

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Double D Super Delicatessen : 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 Year 1974.

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 26th day of March, 1982, he served the within notice of Decision by certified mail upon Double D Super Delicatessen the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Double D Super Delicatessen  
c/o William B. Dickler  
P.O. Box 84  
Old Bethpage, NY 11804

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  
26th day of March, 1982.

*Anna A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition  
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Business Tax under Article 23 of the Tax Law for :  
the Year 1974.

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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 26th day of March, 1982, he served the within notice of Decision by certified mail upon William B. Dickler the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William B. Dickler  
P.O. Box 84  
Old Bethpage, NY 11804

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  
26th day of March, 1982.

*Connie A. Haglund*

*[Signature]*

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

March 26, 1982

Double D Super Delicatessen  
c/o William B. Dickler  
P.O. Box 84  
Old Bethpage, NY 11804

Gentlemen:

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  
William B. Dickler  
P.O. Box 84  
Old Bethpage, NY 11804  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
DOUBLE D SUPER DELICATESSEN  
for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Year 1974.

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DECISION

Petitioner, Double D Super Delicatessen, c/o William B. Dickler, P.O. Box 84, Old Bethpage, New York 11804, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1974 (File No. 21946).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 4, 1981 at 2:45 P.M. Petitioner appeared by William B. Dickler, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether petitioner is entitled to an additional exemption of \$10,588.64 computed under section 709(2) of the Tax Law.

FINDINGS OF FACT

1. On April 4, 1975 petitioner filed a 1974 New York State partnership return wherein it reported net income from business of \$21,177.28 and subtracted therefrom an exemption of \$14,755.34, to arrive at taxable business income of \$6,421.94. The \$14,755.34 exemption consisted of a specific exemption of \$4,166.70 (\$5,000.00 full-year exemption prorated for the 10 months of the year that the partnership was conducting business) and an additional exemption of

\$10,588.64. The additional exemption was computed under section 709(2) of the Tax Law and represents Nicholas C. DiMarco's 50 percent interest in partnership income (one-half of \$21,177.28) which was purportedly included in the separate unincorporated business tax return filed by Mr. DiMarco as the sole proprietor of Golden Star Delicatessen.

2. On March 27, 1978 the Audit Division issued to petitioner a Notice of Deficiency for 1974 assessing additional unincorporated business tax of \$631.58 plus interest. Said Notice of Deficiency was based on an explanatory Statement of Audit Changes, originally dated August 8, 1977, wherein the additional exemption of \$10,588.64 was disallowed as "[T]his income is part of the total partnership income and therefore subject to the Unincorporated Business Tax".

3. For the first ten months of 1974, Leonard Dickler and Nicholas C. DiMarco were equal partners in Double D Super Delicatessen, the petitioner herein. Due to differences of opinion, Mr. Dickler and Mr. DiMarco dissolved the partnership effective October 31, 1974, said dissolution not being achieved on amiable terms.

4. On February 1, 1974, prior to the dissolution of Double D Super Delicatessen, Mr. DiMarco purchased from the partnership a delicatessen located in Blue Point, New York. Mr. DiMarco operated this delicatessen as a sole proprietor doing business as Golden Star Delicatessen.

5. Petitioner did not offer into evidence the separate unincorporated business tax return of Nicholas C. DiMarco, d/b/a Golden Star Delicatessen for the year 1974 nor did it offer any documentary or other credible evidence to show that the additional exemption of \$10,588.64, as claimed on the partnership return, was included in the 1974 unincorporated business gross income of Golden Star Delicatessen.

CONCLUSIONS OF LAW

A. That section 709 of the Tax Law provides, in pertinent part, that:

"There shall be allowed...if a partner in an unincorporated business is itself taxable under this article..., an exemption for the amount of the partner's proportionate interest in the excess of the unincorporated business gross income over the deductions..., but this exemption shall be limited to the amount which is included in the partner's unincorporated business taxable income allocable to this state..." (underlining supplied)

B. That petitioner has failed to sustain the burden of proof pursuant to sections 722 and 689(e) of the Tax Law to show that its partner (Nicholas C. DiMarco) included his proportionate interest in partnership income in his individual unincorporated business taxable income.


C. That the petition of Double D Super Delicatessen is denied and the Notice of Deficiency dated March 27, 1978 is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

MAR 26 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER