

POOR
QUALITY
THE FOLLOWING
DOCUMENT (S)
ARE
FADED & BLURRED

PHOTO MICROGRAPHICS INC.

BUREAU OF LAW

MEMORANDUM

Income Tax Determin. A-Z
Norris, Ralph T.
Trust

TO: State Tax Commission

FROM: Vincent P. Molineaux, Hearing Officer

SUBJECT: LINCOLN ROCHESTER TRUST COMPANY AS
TRUSTEE OF RALPH T. NORRIS TRUST

**Application for Revision or Refund
of Personal Income Taxes Under
Article 16 of the Tax Law and Unin-
corporated Business Taxes Under
Article 16-A of the Tax Law for the
Year 1951**

Ralph T. Norris died March 2, 1938. His will, probated that year, placed his residuary estate, consisting of all but some personal effects, and including nine farms, in a trust of which his wife, Leah Post Norris, was trustee and beneficiary. The farms were operated by the trustee, Leah Post Norris, for 13 years until her death on January 11, 1951.

Lincoln Rochester Trust Company, as successor trustee named in the will, discontinued operation of the farms. The stock and equipment were sold at auction in March, 1951. The farms were sold between June 5 and August 17 and the last closing was conducted in September, 1951. The business of farming was not carried on, but liquidated by the successor trustee. The only farming operations were incidental to the liquidation and no new operations were begun. Crops harvested were already on the land and nothing was planted. All sales were out of inventory and almost entirely at auction. The trustee, Lincoln Rochester Trust Company, filed a New York State fiduciary return for the year 1951 as of April 15, 1952 on which they disclosed the full amount of income but computed capital gain of \$52,949.67 on the sale of the cattle, tools and equipment, farms, and certain securities.

No unincorporated business tax return was filed.

On February 27, 1956, more than three years but less than five years after the due date of the return, the Income Tax Bureau issued Assessment No. AA-977149 in which capital gain is recognized only on the sale of the securities, and normal tax is computed on the gain from the sale of the farms, stock and equipment as business income.

The assessment also includes unincorporated business tax on the sale of the farms, stock and equipment.

It is claimed by the taxpayer, first, that the assessment, having been issued more than three years after the due date and the filing of the return, was invalid as not having been issued within the time provided by subdivision 1 of Section 573 of the Tax Law.

Under similar circumstances, in the Matter of Bernard Kirsh decided by the State Tax Commission February 8, 1965, it was held, based upon the Matter of Varneske v. State Tax Commission, 15 A D 2d 320, and Colonis v. Commissioner of Internal Revenue, 357 U.S. 20, that since the taxpayer did not conceal any information or omit specific receipts, but made full disclosure on his return, the assessment for personal income tax could only have been made within the statutory time period of three years. (Tax Law, Section 373)

However, since no return was filed for unincorporated business tax, no disclosure for that purpose was made. This, therefore, constituted an omission within the intent of Section 386-h of the Tax Law and the five-year provision in Section 373-1 of the Tax Law would apply. The unincorporated business tax portion of the assessment was therefore timely issued. See 1955 Atty. Gen. 233

It is the second claim of the taxpayer that since the words "or being liquidated" were added to the definition of unincorporated business tax in Section 386 of the Tax Law in 1932 and that their only relation to the farming business was liquidation, that the gain realized on the sale of the farms and equipment was not subject to unincorporated business tax under Section 386, supra.

It is apparent from the letter to the Governor by Counsel to the State Tax Commission dated March 4, 1932, in support of the enactment of the amendment to Section 386, that the intent of Section 3 of Chapter 703 of the Laws of 1932, which added the words "or being liquidated" to Sections 386 and 386-d of the Tax Law was to clear up the obvious doubt that income from a business "under liquidation" was subject to unincorporated business tax. There being such doubt it must be resolved in favor of the taxpayer. American Locker Co. v. City of New York, 308 N.Y. 266-269, and cases cited therein.

The Income Tax Bureau Manual for the year 1951 at page 222 preceding question 23-a, reads, in part, as follows:

"A trustee, receiver, assignee or other legal representative of a bankrupt or otherwise financially embarrassed unincorporated business may either continue such business or merely liquidate it. The test is whether the business is to be carried on by the legal representative in substantially the form in which it was conducted by the owner, in which event the legal representative will be held to be carrying on an

unincorporated business, or whether the function of the legal representative is merely to liquidate the business by selling the assets, distributing the proceeds and winding up the affairs of the business, in which event the legal representative would not be engaged in or carrying on an unincorporated business."

