

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Enno Van Dam, Sr. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Year 1976. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of March, 1984, he served the within notice of Decision by certified mail upon Enno Van Dam, Sr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Enno Van Dam, Sr.
RD #1
Goshen, NY 10924

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
9th day of March, 1984.

David Parchuck

James A. Hays
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 9, 1984

Enno Van Dam, Sr.
RD #1
Goshen, NY 10924

Dear Mr. Van Dam:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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 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
Neshan Alexanian
16 Grove St. P.O. Box E
Middletown, NY 10940
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ENNO VAN DAM, SR.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1976.	:	

Petitioner, Enno Van Dam, Sr., RD #1, Goshen, New York 10924, 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 1976 (File No. 31175).

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 May 12, 1983 at 2:45 P.M., with all briefs to be submitted by June 12, 1983. Petitioner appeared by Neshan Alexanian, CPA. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether certain capital gain income derived from two real estate transactions is subject to the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Enno Van Dam, Sr. (hereinafter petitioner), timely filed a joint New York State Income Tax Resident Return with his wife for the year 1976. In conjunction therewith, petitioner filed a 1976 New York State Unincorporated Business Tax Return whereon he reported net profit from business of \$10,627.00. Pursuant to petitioner's Federal Schedule C, said net profit was derived from

petitioner's activities engaged in with respect to the construction and sale of houses.

2. On January 24, 1980, the Audit Division issued a Statement of Unincorporated Business Tax Audit Changes to petitioner wherein the capital gains derived from two transactions reported on petitioner's Federal Schedule D were held subject to the unincorporated business tax. Such gains were described as follows:

Capital Gain on the Sale of Land	\$37,333.00
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Capital Gain on the Repossession of Property Previously Sold	\$10,299.00
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Accordingly, a Notice of Deficiency was issued against petitioner on April 4, 1980 asserting additional unincorporated business tax of \$2,550.99, plus interest of \$639.09 for a total due of \$3,190.08.

3. Prior to 1974 petitioner operated a dairy farm and was engaged in activities as a cattle dealer.

4. During 1976 petitioner became engaged in the real estate business. His procedure was to erect houses on property which he owned and then sell the houses.

5. In 1969 petitioner invested in a parcel of land known as the "Grimm Property". In 1973 he subdivided a twenty (20) acre portion of the property and sold it. During the year at issue petitioner "sold the balance of that farm", yielding the gain of \$37,333.00 at issue herein.

6. Petitioner contended that the "Grimm Property" was acquired for investment purposes only and that he never developed or improved it. He further contended that such property was never used for farming during the time he owned it or his real estate business and accordingly, the gain should not be held subject to the unincorporated business tax.

7. In 1970 petitioner sold property on which the purchaser was indebted on a mortgage. Upon default of the purchaser, the property was repossessed in 1976 yielding the gain of \$10,299.00 at issue herein. The record does not disclose the original purchase date of said property by petitioner.

8. Petitioner contended that the repossessed property was acquired for investment purposes and never used by him for farming or his real estate business. Accordingly, he claimed that the gain from said property should not be held subject to the unincorporated business tax.

9. Petitioner did not keep separate books and records for his real estate business. His checking account, as well as a ledger in which he recorded all receipts and disbursements, were used for both business and personal purposes.

CONCLUSIONS OF LAW

A. That section 705(a) of the Tax Law provides in pertinent part that:

"Unincorporated business gross income of an unincorporated business means 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". (emphasis supplied).

B. That section 689(e), as incorporated into section 722(a) of the Tax Law, provides that:

"In any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for the following issues, (none of which are applicable herein) as to which the burden of proof shall be upon the tax commission."

C. That petitioner has failed to sustain his burden of proof, required pursuant to sections 689(e) and 722(a) of the Tax Law, to show that the "Grimm Property" and the property repossessed were not employed in either his farming or real estate business. Accordingly, the capital gains derived from such

properties are includible in petitioner's unincorporated business gross income within the meaning and intent of section 705(a) of the Tax Law.

D. That the petition of Enno Van Dam, Sr. is denied and the Notice of Deficiency issued April 4, 1980 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

MAR 09 1984

STATE TAX COMMISSION

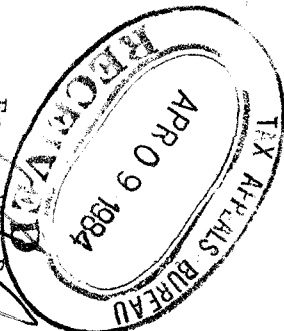
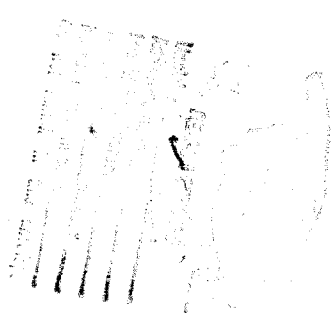
Rodwich Clem
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227



Enno Van Dam, Sr.
RD #1
Goshen, NY 140924

CLAIM CHECK
NO.

36130

☐ HOLD

DATE

3/12/84

1ST NOTICE

3/17/84

2ND NOTICE

RETURN

Detached from
PS Form 3849-A
Oct. 1980



CERTIFIED

P 470 315 297

MAIL



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

March 9, 1984

Enno Van Dam, Sr.
RD #1
Goshen, NY 10924

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Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Neshan Alexanian
16 Grove St. P.O. Box E
Middletown, NY 10940
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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Refund of Unincorporated Business Tax under	:	
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C. That petitioner has failed to sustain his burden of proof, required pursuant to sections 689(e) and 722(a) of the Tax Law, to show that the "Grimm Property" and the property repossessed were not employed in either his farming or real estate business. Accordingly, the capital gains derived from such

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DATED: Albany, New York

STATE TAX COMMISSION

MAR 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER