

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Daniel & Carmela DeCarlo

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Unincorporated  
Business Tax under Article 23 of the Tax Law for :  
the Years 1970 - 1971.

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of July, 1982, he served the within notice of Decision by certified mail upon Daniel & Carmela DeCarlo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Daniel & Carmela DeCarlo  
1222 Shippan Ave.  
Stamford, CT 06902

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 Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
9th day of July, 1982.

*Cornelius A. Hagelend*

*J. Vredenburg*

STATE OF NEW YORK

STATE TAX COMMISSION

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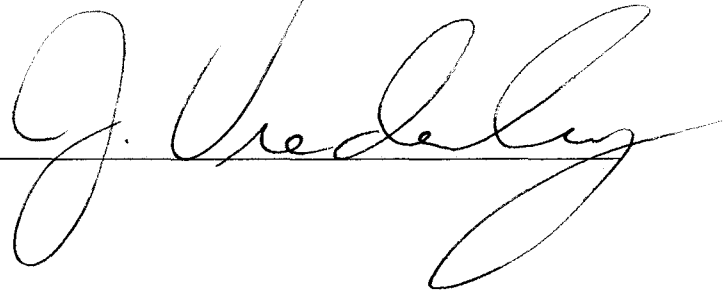
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of July, 1982, he served the within notice of Decision by certified mail upon Don J. Guarnieri the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Don J. Guarnieri  
575 White Plains Rd.  
Eastchester, NY 10707

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 Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the 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  
9th day of July, 1982.

A large, stylized handwritten signature, likely of Jay Vredenburg, is written over a horizontal line. The signature is cursive and flows from left to right, with a large loop at the end.

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

July 9, 1982

Daniel & Carmela DeCarlo  
1222 Shippan Ave.  
Stamford, CT 06902

Dear Mr. & Mrs. DeCarlo:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Don J. Guarnieri  
575 White Plains Rd.  
Eastchester, NY 10707  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
DANIEL DeCARLO and CARMELA DeCARLO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1970	:	
and 1971.	:	

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Petitioners, Daniel DeCarlo and Carmela DeCarlo, 1222 Shippan Avenue, Stamford, Connecticut 06902, 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 1970 and 1971 (File No. 20078).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 22, 1981 at 9:15 A.M. Petitioners Daniel DeCarlo and Carmela DeCarlo appeared by Don J. Guarnieri, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether a gain derived from the sale of real property is subject to the unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Daniel DeCarlo and Carmela DeCarlo, timely filed joint New York State income tax resident returns for the years 1970 and 1971, on which net business income and a capital gain was reported. Petitioners did not file unincorporated business tax returns for the years 1970 and 1971.

2. On October 29, 1974 the Audit Division issued a Notice of Deficiency for the years 1970 and 1971 for \$1,532.69 plus penalties and interest. Attached thereto was an explanatory Statement of Audit Changes which indicated that;

(a) the gain from the sale of business-related property was held taxable at 100% for unincorporated business tax purposes and was included in the net business income reported.

(b) penalties under sections 685(a)(1) and 685(a)(2) were imposed for failure to file and pay the unincorporated business tax. These penalties were not challenged or raised as an issue by petitioners.

3. Petitioner Daniel DeCarlo operated a greenhouse for the purpose of raising and selling flowers. The greenhouse and the unincorporated business operated therefrom was sold on the installment basis. A copy of the contract of sale was submitted with an alleged "rider" which was not signed or initialed by any party.

4. Other than the aforementioned contract of sale, no documentary evidence was submitted and no sworn testimony was rendered as to the business and/or personal use of the real property at issue.

5. A copy of a Federal Schedule D "Sales or Exchanges of Property" and an attachment which were submitted to the Audit Division pursuant to its request, referred to the real property at issue as "business property". Petitioners contended that the reference to "business property" was an error and that only the gain attributable to the greenhouse was subject to the unincorporated business tax.

6. A New York State Income Tax Resident Return filed for the year 1969 indicated that petitioner Carmela DeCarlo was a housewife. An Unincorporated Business Tax Return filed for the year 1969 indicated that petitioner Daniel

DeCarlo was the sole proprietor. The contract of sale indicated that petitioner Daniel DeCarlo was the sole owner of the real property at issue.

CONCLUSIONS OF LAW

A. That petitioners, Daniel DeCarlo and Carmela DeCarlo, have failed to sustain the burden of proof required by section 689(e) of the Tax Law in establishing that any portion of the real property sold was used for personal purposes and not employed in the conduct of the unincorporated business.

B. That the gain from the sale of the real property is subject to the unincorporated business tax in accordance with the meaning and intent of section 705(a) of the Tax Law and 20 NYCRR 205.1.

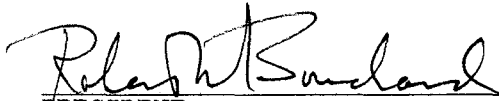
C. That the petition of Daniel DeCarlo and Carmela DeCarlo is granted to the extent that the name of petitioner Carmela DeCarlo is eliminated from the Notice of Deficiency issued October 29, 1974.

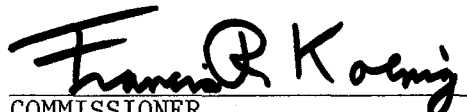
D. That the Audit Division is hereby directed to modify accordingly the Notice of Deficiency issued October 29, 1974; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JUL 09 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER