

The taxpayers having each filed applications pursuant to Tax Law Sections 386j and 374 for revision of notices of additional assessment, each dated October 29, 1951, of taxes due as follows: against Curley's Atlas Hotel and Baths for unincorporated business taxes under Article 16-A of the Tax Law for the years 1946, 1947, and 1948; against James F. Rogers for personal income taxes under Article 16 of the Tax Law for the years 1946, 1947, and 1948; against Robert F. Rogers for personal income taxes under Article 16 of the Tax Law for the years 1947 and 1948; and against James J. Rogers for personal income taxes under Article 16 of the Tax Law for the years 1947 and 1948; and such applications having been denied and hearings thereon having been duly demanded and a joint hearing held and the record having been duly examined and considered,

The State Tax Commission hereby

FINDS:

(1) The issues in this case are the amount of unincorporated business income of Curley's Atlas Hotel and Baths and whether Robert F. Rogers and James J. Rogers were partners in that enterprise with James F. Rogers. The assessments of personal income tax are based solely on an alleged distributive share of the income of Curley's Atlas Hotel and Baths.

(2) James F. Rogers is the uncle of Robert F. Rogers and James J. Rogers who are cousins to each other. James F. Rogers was in his late 60's during the years in question and at the time of the hearing was deceased.

(3) Curley's Atlas Hotel and Baths was located at 116-12 Boardwalk, Rockaway Parkway, Queens, New York City and consisted of a hotel, restaurant, cafeteria, bar and bathhouse. The Curley family owned the premises and prior to 1946 operated the premises with the exception of the bar which was leased to James F. Rogers

on a year-to-year basis. James F. Rogers held the liquor license.

(4) In the Spring of 1946 the Curleys retired and James F. Rogers took a lease on the entire premises. The lease was in his name alone and he alone negotiated with the Curleys and their attorney. The next year a lease for five years was obtained by James F. Rogers.

(5) Robert F. Rogers and James J. Rogers worked on the premises of Curley's Atlas Hotel and Baths during the summers of 1947 and 1948.

(6) James F. Rogers employed about fifty people each summer; he alone interviewed them, hired and fired them; and set working hours for both these employees and his nephews. James F. Rogers alone determined the expenditures of the enterprise.

(7) James F. Rogers was on the premises every day and supervised the work of his nephews.

(8) A financial statement prepared by public accountants considered the uncle as the owner and the amounts paid to the nephews as salary.

(9) Robert F. Rogers and James J. Rogers were discharged from the armed forces in 1945 and in 1946 went to work for the uncle at Curley's Atlas Hotel and Baths. They invested no money in the enterprise and, in fact, had no large amount of capital to invest. Robert F. Rogers managed the hotel section and the restaurant section. James J. Rogers managed the bathhouse. For this, they were each to receive "about one-third" share of the profits and each drew about a hundred dollars a week, when the uncle told them there was enough money available. They were not expected to be liable for debts of the enterprise or to reimburse the enterprise for deficits.

(10) Robert F. Rogers did the bookkeeping for the enterprise, but the general ledger was kept by a public accountant. Robert F. Rogers signed checks drawn on the uncle's bank account under a power of attorney from his uncle.

(11) The drawings of the nephews were reported as salaries on the tax returns of either the enterprise or of the uncle.

(12) Robert F. Rogers practiced law in the winter months. James J. Rogers sold insurance and real estate in the winter months.

(13) The uncle never offered a partnership interest to his nephews.

(14) Curley's Atlas Hotel and Baths did not file tax returns (IT-202) under the unincorporated business income tax for the years 1946 and 1948. It did file for 1947 but the income thereon was too small to incur a tax. In 1946 and 1948 the income of Curley's was reported on the personal income tax returns, (IT-201), of James F. Rogers but the amounts of net income were too small to indicate that an unincorporated business income tax was due.

(15) The assessment against the enterprise increases the income of the enterprise by the drawings of the two nephews and by the value of food consumed by them and also by certain "unexplained monies" claimed by taxpayers to be exchanges or accumulations from prior years. The "unexplained monies" were not specified or identified at the hearing and there is nothing in evidence to show that their source was called to the attention of James J. Rogers or the nephews. There is nothing to indicate that the nephews had any knowledge of the financial affairs of the enterprise.

Upon the foregoing findings and all the evidence herein

The State Tax Commission hereby

DETERMINES:

A. Robert F. Rogers and James J. Rogers were not partners in Curley's Atlas Hotel and Baths during the taxable years in question.

B. The testimony of the two nephews, showing they were not partners, vitiates the basis of this assessment sufficiently so that the burden of coming forward with the evidence shifted to the


Department. The Department gave no explanation of the source of the alleged increased income. Taxpayer has sustained the burden of proof that the assessment is erroneous.

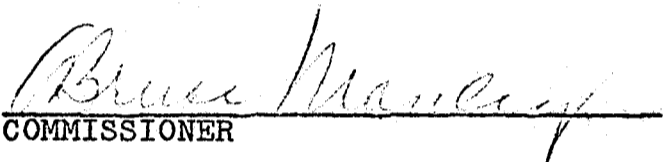
C. The assessments contain taxes which cannot be lawfully demanded. The assessments are hereby cancelled in their entirety.

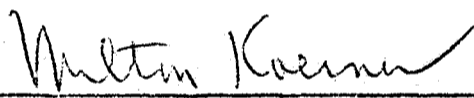
Dated: Albany, New York

STATE TAX COMMISSION

March 9, 1970


PRESIDENT


COMMISSIONER


COMMISSIONER