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BUREAU OF LAW

MEMORNADUM

F & S. Associates
UBT - 1970

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: F & S Associates

decis sent
CCH # 99-256

Petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1961 and 1962

The issue involved is whether the activities of the taxpayer partnership constitute the carrying on of an unincorporated business subject to unincorporated business tax in accordance with the provisions of Section 703 of the Tax Law.

During the years in issue, Ralph Saggese was a 90% shareholder of 128 Restaurant Inc., a domestic corporation organized under the laws of the State of New York, operating a restaurant under the name of "Peppermint Lounge" at 128 West 45th Street, New York, New York. Fein & Silberbush, Esqs., were the attorneys for the aforementioned corporation. In 1961, a dance called the "Twist" became very popular. In order to capitalize on this new dance craze, Ralph Saggese, Louis Lombardo, Sam Kaufman, George [illegible], Ruth Hernandez and Fein & Silberbush entered into an oral agreement of partnership under the name of F & S Associates on June 1, 1961, for the purpose of entering into licensing agreements with manufacturers of apparel, furniture, soft drinks, food items, comic books, toys, etc., for the use of the name "Peppermint Lounge" and/or "Peppermint Twist" and insignia, photographs, etc., in connection therewith. The partnership was authorized by 128 Restaurant Inc. to use the name "Peppermint Lounge" without any consideration being paid. Each of the partners owned a one-sixth interest in the partnership and shared profits and losses equally.

F & S Associates filed partnership returns for the years 1961 and 1962 in which they indicated income from royalties in the amounts of $[illegible] and $30,440.97 for said respective years. The partnership deducted expenses of $1,462.20 and $7,251.15 for the respective years 1961 and 1962, which consisted of legal expenses, music and dancers, promotion and advertising, publicity and out of town traveling. A Notice of Deficiency was issued against the partnership on 6/17/64 imposing unincorporated business taxes for

the years 1961 and 1962 in the amount of $804.05 including interest on the ground that the business activities of said partnership constituted the carrying-on of an unincorporated business subject to unincorporated business tax.

The partnership entered into an agreement with one Everett Rushay, President of Don Juan Sports Wear Inc. and Rudolph Apparel Licensing Corporation to sell grants or licenses to manufacturers for the use of the name "Peppermint Lounge" whereby the said Rushay was to receive one-third of the proceeds of the sale of such licenses and grants including all expenses incurred by him in connection therewith. In order to promote the sale of the grants of licenses, the partnership placed advertisements in various periodicals and also conducted shows displaying the wares of various manufacturers. At such shows it engaged musicians and "twist" dancers.

The partnership applied for a registered trade name or trade mark for the use of the name "Peppermint Lounge" with the United States Patent Office which was denied in 1962. As a result, the partnership ceased operations. Subsequently, 128 Restaurant Inc. went out of business in 1964.

It is to be noted that the partnership did not file any unincorporated business tax returns for the years in issue. The partnership contends that this was a joint venture which was engaged in isolated transactions for the purpose of receiving the proceeds from the granting of licenses by an independent contractor, namely, Everett Rushay.

In my opinion, the foregoing facts disclose that partnership conducted its business with continuity and regularity and was therefore operating a business subject to unincorporated business tax in accordance with the provisions of Section 703 of the Tax Law.

For the reasons stated above, I recommend that the decision of the Tax Commission sustaining the notice of deficiency be substantially in the form submitted herewith.

Solomon Sies

HEARING OFFICER

SS:dd
Enc.
October 17, 1969

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION OF F & S ASSOCIATES FOR A REDETERMINATION OF A DEFICIENCY OR FOR REFUND OF UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 23 OF THE TAX LAW FOR THE YEARS 1961 AND 1962	DECISION

F & S Associates having filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1961 and 1962, and a hearing having been held in connection therewith at the office of the State Commission, 80 Centre Street, New York, New York on the 21st day of February, 1966, before Solomon Sies, Hearing Officer, at which hearing the taxpayers were represented by Fein and Silberbush, Esqs., by Julius A. Silberbush of Counsel, and the matter having been duly considered,

The State Tax Commission hereby finds:

(1) During the years in issue Ralph Saggese was a 95% shareholder of 128 Restaurant Inc., a domestic corporation organized under the laws of the State of New York, operating a restaurant under the name of "Peppermint Lounge" at 128 W. 45th Street, New York, New York. Fein & Silberbush were the attorneys for 128 Restaurant Inc. In 1961, a dance called the "Twist" became very popular. In order to capitalize on this new dance craze, Ralph Saggese, Louis Lanzarie, Sam Kessler, George Monforte, Ruth Bertolatus and Fein & Silberbush, entered into an oral agreement of partnership under the name of F & S Associates on June 1, 1961 for the purpose of entering into licensing agreements with manufacturers of apparel, furniture, soft drinks, food items, comic books, toys, etc., for the use of the name "Peppermint Lounge" and/or "Peppermint Twist" and insignia, photographs, etc. in connection therewith. The partnership was authorized by 128 Restaurant Inc. to use the name "Peppermint Lounge" without any consideration being paid therefor. Each of the partners owned a one-sixth interest in the partner-

ship and shared profits and losses equally.

(2) F & S Associates filed partnership returns for the years 1961 and 1962 in which they indicated income from "royalties" in the amounts of $24,144.45 and $20,440.97 for said respective years. The partnership deducted expenses of $2,462.20 and $7,131.15 for the respective years 1961 and 1962, which consisted of legal expenses, music and dance promotion and advertising, publicity and out of town traveling. The partnership did not file unincorporated business tax returns for the years 1961 and 1962. On August 17, 1964, the Department of Taxation and Finance issued a Statement of Audit Changes against the partnership holding its business activities to constitute the carrying-on of an unincorporated business and the net income derived therefrom subject to unincorporated business tax. Accordingly, a Notice of Deficiency was issued on said date imposing additional unincorporated business taxes against the partnership in the amounts of $468.85 and $528.07 for the respective years 1961 and 1962 with interest of $67.13 for a total of $1064.05.

(3) The partnership entered into an agreement with one Russell Bushey, President of Don Juan Sports Wear Inc. and Raleigh Apparel Licensing Corporation to sell grants or licenses to manufacturers for the use of the name "Peppermint Lounge" whereby the said Bushey was to receive one-third of the proceeds of the sale of such licenses and grants including all expenses incurred by him in connection therewith. In order to promote the sale of the grants or licenses, the partnership placed advertisements in various periodicals and also conducted shows displaying the wares of various manufacturers. At such shows it engaged musicians and "Twist" dancers.

(4) F & S Associates contend that this was a joint venture in which it merely received the proceeds from the sale of licenses for the use of the name "Peppermint Lounge" or "Peppermint Twist" and did not actively participate in any way in operating a business. It further contends that the activities were handled through an independent agent, Russell Bushey. However, it appears from the record that the partnership did in fact operate a business for profit with continuity and regularity. They incurred expenses in connection therewith and shared the profits or benefits from the operation

of said business.

Based upon the foregoing findings and all of the evidence presented herein, the Tax Commission hereby,

DECIDES:

(A) The activities of the partnership, F & S Associates, during the years 1961 and 1962 constituted the carrying on of an unincorporated business with continuity and regularity. The partnership was therefore subject to unincorporated business tax within the intent and meaning of Section 703(b) of the Tax Law.

(B) Accordingly, the notice of deficiency and the statement of audit changes for the years 1961 and 1962 are correct and do not include any tax or other charge which could not have been lawfully determined. The petition of the taxpayers for a redetermination of a deficiency or for refund of unincorporated business tax for the years 1961 and 1962 filed with respect thereto, is therefore denied.

DATED: Albany, New York this 23rd day of Jan., 1969.

STATE TAX COMMISSION

/s/ Norman Gallman
PRESIDENT

/s/ A. B. Manley
COMMISSIONER

/s/ Milton Koerner
COMMISSIONER