While it does not appear that the Morris trust was financially embarrassed the successor trustee did take over only to liquidate and would also not be engaged in carrying on an unincorporated business.

Since the successor trustee was not engaged in carrying on, but only in liquidating, the business, it was not, being before the enactment of Chapter 703 of the Laws of 1932, subject to unincorporated business tax.

Based upon the foregoing, it is my opinion that the assessment was incorrect and unauthorized in whole, and I recommend that the determination of the Tax Commission cancelling the assessment, be substantially in the form submitted herewith.

/s/

VINCENT P. MOLINEAUX

~~Deputy Director~~

VTM:ac
Enc.

February 13, 1968

3-29-68

**STATE OF NEW YORK
STATE TAX COMMISSION**

IN THE MATTER OF THE APPLICATION

OF

**LINCOLN ROCHESTER TRUST COMPANY AS
TRUSTEE OF RALPH T. MORRIS TRUST**

**FOR REVISION OR REFUND OF PERSONAL
INCOME TAXES UNDER ARTICLE 16 OF THE
TAX LAW AND UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 16-A OF THE TAX
LAW FOR THE YEAR 1951**

The taxpayer, Lincoln Rochester Trust Company, as trustee for Ralph T. Morris Trust, having filed an application for revision or refund of personal income taxes under Article 16 of the Tax Law and unincorporated business taxes under Article 16-A of the Tax Law for the year 1951 and a hearing having been held at the office of the State Tax Commission in Rochester, New York on the 5th day of December, 1967 before Vincent P. Molinoux, Hearing Officer of the Department of Taxation and Finance, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Ralph T. Morris died March 2, 1938, and that his will, probated that year, placed his residuary estate, consisting of all but some personal effects and including nine farms in a trust of which his wife, Leah Post Morris, was trustee and beneficiary and that Lincoln Rochester Trust Company was named successor trustee, and that the farms were operated by the trustee, Leah Post Morris, until her death on January 11, 1951.

(2) That Lincoln Rochester Trust Company, as successor trustee, discontinued operation of the farms and sold the stock and equipment at auction in March, 1951 and sold the farms between June 3 and August 17, 1951.

(3) That the taxpayer, Lincoln Rochester Trust Company, filed a New York State fiduciary return for the year 1951 as of April 15, 1952 on which they disclosed the full amount of income for 1951, but computed capital gain of \$52,949.67 on the sale of the cattle, tools and equipment, farms and certain securities and that no unincorporated business tax return was filed with the State Tax Commission.

(4) On February 27, 1956, more than three years but less than five years after the due date for filing of the return, the Income Tax Bureau issued Assessment No. AA-977249 on which capital gain was recognized only on the sale of the securities and normal tax was computed on the gain from the sale of the farms, stock and equipment.

(5) That the assessment also includes unincorporated business tax on the sale of the farms, stock and equipment.

(6) That the filing of the return constituted full disclosure for the purpose of personal income tax and that the portion of the assessment respecting personal income tax was not timely issued.

(7) That since no return was filed for unincorporated business tax, no disclosure for that purpose was made and the portion of the assessment respecting unincorporated business tax was issued within the five-year period allowed by Section 386 of the Tax Law.

(8) That the taxpayer, Lincoln Rochester Trust Company as successor trustee of the Ralph T. Morris Trust was not engaged in the business of conducting a farming enterprise during the year 1951, but was engaged only in the liquidation of that business, which consequently was not subject to unincorporated business tax under Section 386 of the Tax Law for that year.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DETERMINES:

(A) That the portion of Assessment No. AA-977249 which refers to personal income tax was not issued within the time provided by Section 386 of the Tax Law.

(B) That the portion of Assessment No. AA-977249 which refers to unincorporated business tax was not authorized by Section 386 of the Tax Law as in effect for the year 1951.

(C) That accordingly Assessment No. AA-977249 is hereby cancelled in its entirety.

DATED: Albany, New York this 11th day of April, 1955.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

/s/

A. BRUCE MANLEY

/s/

SAMUEL E. LEPLER