

Unincorporated Bus. Tax Determin.
**BUREAU OF LAW
MEMORANDUM**

*A-2**Mac Lean-Grove Co., Inc.*

TO: Commissioners Murphy, Macduff and Conlon
FROM: Solomon Sies, Hearing Officer
SUBJECT: Joint Venture of Mac Lean-Grove Co., Inc.
and George M. Brewster & Son, Inc.

Application for revision or refund of
unincorporated business taxes under
Article 16-A of the Tax Law for the
fiscal year ending December 31, 1959. *x-reg*

A hearing with reference to the above matter was held before me at 86 Centre Street, New York, N. Y., on January 20, 1966. The appearances and evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The primary issue involved herein is whether the joint venture consisting of two foreign corporations engaged in the construction of a tunnel in Delaware County, State of New York for the New York City Board of Water Supply is exempt from unincorporated business taxes on the ground that this constituted an isolated transaction. A corollary issue is whether the definition of an "unincorporated business" contained in Section 386 of the Tax Law includes a joint venture consisting of two corporations.

George M. Brewster & Son, Inc. is a foreign corporation organized under the laws of the State of New Jersey, maintaining its principal place of business at Bogota, New Jersey. Mac Lean-Grove Co., Inc. is a foreign corporation organized under the laws of Delaware. Both corporations are authorized to do business in this State. On September 24, 1956 the two corporations entered into a pre-bidding agreement relative to the construction of a portion of the West Delaware Water Tunnel of the Delaware Water System in the Town of Colchester, Delaware County, New York for the New York City Board of Water Supply. As a result of the submission of a bid, the contract was awarded by the City of New York Board of Water Supply to the joint venture of Mac Lean-Grove Co., Inc. and George M. Brewster & Son, Inc.

On October 16, 1956 the two corporations entered into a joint venture agreement for the construction of the tunnel. The profits and losses were to be divided sixty percent to Mac Lean-Grove Co., Inc. and forty percent to George M. Brewster & Son, Inc. The venture reported its taxable income on a finished contract basis. Under the terms of the contract the construction was to be completed within five years. However, the job was completed on or about August 28, 1959. The joint venture maintained a field office at the

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site of the construction in this State, hired employees and supervised the operations of the construction of the tunnel.

The joint venture filed a partnership return for the fiscal period beginning June 1, 1959 and ending December 31, 1959 but did not file any unincorporated business tax form claiming that it was exempt therefrom on the ground that this was an isolated transaction. The Income Tax Bureau issued an assessment holding the joint venture subject to unincorporated business tax, pro-rated the statutory exemption and allowed the joint venturers additional exemptions pursuant to Section 386-f of the Tax Law and assessed the joint venture unincorporated business tax in the sum of \$48,974.94. The taxpayers paid the assessment and now seek a refund.

The taxpayers contend that this joint venture did not constitute a "partnership"; that during the year in issue a corporation could not enter into any partnership agreement (Frieda Popkov Corp. v. Stack, 103 N.Y.S. 2d 507); that this was an isolated transaction not subject to unincorporated business tax in accordance with the provisions of Article 7 Unincorporated Business Tax Regulations; that the joint venturers are being taxed twice, once for franchise taxes and again for unincorporated business tax purposes on the same income.

Subdivision 11, Section 350 of the Tax Law defines a "partnership" to include a syndicate, group, pool, joint venture or any other unincorporated organization, through or by means of which any business, financial operation or venture is carried on or being liquidated and that the members thereof shall be deemed "partners". Section 386, Article 16-A of the Tax Law, provides, in part, that for the purposes of this Article, the definitions contained in Section 350 shall be applicable.

(5/15/59) Income Tax Bureau Manual, Business Tax, Article 7, Page 1 states:

"A joint enterprise or venture may be made up entirely of corporations, or corporations and banks, or corporations and/or partnership and individuals, etc. If the activities of such an organization constitute the carrying on of an unincorporated business wholly or partly within New York State, such entity is subject to Business Tax, regardless of the identity of the various participants."

