

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of

T. Rallis & G. Contos  
d/b/a Buoy Eleven

: 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

Kathy Pfaffenbach, 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 24th day of January, 1983, she served the within notice of Decision by certified mail upon T. Rallis & G. Contos, d/b/a Buoy Eleven the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

T. Rallis & G. Contos  
d/b/a Buoy Eleven  
Box 375  
Amagansett, NY 11930

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  
24th day of January, 1983.

Kathy Pfaffenbach

James A. Hyslop

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
T. Rallis & G. Contos :  
d/b/a Buoy Eleven :

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

Kathy Pfaffenbach, 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 24th day of January, 1983, she served the within notice of Decision by certified mail upon Ernesto V. Luzzatto the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ernesto V. Luzzatto  
Kirlin, Campbell & Keating  
120 Broadway  
New York, NY 10271

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  
24th day of January, 1983.

*Ann M. O'Haglund*

*Kathy Pfaffenbach*

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

January 24, 1983

T. Rallis & G. Contos  
d/b/a Buoy Eleven  
Box 375  
Amagansett, NY 11930

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  
Ernesto V. Luzzatto  
Kirlin, Campbell & Keating  
120 Broadway  
New York, NY 10271  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
T. RALLIS AND G. CONTOS	:	DECISION
D/B/A BUOY ELEVEN	:	
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, T. Rallis and G. Contos d/b/a Buoy Eleven, Box 375, Amagansett, New York 11930, 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. 29035).

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 April 27, 1982 at 9:15 A.M. Partner Gustantinos Contos appeared with Ernesto V. Luzzatto, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether the partnership, T. Rallis and G. Contos d/b/a Buoy Eleven, is liable for unincorporated business tax on the gain derived from the sale of its restaurant and retail liquor business known and operated as Buoy Eleven.

FINDINGS OF FACT

1. T. Rallis and G. Contos d/b/a Buoy Eleven (hereinafter the partnership) filed a New York State Partnership Return for the year 1974 whereon it reported income and deductions from its restaurant and retail liquor business known and

operated as Buoy Eleven. Pursuant to such return, said business was terminated in November, 1974.

2. In November, 1974, the partnership sold the restaurant and retail liquor business on the installment basis realizing a gain of \$130,575.00, of which \$22,585.00 was received during the year at issue. Partners, Thomas Rallis and Gustantinos Contos, individually reported their share of said gain for personal income tax purposes but failed to report such gain for unincorporated business tax purposes on the return filed by the partnership.

3. On March 8, 1977, the Audit Division issued a Statement of Audit Changes to the partnership wherein it held the gain subject to the unincorporated business tax. Accordingly, a Notice of Deficiency was issued against the partnership on April 4, 1978 asserting additional unincorporated business tax of \$1,073.79, plus penalty and interest of \$382.45, for a total due of \$1,456.24. Said penalty was issued pursuant to section 685(c) of the Tax Law for failure to file a declaration of estimated tax.

4. The partnership's representative argued that the partnership did not sell the assets of the business. Rather, he contended that each partner sold his entire partnership interest. His claim that the gain at issue does not constitute taxable income to the partnership is based solely on the decision rendered in the Matter of United States Stationery Company v. State Tax Commission, 57 A.D.2d 187, which he believes to be controlling in the instant case.

5. Pursuant to the sales agreement dated July 17, 1974, the partnership, rather than the individual partners, was the seller. Said agreement provided that:

"Seller agrees to sell and Buyer agrees to buy the restaurant and 'on premises' retail liquor business at 209 Montauk Highway, East Hampton, Suffolk County, New York, known and operated as BUOY ELEVEN.

This sale shall include the good will, the Seller's trade name and the right to current telephone number, together with all fixtures, appliances and personal property of the business, including but not limited to the property described on Schedule "A" hereto annexed and incorporated herein by reference."

Schedule "A" listed the assets contained in the bar, patio, store room, dining room and kitchen.

#### CONCLUSIONS OF LAW

A. That the partnership, T. Rallis and G. Contos d/b/a Buoy Eleven, sold its restaurant and retail liquor business, inclusive of all assets, pursuant to the sales agreement of July 17, 1974. Accordingly, the partnership's reliance on the Matter of United States Stationery Company v. State Tax Commission, (supra) is misplaced, since in that case each individual partner sold his entire partnership interest and "the partnership itself was not a party to the agreement."

B. That section 705(a) of the Tax Law defines unincorporated business gross income as follows:

"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, or from liquidation of the business, or from collection of installment obligations of the business, with the modifications specified in this section."

Accordingly, since the sale at issue was made by the unincorporated business itself, the income derived therefrom is includible in the partnership's unincorporated business gross income within the meaning and intent of section 705(a) of the Tax Law.

C. That the petition of T. Rallis and G. Contos d/b/a Buoy Eleven is denied and the Notice of Deficiency dated April 4, 1978 is hereby sustained together with such additional penalty and interest as may lawfully be owing.

DATED: Albany, New York

JAN 24 1983

STATE TAX COMMISSION

ACTING

PRESIDENT



  
COMMISSIONER

  
COMMISSIONER