

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Sisto Rotondi & Sons Associates	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Years 1971 & 1972.	:	

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Sisto Rotondi & Sons Associates, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sisto Rotondi & Sons Associates
975 Jericho Tpke.
Smithtown, NY 11787

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
10th day of November, 1983.

Martha L. Druselle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sisto Rotondi & Sons Associates :
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 Years 1971 & 1972. :
_____ :

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 State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Norman Greenberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Norman Greenberg
110 E. 59th St.
New York, NY 10022

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
10th day of November, 1983.

Martha L. Scruelle

Connie A. Hagelund

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

November 10, 1983

Sisto Rotondi & Sons Associates
975 Jericho Tpke.
Smithtown, NY 11787

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) 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
Norman Greenberg
110 E. 59th St.
New York, NY 10022
Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petition :
of :
SISTO ROTONDI & SONS ASSOCIATES : DECISION
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Years 1971 :
and 1972.

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 7, 1982 at 2:45 P.M. with all briefs to be submitted by April 7, 1983. Petitioner appeared by Norman Greenberg, P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

Whether petitioner is subject to unincorporated business tax on miscellaneous income and management fees.

1. Petitioner, Sisto Rotondi & Sons Associates (hereinafter "petitioner"), filed New York State Partnership Returns for 1971 and 1972 on which it listed real estate as its kind of business. The partnership did not complete the total income and deductions portion of Schedule U-A on Page 4 nor did it complete the "Unincorporated Business Tax and Payments" section of Schedule U-D

on Page 1. Both these sections had written in the words "Not Subject". The income section of the partnership returns showed rental income and other income which was comprised of miscellaneous income and management fees.

2. On March 19, 1976, the Audit Division issued a Statement of Audit Changes to petitioner proposing unincorporated business tax due of \$1,723.37, penalties, pursuant to section 685(a)(1) and (a)(2) of the Tax Law, and interest. Said statement was issued on the ground that income from management fees was subject to unincorporated business tax. On May 23, 1977, a Notice of Deficiency was issued, but no petition was filed within the 90 day period prescribed by section 689 of the Tax Law. The Audit Division issued a separate "Notice and Demand for Payment of Income Tax Due" on March 30, 1978 for each of 1971 and 1972. Petitioner paid the unincorporated business tax shown due on each notice in September of 1979 and during the same month filed a Claim for Refund on Form IT-113X for \$1,723.37. On February 25, 1980, the Audit Division disallowed, in full, petitioner's claim for refund.

3. Petitioner was comprised of four brothers: Paul, Michael, Louis and Richard Rotondi. Members of the Rotondi family entered into an oral agreement; pursuant to that agreement Paul and Michael were to supervise and oversee the business activities of all family real estate properties owned by their father Sisto Rotondi, who is now deceased. Their mother consented to said agreement since both Paul and Michael resided in Long Island where the partnership was located. Although Louis and Richard Rotondi had an ownership interest in the partnership, they were not active in its business affairs.

4. For 1971, petitioner reported net income from rents of \$4,234.40 and for 1972, a net loss of \$27,873.96. The gross rental income was derived from a shopping center located in Commack, Long Island, New York. The partnership

returns filed also indicate income received from miscellaneous income and management fees which petitioner claims were erroneously deposited in the partnership checking account.

5. Paul Rotondi, one of two partners designated to oversee all real estate properties, asserted that petitioner was not a management company, that petitioner's sole activity was the ownership of a shopping center, that the fees should have been paid directly to him and his brother Michael and not put into the partnership account, and that the accountant who prepared the partnership returns for 1971 and 1972 inadvertently prepared the tax reports indicating management fee increments as deposits from the cash receipts book. Paul Rotondi testified that said tax reports were not available since he does not hold records that long.

6. Paul Rotondi and Michael Rotondi collected rents on behalf of the partnership from tenants of the shopping center. They were also in charge of apartments, unimproved vacant land, and all real estate in which the family had an ownership interest as well as rectifying the problems associated with these properties. Petitioner's representative, Mr. Greenberg, stated that the only income producing property owned by petitioner was the shopping center and that management fees paid to Paul and Michael were not additional income to the partnership. Neither Mr. Greenberg nor Paul or Michael Rotondi could explain the nature of the miscellaneous income.