TO: Commissioners Murphy, Macduff and Conlon

RE: Joint Venture of MacLean-Grove Co., Inc.
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Article 7, Business Tax Regulations, Q.46 states, in effect, that a joint venture is engaged in an unincorporated business when it is conducting or engaged in a business of the kind and character and in such manner that, if it were engaged in and conducted by an individual, such individual would be said to be conducting or engaged in an unincorporated business.

The case of Frieda Popkey Corp. v. Stash, 163 N.Y.S. 2d 507, was brought in Supreme Court, New York County, Special Term, to impress a trust on certain realty purchased by defendant on ground that defendant had violated an alleged partnership or joint venture agreement. The Supreme Court, Special Term, Wassevegel, Official Referee held that the evidence did not establish a joint venture; that the general consensus of legal authority and opinion in this State prohibits a corporation from entering into a partnership agreement.

Permitting a corporation to promote other business enterprises and to engage in a joint venture is consistent with New York case law Red Robin Stores, Inc. v. Rose, 274 App. Div. 442.

It has been held that though a corporation has no implied power to form a partnership with an individual, nevertheless if the partnership contract was fully executed, the individual cannot set up legal invalidity of such contract. Tatum v. Acadian Production Corporation of Louisiana, 35 F. Supp. 40.

Section 202(a)(15) of the Business Corporation Law (Law of 1961, Chapter 855) provides that a corporation shall have power "to be a promoter, partner, member, associate or manager of other business enterprises or ventures, or to the extent permitted in any other jurisdiction to be an incorporator of other corporations of any type or kind."

I am of the opinion that the joint venture of MacLean-Grove Co., Inc. and George M. Brewster & Son, Inc. constituted a partnership, for tax purposes, as defined in subdivision 11, Section 350, Article 16 of the Tax Law; that the activities of the joint venture conducted with continuity and regularity wholly within the State of New York for approximately four years constituted the carrying on of an unincorporated business within this State subject to unincorporated business tax in accordance with the provisions of Section 366, Article 16-A of the Tax Law.

TO: Commissioners Murphy, Macduff & Conlon

Re: Joint Venture of MacLean-Grove Co., Inc.
and George M. Brewster & Son, Inc.

For the reasons stated above, I recommend that the
determination of the Tax Commission in this matter be substantially
in the form submitted herewith.

2-17-67

OCT 14 1966

SOLOMON SIES

Hearing Officer

/s/ MARTIN SCHAPIRO

Approved

/s/ SAUL HECKELMAN

Approved

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STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application of

JOINT VENTURE OF MAC LEAN-GROVE CO., INC.
and GEORGE M. BREWSTER & SON, INC.

FOR REVISION OR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 16-A OF THE
TAX LAW FOR THE FISCAL YEAR BEGINNING
JUNE 1, 1959 AND ENDING DECEMBER 31, 1959.

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The taxpayers having filed an application for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the fiscal year beginning June 1, 1959 and ending December 31, 1959 and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, N.Y., on the 20th day of January, 1966, before Solomon Allee, Hearing Officer of the Department of Taxation and Finance, at which hearing Wilbert W. Blauvelt, vice-president of George M. Brewster & Son, Inc. appeared and testified, and the taxpayers having been represented by Sidney Meyers, Esq., and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That at all of the times hereinafter mentioned, George M. Brewster & Son, Inc. was and still is a foreign corporation organized under the laws of the State of New Jersey maintaining its principal place of business at Bogota, New Jersey; that at all of the times hereinafter mentioned, Mac Lean-Grove, Inc. was and still is a foreign corporation organized under the laws of the State of Delaware, maintaining an office at 400 Madison Avenue, New York City; that both of the aforementioned corporations were and still are duly authorized to do business in this State; that on September 24, 1956, the two corporations entered into a pre-bidding agreement for the

