L 9 (2-67)

Unincorp. Bus. Tax 1967
Determinations A-Z
Clark, Frank J. and James P.

BUREAU OF LAW
MEMORANDUM

TO: Commissioners Murphy, Macduff and Conlon

FROM: Alfred Rubinstein, Hearing Officer

SUBJECT: Applications of James P. and Frank J. Clark for Revision or Refund of Unincorporated Business Taxes Under Article 16-A of the Tax Law for the Years 1955 and 1956.

Petition of James P. and Frank J. Clark for Redetermination of a Deficiency or for Refund of Unincorporated Business Taxes Under Article 23 of the Tax Law for the Years 1960 and 1961.

A hearing on the above entitled matters was held before me on March 15, 1967 at 80 Centre Street, New York, New York. Appearances were as noted on the transcript.

Taxpayers filed partnership returns for the years involved, reporting no unincorporated business taxes. The Income Tax Bureau assessed $1,073.94 for 1955 (No. B-116801) and $[illegible] for 1956 (No. B-[illegible]), and asserted a deficiency of $1,[illegible] for 1960 and 1961 (File No. P-[illegible]), on findings that the entire net income of the partnership in such years resulted from the conduct of business.

The issue was whether the purchase, sale, holding and management of real property, real estate brokerage, building construction, insurance brokerage and related activities of the taxpayers constituted carrying on of a business. At the hearing the taxpayers conceded that, except for the income derived from the holdings of real property, their activities were subject to the tax, leaving a narrower issue of whether their real estate activities, aside from brokerage, constituted related, connected and incidental business activities.

Despite the fact that the taxpayers' testimony was to a great extent the result of leading questions posed by the taxpayers' representative, the facts presented are sufficiently clear in showing that the real estate activities were business activities for the reasons set forth below.

In 1957 the taxpayers formed a partnership, by oral agreement, each contributing an equal amount of capital. The witness was uncertain as to the amounts contributed, stating, "We put in a couple of thousand dollars apiece, twenty-five hundred or five thousand

apiece." The terms of the agreement, as was practically all of the direct testimony, was given by the representative who evoked positive or negative or similarly abbreviated responses from the witness.

The partners had previously been individually engaged in the real estate and insurance brokerage businesses, and the partnership activities consisted of purchases and sales of vacant land and buildings, erecting buildings, management of properties for others and themselves, and real estate and insurance brokerage. The real property, held jointly in the names of James P. and Frank J. Clark, was treated as partnership property. Although it was stated that all rents were deposited in a separate bank account, such receipts were recorded in a common cash book together with all other partnership receipts, and withdrawals were made from such account for general partnership expenses. All receipts, disbursements, income and expenses relating to the properties were reported on the partnership returns, together with other similar partnership items, and the partners' shares from these activities were reported by them on their individual returns as income and gain from the partnership. No books or records were produced to show any separation of records with regard to the claim that the real property activities of the partners were unconnected with their other business activities, and it was conceded that no allocation or apportionment was ever made with respect to any expenses or disbursements.

The witness testified that properties were purchased and sold in the course of the partnership real estate brokerage business; that the partnership listed for sale as broker, its own properties, and purchased for its own account properties listed for sale by owners (Transcript pages 31 and 32).

Section 386 of Article 16-A and Section 703 of Article 23 of the Tax Law both provide that holding, leasing or managing of real property shall not be deemed conducting a business "solely by reason of" such activities. The provision was originally enacted as an amendment to Section 386 by L. 1935, c. 411, for the purpose as stated in the Departmental memorandum, to relieve real property of the additional burden of the tax, during the depression years, when so many properties were being held by trustees for the benefit of mortgagees. The relief to be accorded was intended to accrue to the benefit of owners, lessees or fiduciaries whose only activities consisted of holding, leasing or managing real property (see letter of Commissioner Graves to Governor Lehman, dated March 26, 1935, annexed). Where a taxpayer is not "solely" engaged in the holding, leasing or management of real property, and is otherwise engaged in a business of broader aspect, he will be deemed to be conducting an unincorporated business. Eisenberg v. Chapman, 273 App. Div. 386;

Matter of [illegible]'s Estate, 8 App. Div. 2d [illegible]. Moreover, under the same sections of the Tax Law, dealers in property are not granted the exemption accorded others who purchase and sell property for their own accounts, solely as investors.

Accordingly, I am of the opinion that the taxpayers' activities in buying, selling, holding, leasing and management of real property were related and incidental to, connected with and an integral part of their building construction and real estate and insurance brokerage activities; that the taxpayers were dealers in real property, and that all of their activities constituted the conduct of an unincorporated business within the meaning of Section 386 and Section 703 of the Tax Law. The assessments and audit changes should be sustained.

The decision and determination of the Tax Commission should be in the forms submitted herewith.

/s/ ALFRED RUBINSTEIN
HEARING OFFICER

AR:lb
Enc.

June 20, 1967

7-6-67

March 22, 1938

Hon. Herbert H. Lehman
Governor of New York
Executive Chamber
Albany, N. Y.

