State nonresident income tax returns on combined forms IT-209 for the years 1968 through 1971.

2. Petitioners Walter H. and Mildred C. Schwedler, d/b/a Walter's Electric - The House of Light, filed a New York State Partnership Return for 1968 on form IT-204.

3. On March 20, 1972, a Notice of Deficiency was issued to petitioners asserting deficiencies in unincorporated business tax due of \$8,637.80 for 1968 and \$9,381.13 for 1969, plus penalties for 1969 in the amount of \$3,236.49, and interest for both years. On May 20, 1974 another Notice of Deficiency was issued to petitioners asserting deficiencies of \$868.45 in tax and \$356.61 in penalties for 1970 and \$22,151.42 in tax and \$7,863.75 in penalties for 1971, plus interest for each year.

The deficiencies were based on the Audit Division's claim that the gain and interest income received from the installment sale of a building at 741-743 Third Avenue in Manhattan, which had been used in the partnership business, and the gain on the sale of partnership goodwill, were subject to unincorporated business tax. The penalties were asserted under section 685(a)(1)

and (a)(2) of the Tax Law for failure to file unincorporated business tax returns and pay unincorporated business tax for the years 1969 through 1971.

Notices of deficiency for personal income tax dated March 20, 1972, February 25, 1974 and May 20, 1974, were also sent to petitioners Walter H. and Mildred C. Schwedler for the years 1968 through 1971 and petitioners protested same. However, petitioners subsequently conceded and paid said deficiencies (apparently not including interest). The only remaining issues pertain to the unincorporated business tax deficiencies.

4. Walter's Electric - The House of Light ("Walter's Electric") was established by petitioner Walter H. Schwedler in 1937. It was engaged in the business of selling electrical supplies, lighting fixtures and photographic lighting equipment.

5. Petitioner Mildred C. Schwedler, then Mildred Palmer, started working for Walter H. Schwedler in 1947. She became Mr. Schwedler's partner in the business in 1955.

6. Mr. Schwedler and Mrs. Palmer had, at least from 1949, studied and kept abreast of real property purchases, sales and listings in the real estate market in or about the vicinity of Third Avenue in Manhattan. Mr. Schwedler and Mrs. Palmer, in their individual capacities, owned all the common stock of G.F.N. Realty Corp. which on October 15, 1948 acquired a building at 230-232 East 46th Street, Manhattan and on March 14, 1955 acquired a building at 228 East 46th Street, Manhattan. In addition, they were investors in real estate from at least 1949 to 1967 and owned at least one parcel of improved real property which was a rental property.

7. Beginning at some time in 1952, Mr. Schwedler and Mrs. Palmer commenced negotiations with respect to the purchase of two buildings located at 741-743 Third Avenue in Manhattan.

8. Walter's Electric had been located at 740-742 Third Avenue for about 11 years, when, in June 1955 petitioners had air conditioning installed in said leased premises at a cost of \$6,359.22. In December 1955, they learned that the building had been sold in October and that they would have to leave by July 1, 1956, as it was to be demolished.

9. In the meantime, Mr. Schwedler and Mrs. Palmer had persuaded the owner of 741-743 Third Avenue to sell the building to them and in fact purchased it on January 3, 1956. They took title as joint tenants with rights of survivorship. The funds to purchase the building came from their own personal accounts, not the business accounts.

10. The buildings at 741-743 Third Avenue were older five story buildings with a total of 7 small stores on the street level and apartments above. The building at 741 was vacant over its stores, as the apartments had been condemned, and the building at 743 contained 8 occupied rent controlled apartments over its stores.

11. After receiving notice that Walter's Electric would have to vacate 740-742 Third Avenue, petitioners looked for space in the area but could find nothing suitable. When they had failed to find a new location by April 1956, they decided to move across the street to the buildings they had acquired earlier as joint tenants.

12. Mr. Schwedler and Mrs. Palmer "paid off" the 7 commercial tenants and the stores were vacated. They then remodeled the stores into one larger space and in August 1956, Walter's Electric moved into the remodeled space.

13. The joint tenancy and Walter's Electric each maintained entirely separate books and records and had separate bank accounts at different banks. At no time were the two bank accounts, i.e. the bank accounts of Walter's Electric and the joint tenancy, commingled. Building expenses such as taxes and renovation expenses were paid by the joint tenants. There was a formal lease between Walter's Electric and the joint tenancy and Walter's Electric paid rent to the joint tenants under the terms of the lease. Walter's Electric paid occupancy taxes to the City of New York while at 741-743 Third Avenue.

