

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Spartacus DeLia :
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. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

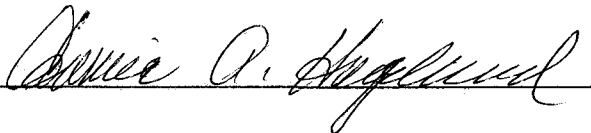
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Spartacus DeLia, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Spartacus DeLia
Winship Rd.
New Hartford, NY 13413

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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Spartacus DeLia :
for Redetermination of a Deficiency or a Revision :
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Business Tax under Article 23 of the Tax Law for :
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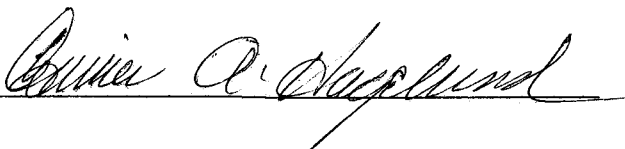
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Douglas P. Rutnik the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Douglas P. Rutnik
Rutnik & Rutnik
Suite 1320, 112 State St.
Albany, NY 11207

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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

July 15, 1983

Spartacus DeLia
Winship Rd.
New Hartford, NY 13413

Dear Mr. DeLia:

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) 690 & 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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Douglas P. Rutnik
Rutnik & Rutnik
Suite 1320, 112 State St.
Albany, NY 11207
Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petition :
of :
SPARTACUS DELIA : DECISION
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Year 1974. :

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on August 10, 1982 at 9:15 A.M., with all briefs to be submitted by December 20, 1982. Petitioner appeared by Rutnik & Rutnik, Esqs. (Douglas P. Rutnik, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Lawrence A. Newman, Esq., of counsel).

Whether petitioner was subject to unincorporated business tax on the gain from sale of two pieces of real property which were used as quarries.

1. On June 16, 1975 petitioner, Spartacus DeLia, filed a New York State income tax return and unincorporated business tax return for 1974. On the income tax return, sale or exchange of capital assets of \$198,944.00 was listed and business income of \$279,478.00 was listed for "Shot Rock Sales." On the 1974 Federal Schedule C, Profit or (Loss) From Business or Profession, which

was attached to petitioner's unincorporated business tax return, petitioner listed his product as "shot rock" and claimed a depreciation deduction of \$16,536.00 for machinery and other equipment.

2. On June 27, 1977, as the result of a field audit, the Audit Division issued a Notice of Deficiency against petitioner in the amount of \$31,096.00 plus interest of \$5,814.95 for a total due of \$36,910.95 for the year 1974.

3. On audit, the auditor found that two of the properties which had been included in the reported capital gains for 1974 were quarries located in Booneville and Litchfield, New York from which petitioner derived the income he had reported on his Federal Schedule C and New York unincorporated business tax return. Following discussions with petitioner's accountant, during which the accountant told the auditor that the depreciated machinery as reported was rock crushing equipment, the auditor determined that the gain from the sale of the two quarries was gain from property employed in an unincorporated business and subject to unincorporated business tax.

4. Petitioner purchased the Booneville quarry site in 1962 and leased the Litchfield site under a long term lease agreement in 1963. Petitioner alleges that he purchased and leased the properties for investment purposes. Petitioner owned two asphalt producing plants, one on each quarry site. Additionally, petitioner owned all of the stock and was president of E.G. DeLia & Sons Construction Corporation ("the Corporation"). Petitioner was also involved in S. DeLia Corporation to an extent not brought out at the hearing. In December, 1974, petitioner sold the two quarry sites to Allied Chemical Company realizing a gain of \$565,375.00.