construction of a portion of the West Delaware Water Tunnel of the Delaware Water System, in the town of Colchester, Delaware County, State of New York, for the City of New York Board of Water Supply, that as a result of the submission of a bid, a contract for the construction of the aforementioned tunnel (Contract #453) was awarded by the City of New York Board of Water Supply to the Joint Venture of Mac Lean-Grove Co., Inc. and George M. Brewster & Son, Inc.; that on October 16, 1962, the two corporations aforementioned entered into a joint venture agreement for the construction of the West Delaware Water Tunnel for the City of New York Board of Water Supply; that the profits and losses were to be divided 60% to Mac Lean-Grove Co., Inc. and 40% to George M. Brewster & Son, Inc.; that the joint venture agreement provided that upon completion of the construction job, whatever machinery or equipment might be on the premises was to be sold and divided between the joint venturers on a sixty-forty percent basis to Mac Lean-Grove Co., Inc. and George M. Brewster & Son, Inc., respectively.

(2) That pursuant to the contract of the joint venture with the New York City Board of Water Supply, the joint venture was required to erect a field office for the engineers of the New York City Board of Water Supply, and a field office for the joint venture, at the site of the construction; that the joint venture was required to purchase and utilize special machinery for the construction of the tunnel; that pursuant to the terms of the contract, the construction was to be completed within five years; that, however, the job was completed on or about August 25, 1959; that the joint venture hired employees from the adjacent area of the site of the construction to perform the necessary work; that the construction work of the joint venture was conducted with continuity and regularity wholly within the State of New York for a period of approximately four years.

(3) That the joint venture elected to report its income, for income tax purposes, on a finished contract basis and reported its entire income from the aforementioned venture for the fiscal year

beginning June 1, 1959 and ending December 31, 1959; that both MacLean-Grove Co., Inc. and George H. Brewster & Son, Inc. during the year 1959 and prior thereto carried on business both within and without the State of New York; that on the partnership return of the joint venture for the fiscal year begun June 1, 1959 and ending December 31, 1959, net income was reported in the sum of \$2,433,538.09 and net capital gain in the sum of \$113,755.87; that the joint venture did not file any unincorporated business tax return upon the ground that the joint venturers were only subject to New York State franchise taxes; that on April 27, 1962, the Department of Taxation & Finance made an assessment of unincorporated business taxes against the joint venture for the year 1959 (Assessment No. 28 007821) and pro rated the statutory exemption and allowed the joint venture additional exemptions pursuant to Section 386-f of the Tax Law in the sum of \$1,362,065.89 and assessed the joint venture unincorporated business taxes in the sum of \$48,974.94.

Based upon the foregoing findings and all of the evidence presented therein,

The State Tax Commission hereby

DETERMINES:

(A) That in accordance with the provisions of subdivision 11, Section 350 of the Tax Law, the word "partnership" is defined so as to include a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, financial operation or venture is carried on or being liquidated; that under the provisions of Section 386 of the Tax Law, the definition of the word "partnership" includes the definition of said word contained in subdivision 11, Section 350 of the Tax Law; that the activity of the joint venture during the tax period in question was conducted with regularity and continuity wholly within the State of New York and constituted the carrying on of an unincorporated business within this State subject to unincorporated

business tax in accordance with the provisions of sections 386 and 386-f, Article 16-A of the Tax Law and Article 7 of the Unincorporated Business Tax Regulations.

(B) That, accordingly, the assessment (Assessment #AB 007822) for the fiscal year beginning June 1, 1959 and ending April 27, 1962 is correct; that said assessment does not include any tax or other charge which could not have been lawfully demanded and that the application for revision or refund filed with respect thereto be and the same is hereby denied.

Dated: Albany, New York, on the 23rd day of March , 1963.

FOR THE COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

JAMES R. MACDUFF

Commissioner

/s/

WALTER MACLYN CONLON

Commissioner

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