7. In 1971, the shopping center, approximately 48,500 square feet, had nine tenants, all of whom had written leases with petitioner. Paul and Michael Rotondi took care of the rental and lease negotiations on behalf of the partnership for which they received no compensation. There were no written agreements between the partnership and its member partners as to salaries or compensation.

8. Paul Rotondi asserted that the management fee was money advanced to him and his brother for the time spent on behalf of family owned properties. They considered this compensation as an advance against their capital accounts.

9. Separate family partnerships were formed for each apartment property owned by the Rotondi family. Both Paul and Michael Rotondi, as partners, received a distributive share from each partnership. These partnerships, including the shopping center, were located within the geographical area of their residences. Each of the two apartment complexes located in Bayshore, Long Island had a superintendent and helper. The tenants in each complex would go to their respective rental office and leave their rental checks with the superintendent. Paul and Michael Rotondi would then pick up the checks.

10. Paul and Michael Rotondi were not involved with any properties outside the family properties.

11. The management fee shown on petitioner's return for 1971 was paid to Paul and Michael Rotondi by Sisto Rotondi and Sons Associates and by the partnerships mentioned in Finding of Fact "9", supra. These amounts were deposited in petitioner's checking account¹ and allegedly withdrawn at a later date and deposited in their personal accounts. Louis Rotondi and Richard Rotondi did not share in the management fees since they performed no service in respect thereto.

12. The amounts received by Paul & Michael Rotondi were not part of any written agreement or based on any percentages.

13. Federal "Schedule M-Reconciliation of Partner's Capital Accounts" showed the following capital balances for 1971 and 1972:

¹ It should be noted that in 1976, Paul and Michael Rotondi ceased depositing their checks in the partnership's checking account.

<u>1971</u>				
<u>Partner</u>	<u>Capital Account Beginning of Year</u>	<u>Ordinary Income</u>	<u>Withdrawals and Distributions</u>	<u>Capital Account at End of Year</u>
Paul Rotondi	(14,758.65)	8,328.40	5,625.00	(12,055.25)
Michael Rotondi	(14,758.65)	8,328.40	5,625.00	(12,055.25)
Louis Rotondi	(7,458.65)	8,328.40	3,125.00	(2,255.25)
Richard Rotondi	(4,451.77)	8,328.39	-	3,876.62
Totals	(41,427.72)	33,313.59 ²	14,375.00	(22,489.13)

<u>1972</u>				
Paul Rotondi	(12,055.25)	(1,321.38)	-	(13,376.63)
Michael Rotondi	(12,055.25)	(1,321.37)	-	(13,376.62)
Louis Rotondi	(2,255.25)	(1,321.37)	-	(3,576.62)
Richard Rotondi	3,876.62	(1,321.37)	-	2,555.25
Totals	(22,489.13)	(5,285.49) ³	-	(27,774.62)

CONCLUSIONS OF LAW

A. That petitioner, Sisto Rotondi and Sons Associates, failed to sustain its burden of proof imposed by section 689(e) of the Tax Law to show that amounts reported for miscellaneous income and management fees did not constitute partnership unincorporated business gross income. The contention made by Paul and Michael Rotondi that monies paid to them were erroneously deposited into petitioner's checking account is without merit since no books, records or other documentary evidence were submitted to show the actual withdrawal of these funds from the partnership during 1971 and 1972, or that the withdrawal and distributions, as shown in Schedule M of the Federal Partnership Return, were other than salary payments or withdrawal of capital invested. Furthermore, neither petitioner nor Paul or Michael Rotondi submitted evidence to show that the individual partners of Sisto Rotondi and Sons Associates reported an amount on their federal and state personal income tax returns which was other than that shown as ordinary income/loss in Federal Schedule M (see Finding of Fact

^{2 & 3} The amounts shown as ordinary income/loss represent the amounts which should have been reported on the partners' federal and New York State personal income tax returns.


"13"). Therefore, miscellaneous income and management fee income was properly reported as income subject to unincorporated business tax.

B. That both the petition and claim for refund of Sisto Rotondi and Sons Associates are denied.



DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983


PRESIDENT


COMMISSIONER

 
COMMISSIONER