5. Petitioner testified that all of the quarrying of shot rock at the sites was carried on by the Corporation and that all of the rock crushing

equipment used was owned by the Corporation, not by petitioner and that he merely leased the quarries to the Corporation for a royalty based on tons of shot rock removed. Petitioner claimed that the \$16,536.00 depreciation deduction was for the two asphalt plants, not rock crushing equipment and that his accountant mistakenly failed to include asphalt production as the nature of petitioner's business. Petitioner maintained that of the \$296,579.00 listed on his Schedule C as gross receipts or sales, \$192,328.00 was income from the asphalt plants and the remainder came from quarry royalties. No business records in any form were offered to substantiate any of the aforesaid figures and petitioner did not explain how he derived \$192,328.00 in sales from the asphalt plants without personally being in business.

6. Petitioner's testimony was vague as to what type of operations were being carried out at the quarry sites and who was involved. He mentioned that the Corporation did the quarrying with its own equipment and then stated that the asphalt plants were also at the site but did not clearly tie the two operations together. The only documentation supplied was a copy of the minutes of the Corporation for a meeting held November 16, 1968 at which it was decided that the Corporation would reimburse petitioner for "the use of the quarry lands held in his name" at no less than \$.09 per ton of shot rock. As to the asphalt plants, no evidence was offered indicating who operated them and petitioner did not explain why he took a depreciation deduction for the plants if he was not operating them as a business on the quarry sites which he later sold. Petitioner did testify that the asphalt was sold to various contractors, his own companies included.

7. At the conclusion of testimony, petitioner petitioned for a refund of the \$14,769.00 in unincorporated business tax paid with his 1974 return based

on the proposition that, if he was not found to have operated the quarries as an unincorporated business for purposes of taxing the gain on the sale of the properties, then none of the income derived from the quarries and reported in his return should be subject to unincorporated business tax.

CONCLUSIONS OF LAW

A. That section 701(a) of the Tax Law imposes a tax on the unincorporated business taxable income of every unincorporated business wholly or partly carried on within New York State. An unincorporated business is defined by section 703(a) of the Tax Law to mean "any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity."

B. That section 705(a) of the Tax Law includes within the definition of unincorporated business gross income, gain from any property employed in the business. However, section 703(e) provides that an owner of real property "shall not be deemed engaged in an unincorporated business solely by reason of holding, leasing or managing real property."

C. That section 689(e) of the Tax Law as applied to Article 23 by section 722 places the burden of proof upon the petitioner with the exception of certain issues not applicable herein. Petitioner failed to meet his burden of proving that he did not operate an unincorporated business at his quarries in Booneville and Litchfield in 1974. Petitioner offered very little documentation to substantiate any of his testimony. No business records of the type which would ordinarily have been kept for an operation the size of petitioner's were offered to corroborate any of the figures testified to by petitioner or any of the arrangements between petitioner and his corporations. The only document

offered, the November 16, 1968 minutes of the Corporation, was extremely vague as to the nature of the quarry operations.

Moreover, there was an apparent inconsistency, which was not satisfactorily explained, as to why petitioner, in 1974, would file as a sole proprietor and later claim he had nothing to do with the quarry operation. Even if we assume arguendo that the Corporation did own all the rock crushing equipment and performed all the quarrying and removal of shot rock, petitioner admitted to owning two asphalt plants on the quarry sites from which he derived nearly \$200,000.00. This operation alone would subject petitioner to the unincorporated business tax. Petitioner submitted no evidence whatsoever as to who ran the asphalt plants or why he claimed a \$16,536.00 deduction for depreciation on his Federal Schedule C if he was not the sole proprietor of an asphalt producing business on his Booneville and Litchfield quarry sites, which sites were sold for a gain which was the subject of the deficiency.

D. That inasmuch as petitioner failed to prove that he was not operating an unincorporated business in 1974, his gain from the sale of the quarry properties employed in the business was subject to unincorporated business tax under sections 701(a) and 705(a) of the The Tax Law. Moreover, in view of the foregoing, petitioner's request for refund of the unincorporated business tax previously remitted must be denied.

E. That the petition of Spartacus DeLia is denied and the Notice of Deficiency issued June 27, 1977 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983

Raduice Asclm
PRESIDENT

Francis R. Koong
COMMISSIONER

[Signature]
COMMISSIONER