

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Sam Stackowitz

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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 27th day of May, 1982, he served the within notice of Decision by certified mail upon Sam Stackowitz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

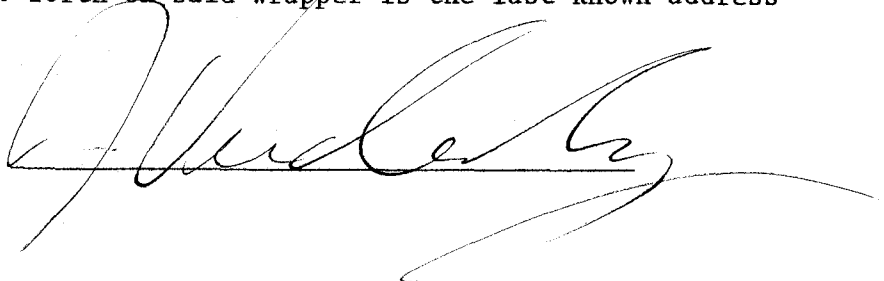
Sam Stackowitz
3 Puritan Ave.
Mt. Sinai, NY 11766

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
27th day of May, 1982.

Carmie A. Hagelund



STATE OF NEW YORK
STATE TAX COMMISSION

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for Redetermination of a Deficiency or a Revision :
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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 27th day of May, 1982, he served the within notice of Decision by certified mail upon Frederick Groth the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frederick Groth
52 Balsam Dr.
Dix Hills, NY 11746

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
27th day of May, 1982.

Annie A. Hagelund

J. Vredenburg

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

May 27, 1982

Sam Stackowitz
3 Puritan Ave.
Mt. Sinai, NY 11766

Dear Mr. Stackowitz:

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
Frederick Groth
52 Balsam Dr.
Dix Hills, NY 11746
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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

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DECISION

Petitioner, Sam Stackowitz, 3 Puritan Avenue, Mt. Sinai, New York 11766, 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. 24674).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 7, 1981, at 1:15 P.M. Petitioner, Sam Stackowitz, appeared with Frederick Groth, C.P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether property located in the town of Baldwin, State of New York, was property employed in petitioner's business, thereby subjecting the gain realized on its sale to unincorporated business tax.

II. Whether the gain realized on the aforementioned property, if determined to have been employed in petitioner's business, can be allocated between business and nonbusiness sources.

FINDINGS OF FACT

1. Petitioner, Sam Stackowitz, and his wife, Harriet Stackowitz, timely filed separate New York State income tax returns for the year 1973 on combined

Form IT-208. On the return there was reported a gain of \$22,938.29 from the sale or exchange of capital assets, said gain being computed in the following manner:

Gain on residence at 866 Shubert St.	\$11,370.57
Gain on land & building at 97 Woodside Ave.	34,506.00
Total	<u>\$45,876.57</u>
Less: 50% capital gain deduction	22,938.28
Reportable gain	<u>\$22,938.29</u>

One-half of the \$22,938.29 gain was reported by petitioner Sam Stackowiz on his return, while the other half was reported on his wife's return. Petitioner did not file an unincorporated business tax return for the year 1973.

2. On June 9, 1978, the Audit Division issued to petitioner a Notice of Deficiency asserting unincorporated business tax due of \$1,243.26 and personal income tax due of \$141.82, together with interest. Petitioner does not contest the personal income tax portion of the Notice of Deficiency and, accordingly, same will not be addressed hereinafter.

3. The aforementioned Notice of Deficiency was based on a Statement of Audit Changes, dated March 27, 1978, wherein the unincorporated business tax assessment was explained in the following statement:

"The gain from the sale of your restaurant represents the sale of a business asset and is therefore taxable for unincorporated business tax purposes at 100%."

4. From January 1, 1973 to approximately December 14, 1973 petitioner Sam Stackowitz and his wife were partners in a catering business known as Woodside Terrace. This business was conducted in partnership form and was located at 97 Woodside Avenue, Baldwin, New York. The land and building located at 97 Woodside Avenue was sold on December 14, 1973 and resulted in a gain of \$34,506.00

reportable during the 1973 tax year. Said \$34,506.00 gain is the gain which the Audit Division asserts is subject to unincorporated business tax.

5. The building located at 97 Woodside Avenue was a 50 year old two story structure with the catering business being located on the first floor, while petitioner's personal residence was located on the second floor. The building was situated on approximately two acres of land. The land and building were sold to a real estate developer who tore down the building and constructed 11 single family housing units on the two acres of land. The purchaser of the land and building located at 97 Woodside Avenue did not purchase the catering business of Woodside Terrace. The partnership Woodside Terrace was dissolved and any tangible personal property of the partnership, which consisted of mostly antiquated equipment, was sold separately or otherwise disposed of.

6. The 1973 partnership return filed by Woodside Terrace did not include in unincorporated business gross income the gain realized on the sale of the land and building located at 97 Woodside Avenue.

CONCLUSIONS OF LAW

A. That petitioner, Sam Stackowitz, was not individually engaged in the conduct of an unincorporated business within the meaning and intent of subsection (a) of section 703 of the Tax Law. That the partnership, Woodside Terrace, was the unincorporated business entity which should have included in its unincorporated business gross income the gain realized from the sale of land and building

employed in the business. That the Audit Division incorrectly issued the Notice of Deficiency to Sam Stackowitz individually, instead of to the partnership Woodside Terrace; therefore, said notice is invalid.

B. That the question of allocation is rendered moot in light of Conclusions of Law "A", supra.

C. That the petition of Sam Stackowitz is granted and that portion of the Notice of Deficiency dated June 9, 1978 imposing unincorporated business tax of \$1,243.26 is hereby cancelled.

DATED: Albany, New York

MAY 27 1982

STATE TAX COMMISSION

James W. Tueller
PRESIDENT

Francis R. Koeng
COMMISSIONER

[Signature]
COMMISSIONER