

*Unincorporated Business Tax*  
*Determinations A-Z*  
*B & B Distributing Company*

**BUREAU OF LAW  
MEMORANDUM**

**TO: Commissioners Murphy, Macduff and Conlon**

**FROM: E. H. Best, Counsel**

**SUBJECT: B & B DISTRIBUTING COMPANY**  
**Application for revision or refund**  
**under Article 16-A for assessment**  
**in respect to fiscal year ended**  
**February 28, 1947**

The issue is whether a gain from the sale of a business was taxable for unincorporated business tax purposes in the fiscal year March 1, 1946 to February 28, 1947.

B & B Distributing Company was a partnership made up of members of the Schine family, engaged in selling candy to the theatres owned by Schine Chain Theatres, Inc. and other theatres. The record and file also indicate that aside from its candy business the partnership was a joint lessee and operator of a movie theatre in Rochester.

On March 1, 1947, the partnership assets, exclusive of the theatre lease, which assets were mainly an inventory of candy, accounts receivable and equipment, were sold to Schine Chain Theatres, Inc. for the sum of \$436,000. The copy of the bill of sale is dated March 1, 1947, but an affidavit submitted by the adult partners only states that the sale was effective March 1, 1947. Aside from the bill of sale, taxpayer submitted other evidence that the sale took place on March 1, 1947. Copies of journal entries from the books of the parties to the sale recorded the sale as occurring March 1, 1947. An affidavit concerning the preparation of these journal entries was to be submitted by the accountant who prepared them, but no such affidavit appears to have been submitted. The attorney for taxpayers stated that the sale was accomplished through dissolution of the partnership on February 28, 1947, distribution of the assets to the partners individually and a sale of the assets the next day by the partners individually to Schine Theatres. The distribution to the individual partners was accomplished solely through entries on the partnership books showing an allocation of value but no actual breakdown of the assets in kind. The bill of sale was signed by each of the partners but they were described in the body of the document as "comprising the partnership known as B & B Distributing Company". Taxpayers' attorneys stated that

the consideration was paid by having Hildemart Corp., whose shareholders were the same as the partners in the partnership, assume the liabilities of Schine Theatres to the partners on account of the sale, thereby paying a debt it owed to Schine Theatres. The sale price was greater than the debt and Schine paid Hildemart some \$42,000 to make up the difference, but the attorney who handled the transaction testified that none of the consideration was paid prior to March 1, 1947.

The partnership was dissolved on February 28, 1947 by oral agreement between the partners, with the intention that the partnership would cease doing business at the end of February 28, 1947 and the business would be taken over and continued March 1, 1947 by Schine Theatres. The partnership's employees' report of contributions submitted to the Department of Labor for the quarter December 29, 1946 to March 29, 1947 contained a notation that the business was sold to Schine Chain Theatres and Rochester State Corp. No employees were reported as being employed in the month of March, 1947. The workmen's compensation and employer's liability policy terminating March 5, 1947 was not renewed. The insurance company was instructed to add that coverage to Schine Theatres' policy because that corporation had purchased the business of B & B Distributing Company on March 1, 1947. The insurance company's premium statement contains a notation that it covers the period ending February 28, 1947. A letter dated February 28, 1947 addressed to B & B Distributing Company concerning orders of peanut bars was answered March 7, 1947 by Schine Chain Theatres, Confectionery Division.

Taxpayers claim that their interest in the lease of the Rochester theatre was assigned on March 1, 1947, the date of the sale to the Rochester State Corp. A copy of the assignment was not submitted by taxpayers and the hearing officer did not request it. However, in view of Petitioner's Exhibit E, the employer's contribution report to the Department of Labor, showing no employees in the month of March, and Petitioner's Exhibit G showing that insurance coverage for the Rochester theatre and its employees was terminated as of February 28, 1947 and the coverage added to Schine Chain Theatres' Circuit policy (Rochester State Corp. being a subsidiary of Schine Theatres), I think there is sufficient proof for finding that the partnership's leasehold interest was assigned on March 1, 1947, although the best evidence would have been the assignment itself.

The attorney for the partnership testified that it did not file with the County Clerk a certificate of discontinuance of use of an assumed name until sometime after March 1, 1947. There is a real question whether such a certificate was ever filed, since as late as March 15, 1957 taxpayers' attorneys wrote to the conferee that no public record can be found. However, the failure to file such a certificate is not enough to warrant a finding that the partnership was in business on March 1, 1947.

The record supports taxpayers' contention that their candy business was sold and their leasehold interest assigned on March 1, 1947. Since the sale and assignment took place on March 1, 1947 and not in the fiscal year ending February 28, 1947, the assessment is invalid. The proposed determination cancels the assessment on this ground and, therefore, I recommend it be approved.

