

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Sam & Harriett Mink	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Years	:	
1973 - 1975.	:	

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 Sam & Harriett Mink, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sam & Harriett Mink
12960 Hartsook St.
Sherman Oaks, CA 91403

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. Drucelle

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sam & Harriett Mink :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1973 - 1975. :

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 Burton S. Schreiber the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Burton S. Schreiber
320 Executive Office Bldg., 36 Main St. W.
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
10th day of November, 1983.

Maude L. Brunelle

Connie P. Hagelund

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

November 10, 1983

Sam & Harriett Mink
12960 Hartsook St.
Sherman Oaks, CA 91403

Dear Mr. & Mrs. Mink:

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 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
Burton S. Schreiber
320 Executive Office Bldg., 36 Main St. W.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SAM MINK and HARRIETT MINK	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1973, 1974 and	:	
1975.	:	

Petitioners, Sam Mink and Harriett Mink, 12960 Hartsook Street, Sherman Oaks, California 91403, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973, 1974 and 1975 (File No. 19331).

A formal hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on August 19, 1982 at 10:45 A.M., with a supplemental stipulation of facts submitted March 3, 1983. Petitioners appeared by Burton S. Schreiber, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether the co-ownership of the Downtowner Motel by petitioner Sam Mink and others constituted a partnership or a mere co-ownership of property.

II. Whether it is proper for petitioners to revise petitioner Sam Mink's distributive share of partnership income, if the relationship is that of a partnership.

FINDINGS OF FACT

1. Petitioners herein, Sam Mink and Harriett Mink, filed a New York State Nonresident Income Tax Return for each of the years 1973, 1974 and 1975 wherein they included income or loss from the Downtowner Motel Account in the computation of their New York total income. Said amounts were represented as partnership income or loss on their returns.

2. On December 10, 1976, the Audit Division issued a Statement of Audit Changes to petitioners for the years 1973, 1974 and 1975 wherein it held that petitioner Sam Mink is bound by the partnership election of the Downtowner Motel Account ("Downtowner Motel") to use the accrual method of accounting. The Audit Division then recomputed petitioners' taxable income for the years in issue using petitioner Sam Mink's distributive share of income or loss as reflected on the partnership returns of the Downtowner Motel. The Audit Division included the following amounts from the Downtowner Motel in the recomputation of petitioners' taxable income:

<u>YEAR</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
1973	Ordinary income (loss)	(\$24,664.79)
1974	Ordinary income (loss)	(1,137.06)
1975	Ordinary income (loss)	35,993.29
1975	Sale or exchange from other than a capital asset	15,862.00

A timely Notice of Deficiency reflecting the above adjustments was issued against petitioners for the years 1974 and 1975 asserting tax of \$6,864.54, plus interest of \$597.45, for a total of \$7,461.99. The recomputation for 1973 resulted in a \$34.00 overpayment of tax that, as indicated on the Notice, will be applied against the asserted deficiency.

3. Petitioner Sam Mink acquired an interest in the property known as the Downtowner Motel on July 14, 1959 when he and others, as tenants-in-common,

purchased said property from an apparently unrelated corporation. On June 6, 1961, petitioner, along with the other co-owners, transferred the property to Main and Courtland, Inc. ("Main and Courtland"), of which they were the stockholders. Main and Courtland leased the property to an unrelated party which actually operated the Downtowner Motel.

4. On August 14, 1967, as part of a plan of liquidation, Main and Courtland deeded the Downtowner Motel back to its shareholders as tenants-in-common. Each shareholder received an interest in the property in proportion to their ownership in the corporation. On the same date, Main and Courtland transferred the lease of the Downtowner Motel to its shareholders.

5. On August 24, 1967, petitioner Sam Mink signed an agreement with the other tenants-in-common in order "to establish a method of managing their interest" in the Downtowner Motel. Said agreement designated Raye-Namrof, Inc. as the managing agent of the Downtowner Motel. The agent, for a fee of \$3,000.00 per year, was to collect the rents, make mortgage and other payments required by the Downtowner Motel lease, make a periodic accounting of its activity and to remit the net proceeds to the co-owners. The agreement could be cancelled by any of the individual tenants-in-common with written notice to the managing agent and the other co-owners. The managing agent's fee was charged against each of the tenants-in-common in accordance with their respective interest in the Downtowner Motel. Said agreement was in effect during the years in issue.

6. New York State partnership returns were filed for the Downtowner Motel for the years 1973, 1974 and 1975 on the accrual basis. The 1973 and 1974 returns included uncollected lease rentals in income and unpaid real estate tax as an expense. The 1975 New York State partnership return filed by the Downtowner Motel reversed the accrued rental and real estate tax accounts, said reversing

entries explained in a schedule attached to the 1975 partnership return as follows:

"As of May 27, 1975, the partnership sold its sole asset (Downtown Motel) and was relieved of the obligation for accrued property taxes and forgave the rent accrued at 12/31/74. The net of these two items is restored to income."

Petitioners maintain that partnership returns were filed because it was a convenient way to account for the co-owners' separate items of income and deduction.

7. Petitioners filed their New York State income tax returns for the years in issue on the cash basis. Petitioner Sam Mink computed his income or loss from the Downtown Motel on the cash basis and therefore reported an amount each year different from that reported as his distributive share on the partnership returns. Petitioners contend that their method was proper as the co-owners never intended to create a partnership.