14. Mr. Schwedler and Mrs. Palmer were married on April 13, 1961 and Mrs. Palmer became Mildred C. Schwedler.

15. In each of the years 1956 to and including 1962, Walter H. Schwedler and Mildred C. (Palmer) Schwedler separately reported the income derived from Walter's Electric and the income derived from the real property on different United States partnership returns (form 1065) and separately reported that income on their United States individual income tax returns.

In each of the years 1963 to and including 1967 Walter Schwedler and Mildred C. (Palmer) Schwedler separately reported the income from Walter's Electric on U.S. partnership returns (form 1065) and on form 1040 part III (income from partnership); in each of the years they separately reported income derived from the real property on form 1040 part II (rent and royalty income).

16. In 1965 Mr. and Mrs. Schwedler rented a store in Florida selling basically the same items as the New York store and they went back and forth between New York and Florida for several years. In 1969 they bought a store in Delray Beach, Florida which they operated until Walter Schwedler's death several years later.

17. Mr. and Mrs. Schwedler were residents of New York State until 1967, when they became residents of Florida.

18. In December, 1967, Mr. and Mrs. Schwedler sold the buildings at 741-743 Third Avenue to Chatham Associates, an unrelated third party for \$1,000,000.00 in an installment sale. Their cost or basis for the property was \$289,025.00. Tax on the gain on the sale constitutes one of the issues in this case.

19. After January 1, 1968, Walter's Electric made regular rental payments to Chatham Associates.

20. On August 16, 1968 the assets of Walter's Electric were sold to Sutton Associates, Inc., a corporation unrelated to petitioners. The sale included inventory, fixtures and the right to use the names "Walter's Electric" and "The House of Light" within the City of New York. The selling price was \$75,000 plus \$9,810 for accounts receivable. Petitioners represented that the inventory consisted of merchandise of not less than \$20,000 in retail value. Schedule A line 7 of the 1968 partnership return shows the cost of closing inventory to be \$500.00. The parties also agreed that the value of the furniture and equipment was \$300. Petitioners' joint personal income tax nonresident return for 1969 indicated that the total basis and expense of sale for sale of goodwill and trade name was \$2,431.00.

21. Petitioners Walter H. and Mildred C. Schwedler sold their New York City cooperative apartment on October 1, 1968.

CONCLUSIONS OF LAW

A. That section 703(e) of the Tax Law provides that an owner of real property, a lessee or a fidiciary shall not be deemed engaged in an unincorporated business solely by reason of holding, leasing or managing real property.

However, where the holding, leasing or managing of real property relates to property used in or connected with an unincorporated business otherwise regularly carried on by an individual or other entity, any gains, profits, rents and other income from the property will be includable in the unincorporated business gross income of the individual or other entity [20 NYCRR 203.13].¹

Here the real property at 741-743 Third Avenue was used in or connected with petitioners' unincorporated business. Neither ownership by petitioners Walter H. and Mildred C. Schwedler as joint tenants, nor the maintenance of separate books and records and bank accounts is relevant. This case is clearly distinguishable from People Ex rel. Voelkel v. Browne, 268 App. Div. 596, since that case involved only that real property which was not used in the unincorporated business.²

B. That the gain on good will realized upon the sale of Walter's Electric is to be calculated after allowing \$500.00 of the \$75,000 purchase price for inventory, and \$2,431.00 for goodwill (see Finding of Fact "20"). It was not shown that the furniture and equipment had not been depreciated and thus no cost or other basis may be allowed. Accordingly, the gain on the sale of the business was \$72,069.00 and said amount was subject to unincorporated business tax. (This is \$500.00 less than the gain claimed by the Audit Division).

C. That except as provided for in Conclusion of Law "B", the petitions of Walter H. and Mildred C. Schwedler, Walter's Electric - The House of Light

¹ Although this section was added February 1, 1974, which is subsequent to the years at issue, it represents the long standing position of the State Tax Commission.

² In Voelkel, which dealt with the Tax Commission's disallowance of depreciation deductions, depreciation on real property used for factory purposes was not at issue and had apparently been allowed. See 268 App. Div. at 598.

are denied and the notices of deficiency dated March 20, 1972, February 25, 1974 and May 20, 1974, are sustained.

DATED: Albany, New York

JAN 18 1984

STATE TAX COMMISSION

Rodrich W. Cline
PRESIDENT

Francis Q. Koeng
COMMISSIONER

Mark J. Dineen
COMMISSIONER