The matter was not submitted to the Tax Commission at the time the proposed determination was prepared because we were awaiting an Attorney General's opinion in another matter (Capital Associates and its partners) which we believed would have cast light on the further question whether an assessment should be issued for the fiscal year ending February 28, 1948 covering the gain on the sale of the business which took place on March 1, 1947. The hearing officer concluded that no assessment could be issued because the sole activity in the fiscal year ending February 28, 1948 was the sale of the business on March 1, 1947, the partnership having ceased doing business on February 28, 1947. This conclusion accords with the position of the Income Tax Bureau for the years prior to 1952 that if the sole activity of an unincorporated entity in a taxable year was the sale or liquidation of its business, it was not doing business.

This aspect of taxation under Article 16-A was clarified by Chapter 703 of the Laws of 1952 through an amendment to sections 386 and 386-d of the Tax Law, effective for taxable years commencing on and after January 1, 1952. The memorandum accompanying the bill enacted as Chapter 703 stated, in part, as follows:

"Under the present provisions of Article 16-A of the Tax Law, there is some doubt as to the taxability of income received during the liquidation of an unincorporated business,

it being contended that the tax is imposed on the carrying on of business and not upon the liquidation thereof. The existing loopholes may be illustrated by the following:

"A taxpayer contemplating the sale of his unincorporated business at a profit may, by selling his business on the installment plan, avoid the payment of the unincorporated business income tax with respect to the major portion of such profit received in years subsequent to the year in which business operations were discontinued. In addition, where an unincorporated business discontinues active business operations, it may proceed to liquidate without subjecting itself to tax, thereby, for example, avoiding the tax with respect to profits attributable to the recovery of excess depreciation which had been used to reduce the unincorporated business income tax during previous years.

. . . [other examples of avoidance]

"The amendments to §§386 and 386-4 proposed by this bill would clarify the statute and close such possible loopholes by clearly subjecting to tax under Article 16-A of the Tax Law all profits derived either through the collection of installment obligations outstanding and accounts receivable, or through the sale of other assets in the course of the liquidation of an incorporated or unincorporated business."

The request for an opinion of the Attorney General was pending with the Attorney General for a number of years. The request for the opinion was then withdrawn because the matter was settled.

It would appear that the statute of limitations on assessment is still open on the ground that no true tax return was filed for the fiscal year ended February 28, 1948. However, since it was the policy of the Bureau not to issue assessments in such matters for the period prior to 1952 and in view of the long passage of time, I agree with the Income Tax Bureau that no assessment for the fiscal year ending February 28, 1948 should be issued.

/s/

E. H. BEST

Counsel

SH:er  
June 2, 1967

**STATE OF NEW YORK**

**STATE TAX COMMISSION**

----- X  
IN THE MATTER OF THE APPLICATION :  
OF :  
DONALD SCHINE, HILDEGARD SCHINE, MARTHA SCHINE, :  
DOREEN SCHINE, DORIS SCHINE MAXWELL, DAVID SCHINE, :  
RHEEN SCHINE, AND RICHARD SCHINE, INDIVIDUALLY :  
AND AS CO-PARTNERS D/B/U THE FIRM NAME AND STYLE OF :  
B & B DISTRIBUTING COMPANY :  
FOR REVISION OR REFUND OF UNINCORPORATED BUSINESS :  
TAXES UNDER ARTICLE 16-A OF THE TAX LAW FOR THE :  
FISCAL YEAR ENDED FEBRUARY 28, 1947 :  
----- X

B & B Distributing Company, the taxpayer herein, having duly filed an application for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the fiscal year ended February 28, 1947, and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, N. Y., on June 4, 1958, before Laurence S. Gifford, Senior Tax Administrative Supervisor, Income Tax Bureau, Department of Taxation and Finance, at which hearing the partnership was represented by Mr. Arthur K. Mason, of Counsel, of the firm of Chapman, Walsh & O'Connell, 122 East 42nd Street, New York, N. Y., and the matter having been duly examined and considered, the State Tax Commission hereby

**DETERMINES:**

That the gain of \$348,849.29 from the sale of the business assets of the partnership was not includible in

gross income of the firm for the fiscal year thereof ended February 28, 1947 for purposes of computing the tax liability of the partnership under Article 16-A of the Tax Law as such sale did not take place during such fiscal year and as the gain was not realized during such year; so that the additional unincorporated business taxes of \$9,982.50 assessed against the partnership on December 4, 1950, by assessment number AA-282003 (on the contrary basis; namely, that such gain was includible in gross income for the said fiscal period) should be cancelled and it is so ORDERED.

Dated: Albany, N. Y., this 13th day of June , 1967.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**President**

/s/

JAMES R. MACDUFF

**Commissioner**

/s/

WALTER MACLYN CONLON

**Commissioner**