

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

DiBELARDINO AND TEMPESTA

For a Redetermination of a Deficiency or
a Refund of Unincorporated Business;
Taxes under Article(s) 23 of the
Tax Law for the (Year(s) 1965 and 1966;

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

State of New York
County of Albany

Rae Zimmerman, 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 29th day of February, 1972, she served the within Notice of Decision (or Determination) by (certified) mail upon DiBelardino and Tempesta (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: DiBelardino and Tempesta
c/o G.B.I., Inc.
42-15 Crescent Street
Long Island City, New York 11101
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

29th day of February, 1972.

Martha Fuxas

Rae Zimmerman

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
DiBELARDINO AND TEMPESTA

For a Redetermination of a Deficiency or
a Refund of UNINCORPORATED BUSINESS :
Taxes under Article(s) 23 of the
Tax Law for the (Year(s) 1965 and 1966

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

State of New York
County of Albany

Rae Zimmerman , 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 29th day of February , 19 72, she served the within
Notice of Decision (or Determination) by (certified) mail upon Isaac Kaplan, Esq.

(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Isaac Kaplan, Esq.
c/o Kaplan, Steiner & Kaplan
111 Broadway
New York, New York 10006
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

29th day of February , 1972.

Martin F. Farrow

Rae Zimmerman



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A

STATE CAMPUS

ALBANY, N. Y. 12226

AREA CODE 518

457-2655, 6, 7

STATE TAX COMMISSION

HEARING UNIT

EDWARD ROOK

SECRETARY TO
COMMISSION

STATE TAX COMMISSION

NORMAN F. GALLMAN, ACTING PRESIDENT

A. BRUCE MANLEY

MILTON KOERNER

ADDRESS YOUR REPLY TO

Albany, New York

February 29, 1972

DiSalardino & Tempesta

c/o G.B.I., Inc.

42-15 Crescent Street

Long Island City, New York 11101

Gentlemen:

Please take notice of the **Decision** of
the State Tax Commission enclosed herewith.

Please take further notice that pursuant to **section 722 of**
the Tax Law any proceeding in court to review an adverse decision
must be commenced within **four months** after
the date of this notice.

Any inquiries concerning the computation of tax due or refund allowed
in accordance with this decision or concerning any other matter relat-
ing hereto may be addressed to the undersigned. These will be referred
to the proper party for reply.

Very truly yours,

Nigel G. Wright

HEARING OFFICER

cc Petitioner's Representative
Law Bureau

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
DiBELARDINO AND TEMPESTA : DECISION
for a Redetermination of Deficiency or :
for Refund of Unincorporated Business :
Taxes under Article 23 of the Tax Law :
for the Years 1965 and 1966. :

DiBelardino and Tempesta filed a petition under sections 722 and 689 of the Tax Law for a redetermination of a deficiency in unincorporated business taxes for the years 1965 and 1966.

A hearing was held on June 24, 1971, before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York. Isaac Kaplan, Esq., represented the petitioner and Edward H. Best, Esq., (Francis X. Boylan, Esq., of Counsel) represented the Income Tax Bureau. The record of said hearing has been duly examined and considered.

ISSUE

The issue in this case is whether the individual partners of petitioner, or the petitioners themselves, were engaged in an unincorporated business or whether they are mere passive recipients of royalty income and not engaged in a business.

FINDINGS OF FACT

1. Aldo DiBelardino and Peter Tempesta are brothers-in-law. They were the officers of and sole stockholders in Mediterranean Importing Company, Inc., an importer and wholesaler of alcoholic beverages.

2. In 1958, Aldo DiBelardino and Peter Tempesta individually acquired the United States rights to the formula and trademark of "Liquore Galliano", an alcoholic beverage, from the Italian owners thereof. These rights were in the name of DiBelardino individually. However, Tempesta had borne half of the travel and other expenses in locating and acquiring these rights and DiBelardino had always considered him to have a half interest in these rights.

3. The two individuals did not have the capital to produce the liquor. They therefore sought a buyer. An arrangement was made for a transfer of all rights back to the original owner and a sale by the original owner directly to McKesson & Robbins. DiBelardino, on March 11, 1959, entered into an agreement with McKesson & Robbins whereby the latter acknowledged that DiBelardino had assisted in the acquisition of the rights and in promoting the liquor and would continue to use his best efforts to promote the liquor in the future, and in consideration of past and future services McKesson would pay a "brokerage" of up to \$1.00 a case on the liquor shipped into the United States. This agreement was to last 10 years with the brokerage payments surviving the death of DiBelardino for the full term. Subsequently, McKesson & Robbins acquired the original distillery in Italy. Mr. DiBelardino testified he could have had a longer agreement if he had unconditionally agreed to sell and promote the liquor.

4. From 1959 through 1964 the income under the 1959 agreement was reported as income by Mediterranean Importing Co., Inc. which was then a "subchapter S" corporation for federal income tax purposes. A federal audit was made and it was determined that the income under

the agreement should be reported on a partnership return. Petitioners feel that such income is properly considered as a royalty.

5. On December 2, 1964, the two brothers-in-law signed a partnership agreement forming the firm of DiBelardino and Tempesta. The purpose of the partnership, as stated in said indenture, was to service and collect commissions derived from the contract made with McKesson & Robbins.

6. Beginning in 1965 the partnership filed Federal and New York partnership returns. On the New York return (IT-204) it was stated that the partnership was exempt from unincorporated business taxes. The business was characterized on the return as "importing and sales representation".

7. Tempesta did nothing to promote the liquor or the interests of the partnership.

8. DiBelardino was very active in promoting the liquor. He traveled extensively to solicit for Mediterranean and while doing so he promoted the liquor among the wholesalers he knew. Large travel expenses were charged to the partnership on the partnership returns. The tax returns also show "promotion" and "advertising" expenses as deductions. DiBelardino contributed his ideas to McKesson & Robbins for the promotion. Among these were the motto "Think Italiano, drink Italiano", and the symbol of an Italian traffic policeman, both of which were used in heavy advertising by McKesson & Robbins in national magazines.

9. The deficiency in issue is dated February 10, 1969, and is in the amount of \$1,931.88 plus interest of \$270.43 for a total of \$2,202.31 for the two years together.

CONCLUSIONS OF LAW

Petitioner has not sustained the burden of proof that it or its partners are mere passive investors and recipients of royalty income (see Petition of F. & S. Associates, January 23, 1970; C.C.H. N.Y. State Tax Rep. ¶99-256).

DECISION

The petition is denied and the deficiency is found to be correct and due together with such interest, if any, as may be due under section 684 of the Tax Law.

DATED: Albany, New York

February 29, 1972

STATE TAX COMMISSION

Norman Jackson

COMMISSIONER

Bruce Mesolese

COMMISSIONER

Milton Krerner

COMMISSIONER