

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Orsini & Earl	: : : : : :	: : : : : :
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

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Orsini & Earl, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Orsini & Earl  
34 Park Avenue  
Rochester, NY 14607

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  
6th day of May, 1983.

David Parchuck

Ann C. Hegdahl

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Orsini & Earl :  
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

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Jack M. Battaglia the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack M. Battaglia  
Suite 1111, First Federal Plaza  
Rochester, NY 14614

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  
6th day of May, 1983.

David Parchuck

Barbara A. Haglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 6, 1983

Orsini & Earl  
34 Park Avenue  
Rochester, NY 14607

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  
Jack M. Battaglia  
Suite 1111, First Federal Plaza  
Rochester, NY 14614  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
ORSINI & EARL	:	DECISION
	:	
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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Petitioner, Orsini & Earl, 34 Park Avenue, Rochester, New York 14607, 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. 22687).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on October 28, 1981 at 9:15 A.M., with all briefs to be submitted by August 1, 1982. Petitioner appeared by Jack M. Battaglia, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether the net worth method of income reconstruction used by the Audit Division was a proper audit method which accurately reflected petitioner's tax liability for 1973 and 1974.

II. Whether the death of a partner terminated the partnership or merely dissolved the partnership until the winding up of partnership affairs was completed.

III. Whether the income and expenses relating to the Hub House construction was properly attributed to the partnership for the year 1974 in the Audit Division's net worth audit.

IV. Whether the Audit Division properly disallowed \$15,398.00 of expenses in reconstructing petitioner's 1973 profit from construction of Hub House restaurants.

FINDINGS OF FACT

1. On April 14, 1978 the Audit Division, as the result of a field audit, issued a Notice of Deficiency against petitioner, Orsini & Earl, in the amount of \$4,623.00 plus penalty of \$231.15 and interest of \$1,177.80 for a total due of \$6,031.95 for the taxable year 1974. On December 20, 1976 petitioner, by Gerald Earl, partner, signed a Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Taxes at April 15, 1978. There is no record of petitioner's having filed a 1974 New York State partnership return.<sup>1</sup>

2. Petitioner was a partnership formed by Everett Orsini and Gerald Earl in 1966 to conduct a construction business. Petitioner continued in operation until December, 1973 when Everett Orsini died. Following Mr. Orsini's death Gerald Earl finished some of the construction jobs begun by petitioner before Mr. Orsini's death.

3. Petitioner maintained no formal books or records nor did it maintain a partnership checking account. All checking transactions were handled through an account maintained by Gerald Earl. This single account was used for Mr. Earl personally, for two corporations owned by Mr. Earl, and for the partnership. Mr. Earl also used the account for apartment complexes which he owned individually. From this one account petitioner made up a master check file to keep track of its income and expenses. This file constituted petitioner's books and records.

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<sup>1</sup> Petitioner apparently filed a 1973 partnership return, however, it was not submitted in evidence.

4. On audit, the auditor decided that the aforementioned list of checks was an inadequate record upon which to conduct a proper audit. The auditor, therefore, reconstructed the partnership income using the net worth method. The auditor computed assets and liabilities for the beginning of 1973 and 1974 to determine net worth and compared this figure to the end of year net worth for each year to arrive at increase or decrease in net worth which would reflect income for the year. The audit revealed \$94,056.00 in unreported partnership income for 1974.

5. At a pre-hearing conference several of the figures used in the computations were adjusted as a result of additional information supplied to the Audit Division. The adjusted net worth statement showed a loss of \$36,900.00 for 1973 and adjusted gross income for 1974 of \$121,523.00. Petitioner continued to contest the audit findings insofar as they failed to allow \$15,398.00 of expenses for construction work done at an apartment complex, owned by Gerald Earl personally, located on Mt. Hope Avenue<sup>2</sup> and attributed income and expenses on Hub House restaurant contracts to the partnership rather than to Gerald Earl personally.

6. During the years 1971 to 1974 petitioner engaged in the construction of Hub House restaurants for Hubbard Farms, a division of Hubbard Foods, Inc. The restaurants were built in various locations in Western New York. At the time of Everett Orsini's death, work still remained to be completed on a Hub House located on the Brighton-Henrietta Town Line. Gerald Earl completed this work and received payments totalling \$69,251.35 in 1974 for said work.