In re: Senate bill, Intro. No. 736, Pr. No. 1923

My dear Governor:-

The above bill is in your hands for action. It amends section 386 of the Tax Law, in relation to the definition of unincorporated business for purposes of the tax on net incomes of unincorporated businesses imposed by Article 16-A of the Tax Law.

Real estate has long been the cause of anxiety or solicitude on the part of the State, because of the belief that it was already bearing more than its just proportion of the tax burden. In 1935, at the time of the enactment of the tax on net incomes of unincorporated businesses, it was not realized that such tax would be applicable to the holding, leasing or managing of real property. It has, however, been found in the administration of the tax that, because of the definition of unincorporated business, the holding or leasing of real property was engaging in an unincorporated business so as to be subject to tax. The imposition of a further tax of four per cent on net incomes upon a group of taxpayers already overburdened is inequitable. For example, it has been found that an individual owning a number of two family houses, who devotes his time and energy to their upkeep and management, is engaged in an unincorporated business, and subject to tax. It has also been found that trustees operating real property for the benefit of mortgagees are subject to tax, although in all probability the mortgagees will never recover the amount of the mortgage obligation. The amendment is designed to relieve an owner, lessee or fiduciary, whose only activity is the holding, leasing or managing of real property, from the burden of tax.

This bill was introduced at the request of the Department of Taxation and Finance. In my opinion, it should receive executive approval.

Very truly yours,

MARK GRAVES
Commissioner of
Taxation and Finance

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION	:
OF	:
JAMES P. CLARK AND FRANK J. CLARK	:
FOR REDETERMINATION OF A DEFICIENCY OR FOR REFUND OF UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 23 OF THE TAX LAW FOR THE YEARS 1960 AND 1961	:

James P. Clark and Frank J. Clark having filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1960 and 1961 (File No. [illegible]), and a hearing having been held before Alfred Rubinstein, Hearing Officer of the Department of Taxation and Finance, on March 15, 1967, at the office of the State Tax Commission, 80 Centre Street, New York, New York, at which hearing Frank J. Clark and taxpayers' representative, Sidney [illegible], Esq., appeared, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers, a partnership doing business under the firm name and style of James P. and Frank J. Clark, filed partnership and unincorporated business tax returns for 1960 and 1961, reporting partnership income and gains of $[illegible] for 1960 and partnership income and gains of $[illegible] for 1961; that taxpayers reported no unincorporated business tax for 1960 and 1961; that the Income Tax Bureau imposed unincorporated business taxes against the taxpayers in the amount of $[illegible] for 1960 and 1961, by notice of deficiency and statement of audit changes (File No. [illegible]) based on findings that the entire partnership income of the taxpayers for such years was derived from carrying on an unincorporated business; that taxpayers filed a

petition for redetermination of deficiency or for refund for the years 1960 and 1961.

(2) That the taxpayers have been partners since 1957 engaged in the activities of real estate brokerage, insurance brokerage, purchases and sales of vacant land and buildings, building construction, management of real properties owned by themselves and owned by others; that the real properties purchased by the taxpayers, as partners, were held by them jointly; that the taxpayers' real properties were purchased and sold in the course of the taxpayers' real estate brokerage activities, having been listed for sale by the taxpayers, as broker, and having been purchased for their own account from listings supplied to them, as broker, by customers; that the taxpayers maintained one set of records for all of their business activities and recorded therein, in a single set of accounts, the entire income, gains, expenses and disbursements attributable to all of their partnership activities without distinction, separation or allocation and reported the income and gain of all such activities on their partnership tax returns for 1960 and 1961; that the taxpayers reported their distributive shares of all such activities on their individual tax returns for 1960 and 1961 as income and gain from the partnership.

(3) That the taxpayers concede that the unincorporated business taxes imposed on them based on their partnership activities were properly imposed, except to the extent that such imposition includes taxes based on income derived from holdings of real property.

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

DECIDES:

(A) That during 1960 and 1961 the taxpayers, as partners,

engaged in the activities of buying, selling, managing and holding real property; that said real property activities of the taxpayers were related and incidental to, connected with and an integral part of their building construction, real estate brokerage and insurance brokerage activities; that said real property activities of the taxpayers constituted the conduct of business as dealers in real property; that none of the income and gains derived by the taxpayers from their partnership activities was so derived solely by reason of the holding, leasing or management of real property; that all of the income and gains the taxpayers derived from their partnership activities was so derived from a trade, business or occupation conducted by them within the meaning of section 703 of the Tax Law.

(B) That, accordingly, the notice of deficiency imposing unincorporated business taxes on the taxpayers in the sum of $1,370.10 for 1960 and 1961 is correct; that the amount set forth therein is due and owing together with interest, if any, and other statutory charges; that said notice of deficiency does not include any tax of other charges which could not have been lawfully demanded, and that taxpayers' petition for redetermination or for refund with respect thereto be and the same are hereby denied.

Dated: Albany, New York this 27th day of September, 1967.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ JAMES R. MACDUFF
COMMISSIONER

/s/ WALTER MACLYN CONLON
COMMISSIONER

[illegible]

(d) [illegible]