8. Petitioners and the Audit Division stipulated to the following facts:

a. Business expenses for travel, legal, accounting, etc. were incurred and are deductible as attributable to New York sources of income, in the following amounts:

For 1973	\$1,311.80
For 1974	\$ 825.00
For 1975	\$4,242.20

b. Under the lease for the Downtown Motel, the tenant agreed to pay all real property taxes.

c. If the Downtown Motel is deemed to be a partnership, reporting under the accrual method accounting whereby uncollected rent is accrued as income and unpaid real property tax is accrued as an expense deduction, then the accrual of rental income properly includes an additional amount attributable to the tenant's obligation to pay the real property taxes.

d. Such additional income unreported by the Downtown Motel attributable to the tenant's obligation to pay the real property taxes amounts to \$209,271.96 for 1973 and \$19,276.30 for 1974. The corresponding amounts for petitioner Sam Mink's 17 percent share in

the Downtowner Motel amounts to \$35,576.23 for 1973 and \$3,276.97 for 1974.

e. Corresponding to the reversal of uncollected rental income and unpaid real property taxes upon sale of the Downtowner Motel in 1975, the uncollected rental income should properly include an amount attributable to the accrual as income, of the tenant's obligation to pay the realty taxes for 1973 and 1974, in the aggregate of \$228,548.26, of which petitioner Sam Mink's share amounts to \$38,853.20.

f. Stipulated expenses attributable to New York sources of income (original Stipulation "a") constitute deductions in arriving at Adjusted Gross Income, and are in lieu of New York amounts shown on IT-38 (Statement of Audit Changes) as:

1973 Adjustment	\$3,436.00
1974 Adjustment	\$3,876.00
1975 Business	-0-

Accordingly it is stipulated that IT-38 is to be revised in this respect to incorporate the following New York deductions (with the Federal amounts remaining unchanged):

	<u>Federal</u>	<u>New York</u>
1973 Adjustment	\$7,368.00	\$1,311.80
1974 Adjustment	\$7,400.00	\$ 825.00
1975 Business	\$6,238.00	\$4,242.20

9. Stipulated items lettered c,d, and e, supra, were entered into between the parties with the understanding that they relate only to the items and amounts to be used in the recomputation of petitioner's New York State taxable income in the event it is determined that (1) the Downtowner Motel is a partnership and that (2) petitioner Sam Mink may correct his partnership distribution. Further, the Audit Division and petitioners agreed, after applying said stipulations of fact, that petitioner Sam Mink's distributive share of partnership ordinary income or (loss) from the Downtowner Motel would be \$10,904.93, \$2,132.86 and (\$18,542.49) for 1973, 1974 and 1975 respectively.

10. Petitioners submitted a copy of their 1974 federal itemized deduction schedule which showed total federal itemized deductions of \$5,321.00. Petitioners

incorrectly listed their total federal itemized deductions on their 1974 New York State return as \$5,172.00.

11. Neither the petitioners nor any of the co-owners testified at the hearing.

CONCLUSIONS OF LAW

A. That whether a partnership exists is a question of fact (Commissioner v. Tower, 327 U.S. 280) and the intent of the parties to an arrangement, as evidenced by their actions, is a key factor in determining whether a particular arrangement constitutes a partnership for tax purposes (Commissioner v. Culbertson, 337 U.S. 733).

B. That the record herein supports a finding that petitioner Sam Mink and the other co-owners intended to and did in fact operate the Downtowner Motel as a partnership. The filing of partnership returns, while not conclusive, points to existence of a partnership as does the representation of the Downtowner Motel as "partnership property" on a schedule attached to the 1975 partnership return, as well as on schedules attached to petitioners' 1974 and 1975 New York State income tax returns. Further, the transfer of the property, after its purchase in 1959, to their corporation and its subsequent transfer back to the co-owners indicates that petitioner Sam Mink and the other co-owners intended to be partners rather than mere passive investors in jointly-owned property (Varner, 32 TCM 97; cf. Coffin v. United States, 120 F. Supp. 9 [tenants-in-common held not to be a partnership]). Moreover, the government may, as a general rule, bind a taxpayer to the form in which he has cast a transaction (see In re Steen, 509 F.2d 1398, 1402 n.4). Given the fact that petitioners offered no testimony from any of the co-owners or their representatives concerning their intent with respect to the co-ownership of the property, an exception to the general rule is not warranted.

C. That the Downtowner Motel elected to file its partnership returns for the years in issue using the accrual method of accounting and such election is binding upon petitioner Sam Mink [Treasury Reg. §1.703-1(b)].

D. That it is proper in the instant case for petitioners to correct Mr. Mink's distributive share of partnership income received from the Downtowner Motel (See McCauley v. Tax Comm., 67 A.D.2d 51). There is no dispute between the Audit Division and petitioners that petitioner Sam Mink's distributive share of ordinary income as reported on the partnership returns of the Downtowner Motel for the years in issue was incorrect. Further, the parties have agreed to the correct amount. Accordingly, petitioners have established that said partnership distribution was incorrect.

E. That the Audit Division is directed to recompute the Notice of Deficiency to allow the business deductions stipulated to in Finding of Fact "8f", supra and to use the partnership ordinary income agreed to in Finding of Fact "9", supra in lieu of the amounts listed as ordinary income in Finding of Fact "2", supra. In addition, the Audit Division is directed to use the amount of \$5,321.00 as federal itemized deductions in computing petitioners' 1974 New York itemized deductions.

F. That the petition of Sam Mink and Harriett Mink is granted to the extent indicated in Conclusion of Law "E", supra; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 10 1983

STATE TAX COMMISSION

Baldwin
PRESIDENT
Francis R. Koeng
COMMISSIONER
Mark J. [illegible]
COMMISSIONER