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<sup>2</sup> The community was not identified.

7. Petitioner maintained that the partnership terminated at the death of Everett Orsini and any income and expenses incurred for work done thereafter by Gerald Earl was properly attributable to Gerald Earl personally, not to the partnership. The Audit Division argued that Mr. Orsini's death merely dissolved the partnership and it viewed Mr. Earl's work on the Hub House restaurants as the winding up of partnership affairs in the form of completion of contracts previously entered into by the partnership. Petitioner produced no evidence indicating that Gerald Earl personally, or through his corporations, entered into a contract with Hubbard Farms to do additional work not originally contracted for by the partnership.

8. In 1973, \$15,398.00 in expenses were incurred for materials delivered to property owned by Gerald Earl at 1232 Mt. Hope Avenue. Petitioner maintained that the aforesaid expense was attributable to the partnership as part of its contract with Hubbard Farms. The Audit Division disallowed the expense as being an expense attributable to construction projects of Gerald Earl personally rather than of the partnership. Petitioner submitted into evidence a contract between Hubbard Foods, Inc. and Jerry Earl Enterprises dated February 7, 1973 indicating that some renovation work was done for Hubbard Farms at the 1232 Mt. Hope Avenue address. However, petitioner presented no clear evidence directly connecting the partnership with this contract nor demonstrating that the \$15,398.00 was expended on this contract. Testimony indicated only that the Mt. Hope Avenue address was used as a central storage area for various projects. No connection was shown between the Hub House construction and the claimed expenses.

#### CONCLUSIONS OF LAW

A. That section 658(a) of the Tax Law and 20 NYCRR 152.1 require that taxpayers keep sufficient records to show whether such persons are liable for

tax. "In a situation where adequate records do not exist or access to them is not available, the Government, in attempting to establish a violation of the income tax laws, may reconstruct a taxpayer's taxable base by any reasonable method" (United States v. Morse, 491 F. 2d 149, 151). The maintenance of a record of a checking account shared with four or five other entities as the total books and records of petitioner was clearly inadequate as evidenced by the discovery of \$94,056.00 in unreported income in 1974. Such scarce documentation is a "classic case" for using the net worth audit method (United States v. Stone, 431 F. 2d 1286, 1287).

B. That subdivision 4 of section 62 of the Partnership Law provides that the death of any partner causes the dissolution of the partnership. However, "[a]lthough a partner's death dissolves the partnership, it remains in existence and may be continued for a reasonable time by the surviving partners for the purpose of winding up the business affairs" (16 N.Y. Jur 2d Business Relationships § 1425). Gerald Earl, in completing the work on the Hub House restaurants was merely winding up partnership obligations which were incurred prior to Everett Orsini's death. Although it is true that, following the death of a partner, the surviving partners cannot bind the partnership or the decedent's estate by new partnership contracts (16 N.Y. Jur 2d Business Relationships § 1431), there was no evidence of any new contracts by Gerald Earl, individually, with Hubbard Farms after Mr. Orsini's death. Therefore all income and expenses derived from the Hub House projects in 1974 were properly attributable to the partnership, not Gerald Earl individually.

C. That section 689(e) of the Tax Law provides that, with certain exceptions not applicable herein, the burden of proof is on petitioner to show that the expenses incurred in connection with the 1232 Mt. Hope Avenue address were attributable to Hub House construction. Inasmuch as petitioner did not produce



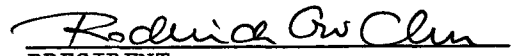
any evidence clearly connecting the \$15,398.00 expended at 1232 Mt. Hope Avenue with the Hub House projects, it has failed to meet its burden of proof and the Audit Division properly disallowed the aforesaid expenses.

D. That the petition of Orsini and Earl is denied and the Notice of Deficiency issued April 14, 1978 is sustained.

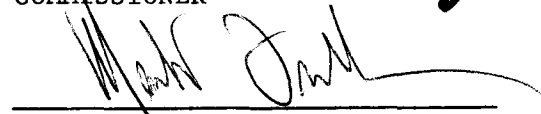
DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER