

STATE OF NEW YORK  
STATE TAX COMMISSION

*Kramer, Max  
Katz, Nathan*

In the Matter of the Petition

of

Nathan Katz & Max Kramer

For a Redetermination of a Deficiency or  
a Refund of Unincorporated Business;  
Taxes under Article(s) 16-A of the  
Tax Law for the (Year(s) 1954

AFFIDAVIT OF MAILING  
OF NOTICE OF DECISION  
BY (CERTIFIED) MAIL

State of New York  
County of Albany

Martha Funaro , being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of January , 19 71, she served the within Notice of Decision (or Determination) by (certified) mail upon Nathan Katz & Max Kramer (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Joseph Schnierer  
Nelson & Nelson  
570 Seventh Avenue  
New York, New York  
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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

4th day of January , 1971.

*Joyce S. Van Pelt*

*Martha Funaro*

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730 Grand Concourse  
New York, New York

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Sworn to before me this

4th day of January, 1971.

Joyce S. Ken Patterson

Martha Funaro

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATIONS OF

NATHAN KATZ AND MAX KRAMER

INDIVIDUALLY AND AS CO-PARTNERS D/B/U  
THE FIRM STYLE AND NAME OF BON BON  
SWEET SHOPPE FOR REVISION OR REFUND OF  
UNINCORPORATED BUSINESS TAXES UNDER  
ARTICLE 16-A OF THE TAX LAW FOR THE  
YEAR 1954  
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DETERMINATION

The above named partnership having duly filed an application for revision and refund under Article 16-A of the Tax Law for the calendar year 1954 and a hearing having been held in connection therewith on February 5, 1963, at the office of the State Tax Commission, 80 Centre Street, New York, New York, before Martin Schapiro, hearing officer, of the Department of Taxation and Finance; at which hearing the partnership appeared by and was represented by Joseph Schnierer of the firm of Nelson & Nelson, accountants and auditors, 570 Seventh Avenue, New York, New York, and the record having been duly examined and considered, the State Tax Commission hereby finds:

(1) That prior to and during the year 1954, the copartnership operated a business in New York; that on July 2, 1954, the business together with all its assets was sold for a purchase price of \$50,000, \$10,000 to be paid in cash and the balance of \$40,000 to be paid by a series of bi-weekly notes in the amount of \$187.50 each, until the entire indebtedness was to be paid in full, which notes were secured by an underlying chattel mortgage in the sum of \$40,000; that during the year 1954, the notes were paid as they matured; that the total amount received by the partners during such year was in the sum of \$14,500; that during the year 1955, an additional \$7,875 was collected; that, however, on the failure of the purchasers to continue payments in 1956, the chattel mortgage was foreclosed and the business

repossessed by the partners;

(2) That each of the partners herein individually filed returns of income under Article 16 of the Tax Law for the year 1954; that in addition thereto the copartnership filed an unincorporated business tax partnership return completing the unincorporated business tax portion of the return; that attached to such return was a schedule showing return of net capital gain or loss of the partnership for personal income tax purposes; that reported on such schedule was a net capital gain of \$22,195.32, which amount represented the total net profit (on an accrual basis) from the sale of the partnership; that this amount was not included in the income from the business on the unincorporated business tax return and no tax was, therefore, paid by the partnership on such profit or gain; that thereafter, an assessment was issued (Assessment No. B-237786) assessing unincorporated business taxes on the ground that the profit on the sale of the business constitutes business income and is required to be included with the operating income in computation of the unincorporated business tax;

(3) That thereafter the partnership filed an application for revision or refund together with what purports to be an amended return including in such return a portion of such profit from the sale of the business as business income on an installment basis (although the entire profit was previously reported as set forth in finding of fact (2) above on an accrual basis as a capital gain for personal income tax purposes);

(4) That on September 4, 1958, the application for revision and refund was denied; that on December 5, 1958, more than 90 days after the mailing of such denial of the taxpayers' application for revision and refund, (which 90-day period is prescribed by Section 374 of the Tax Law) the taxpayers filed a formal demand for a hearing;

Upon the foregoing and all the evidence presented herein,

the State Tax Commission hereby

DETERMINES:

(A) That the taxpayers failed to file a timely demand for a hearing within 90 days from the date of the mailing of the application for revision or refund as prescribed by Section 374 of the Tax Law;

(B) That the gain realized on the sale of the business was ordinary income derived from the sale of the assets used in the trade or business; that such income was required to be included in the income of the business pursuant to Section 386, subdivision d of the Tax Law;

(C) That since the profit on the sale of the business was reported by the partners for personal income tax purposes for the year 1954 on the accrual basis, such accrual basis was required to be reported for unincorporated business tax purposes there is no provision in the Tax Law authorizing a subsequent election to change the basis from an accrual to an installment basis on the same transaction for the same taxable year; that an election having been made to report on an accrual basis for the year 1954, no election can subsequently be made to report such transaction on an installment basis for the same taxable year;

(D) That, accordingly, the additional taxes assessed against the partnership for 1954 pursuant to Article 16-A of the Tax Law are correct and are legally due and owing and the taxpayers are not entitled to any revision or refund of the taxes assessed and/or paid under such article for the year 1954.

Dated: Albany, New York, this 31<sup>st</sup> day of December 1970.

December 31, 1970

STATE TAX COMMISSION

*Leopoldo Gallman*

COMMISSIONER

*Charles W. Venable*

COMMISSIONER

*William Koerner*

COMMISSIONER