

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Charles Schmidt

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 1973. :

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Charles Schmidt, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles Schmidt
68 Douglas Dr.
East Meadow, NY 11554

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
4th day of August, 1982.

Amie A. Heglund

Jay Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
Charles Schmidt :

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Business Tax under Article 23 of the Tax Law for :
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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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Martin R. Carlson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Martin R. Carlson
13-04 Tanis Place
Fair Lawn, NJ 07410

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
4th day of August, 1982.

Annice A. Hagelund

J. Vredenburg

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

August 4, 1982

Charles Schmidt
68 Douglas Dr.
East Meadow, NY 11554

Dear Mr. Schmidt:

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
Martin R. Carlson
13-04 Tanis Place
Fair Lawn, NJ 07410
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
CHARLES SCHMIDT
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1973.

DECISION

Petitioner, Charles Schmidt, 68 Douglas Drive, East Meadow, New York 11554, 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 1973 (File No. 19180).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 6, 1981 at 10:45 A.M. Petitioner appeared by Martin R. Carlson, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the gain from sale of a building owned by petitioner and his wife, which was used by petitioner Charles Schmidt's unincorporated business, is includable in the gross income of such unincorporated business.

FINDINGS OF FACT

1. Petitioner, Charles Schmidt, timely filed a Combined New York State Income Tax Resident Return with his wife, Mary Schmidt, for the year 1973, whereon he reported business income of \$11,349.00 derived from the manufacture of coils. Additionally, petitioner and his wife each reported one-half of a capital gain reported on the installment method, which was derived from the

sale of a building situated at 252 Eastern Parkway, Farmingdale, New York. Petitioner did not file an unincorporated business tax return for the year 1973.

2. On February 10, 1977, the Audit Division issued a Statement of Audit Changes to petitioner wherein it held that his business activities constituted "the carrying on of an unincorporated business and, as such, all income derived therefrom is subject to the unincorporated business tax." Said statement further held that the aforementioned gain derived from the sale of the building was additionally subject to such tax since the building was a business asset. Accordingly, a Notice of Deficiency was issued against petitioner on March 28, 1977 asserting unincorporated business tax of \$499.14, penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law of \$112.31 and \$89.85, for failure to file an unincorporated business tax return and failure to pay the tax determined to be due, respectively, plus interest of \$110.52, for a total due of \$811.82.

3. During 1973, petitioner and his wife sold a building personally owned by them which was used solely for the purpose of containing petitioner's unincorporated business known as A.B.C. Coil Company.

4. Petitioner did not contest the determination that his income derived from A.B.C. Coil Company was subject to the unincorporated business tax. However, he contended that the gain derived from the sale of the building is not subject to the imposition of unincorporated business tax since such building was not owned by the business. Further, petitioner claimed that A.B.C. Coil Company paid rent to petitioner and his wife.

5. On Federal Schedule "D"; Capital Gains and Losses, depreciation on the building of \$11,145.00 was reported. No evidence was submitted to show where

said depreciation was claimed in computing income. No evidence was submitted to substantiate rental payments or a schedule showing rental income or loss. Also no Federal Schedule "C",; Profit or (Loss) From Business or Profession, was submitted to show either the payment of rent or that depreciation on the building was not deducted in computing business income.

CONCLUSIONS OF LAW

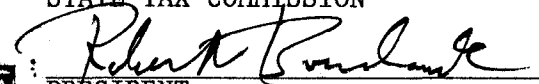
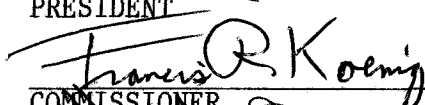
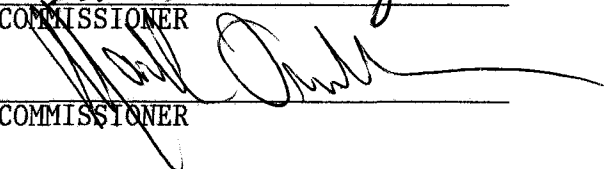
A. That "unincorporated business gross income of an unincorporated business means the sum of the items of income and gain of the business, of whatever kind and in whatever form paid, includible in gross income for the taxable year for Federal income tax purposes, including income and gain from any property employed in the business..." section 705(a) of the Tax Law.

B. Petitioner, Charles Schmidt, failed to sustain the burden of proof imposed by sections 722 and 689(e) of the Tax Law that the building owned by petitioner and his wife was not employed in the business; as reported in Findings of Fact #3", above, the building was used solely for the purpose of containing the unincorporated business A.B.C. Coil Company. Therefore, the gain from the sale of the building is includable in the gross income of the unincorporated business within the meaning and intent of section 705(a) of the Tax Law.

C. That the petition of Charles Schmidt is denied and the Notice of Deficiency dated March 28, 1977 is sustained.

DATED: Albany, New York

AUG 04 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER