Borruso, Anthony
UBT
1970

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

ANTHONY BORRUSO

For a Redetermination of a Deficiency or a Refund of Unincorporated Business Taxes under Article(s) 23 of the Tax Law for the (Year(s) 1964

AFFIDAVIT OF MAILING OF NOTICE OF DECISION BY (CERTIFIED) MAIL

State of New York
County of Albany

LYNN PUORTO, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of January, 19 70, she served the within Notice of Decision (~~or Determination~~) by (certified) mail upon Anthony Borruso (~~representative of~~) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Mr. Anthony Burruso, 37 Pine Terrace Staten Island, New York 13012

and by depositing same enclosed in a postpaid properly addressed wrapper in a (~~post office~~ official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (~~representative of~~) 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
6th day of January, 19 70

Edward Rock

Lynn Puorto

L 9 (4-69)

BUREAU OF LAW

MEMORANDUM

Charles Dorian, etc.
4BT Deter

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: Joint Venture - Jean Charles, Ignio Biorio, Marie Hummel, Ben Battel, Larry Winters and Sidney Mailin--TAX 1955
Assessment No. FA [illegible]

Joint Venture - Jean Charles, Ignio Biorio, Marie Hummel and Ben Battel--TAX 1956
Assessment No. FA [illegible]

Article 16-A

Hearings were held in the above matter at the New York City office on November 9, 1966 and January 27, 1969.

The issues involved herein are: (1) timeliness in filing the applications for revision or refund; (2) timeliness in filing the demands for a hearing; (3) whether the assessments are valid as against the taxpayers Ignio Biorio and Ben Battel who claim that (a) they never received the assessments and (b) they never authorized Martin Duff, the attorney who participated in the field audit investigation and filed TT 113's on behalf of the taxpayers, to represent them; (4) whether the taxpayers Ignio Biorio and Ben Battel were members of the joint ventures; and (5) whether the joint ventures were subject to unincorporated business taxes.

On his resident State return for 1955, the taxpayer Ignio Biorio reported in addition to salary compensation of $[illegible], income from contest winnings in the amount of $[illegible]. He attached a schedule claiming a spreadback of said income for the years 1951 through 1955 and reported $7,[illegible] attributable to 1955. He deducted $[illegible] (legal fees paid to Martin Duff, Esq.). The Income Tax Bureau disallowed the spreadback of income. In addition, an investigation was initiated with respect to the prize winnings.

As a result of a field audit it was disclosed that Jean Charles received in 1955, $152,500.00, second prize in "The American Puzzle Contest" awarded by Winters Press Inc. She had entered this contest in 1951. This was a rebus type puzzle and consisted of a series of initial puzzles (relatively simple) followed by a series

of progressively difficult "tie breaker" puzzles until the winners were finally determined in 1955. As these puzzles had a numerical score value, it was possible to have more than one solution. The six members of the group, Jean Charles, Ignio Bierie, Earle Hummel, Ken Battel, Larry Winters and Sidney Ehlich, worked together to obtain as many solutions as possible within a specified time or dead line. The best solution was then selected and submitted by the nominee (the entrant) for the group. The next best solutions were then offered for sale to selected individuals in exchange for a portion of prize awards received by them. The individuals named in the 1955 assessment all participated in the contest by furnishing solutions to Jean Charles. Jean Charles or one or more members of the group received $36,000.00 from H. Tachihara Ohe, fourth prize winner ($50,000.00) and $5,000.00 from Elizabeth C. Griffith, fifth prize winner ($35,000.00). The above-mentioned $61,000.00 represented the sale of solutions to the aforementioned contestants. The total income received by the group or joint venture in 1955 was $213,500.00 (the winnings of Jean Charles, $152,500.00 plus the aforementioned $61,000.00) of which $1,500.00 was paid to Martha Duff for "legal services", leaving a balance of $212,000.00 of which $35,333.33 was distributed equally among the six members. No income was earned by the group during the years 1951 through 1954.

The field audit also disclosed that Jean Charles, Ignio Bierie, Earle Hummel and Ken Battel banded together for the purpose of participating in the Northwest Numerical Puzzle Contest. Earle Hummel, as nominee for this joint venture, entered said contest and in 1956 was awarded a prize of $21,900.00 which was divided equally among the four members of the group.

Martha Duff, Esq., participated in the field audit examination as a representative for the joint ventures (Minutes of Hearing 1/27/69 pp. 12, 13). It was claimed by Martha Duff (see Report of Field Audit) that the group had formed for the sole purpose of entering "The American Puzzle Contest" which began in 1951 and terminated in 1955 when the awards were made; that the monies received from the 4th and 5th place winners were incidental to and part of the same transaction. The taxpayers contend that they worked independently for Jean Charles with respect to the 1955 prize award. As to the 1956 contest award, they claim they worked for Earle Hummel.

On January 27, 1960 unincorporated business tax assessments were issued against the first mentioned joint venture for $5,277.76 (Assessment No. PA 07651) and against the second mentioned joint venture for $952.86 (Assessment No. PA 07652) including penalty and interest. The assessments were mailed to the taxpayers, care of Martha Duff, Esq., 8 West 40th Street, New York, New York. On February 23, 1960 Martha Duff mailed separate letters protesting each of the aforementioned assessments. The letters were received on February 25, 1960. Formal applications for revision were filed on February 15, 1961 executed by "Martha Duff, as attorney and agent for the above-named taxpayers". The representatives for Bierie and

Battel contend that no power of attorney was ever filed by Martha Duff. Forms 1099 were prepared by "Martha Duff, as Attorney" and issued to each of the members of the venture (see Taxpayers' Exhibit No. 4). It is to be noted that prior to 1961, a representative for a taxpayer was not required to file a power of attorney.

On August 30, 1961, a letter of denial of the applications for revision of the assessments for 1955 and 1956 were sent to the taxpayers, care of Martha Duff. No. IT-115's were filed on behalf of the taxpayers.

Ignacio Diaria claims that he was not aware of the assessments until May 4, 1965 when collection efforts were instituted against him. He paid the assessments on December 29, 1965 and now seeks a refund. On June 30, 1965 Jack Reichlin, Esq. filed a power of attorney on behalf of Ignacio Diaria and requested a conference. A similar power of attorney was filed on behalf of Ben Battel. Jack Reichlin, Esq. and Charles McGarvey, Esq. were designated to represent Ignacio Diaria and Ben Battel.

Earle Hummel, Larry Winters and Sidney Malelik failed to appear at the formal hearings, although notices of hearing were mailed to them. I am of the opinion that the applications of the aforementioned taxpayers be dismissed for their nonappearance.

I am of the opinion that one or more of the members of the joint venture authorized Martha Duff, Esq. to act as attorney and represent said joint venture. See Minutes of Hearing, November 9, 1966, page 70, wherein Ben Battel testified as follows:

> "I called Miss Charles and she said that she had retained Martha Duff to handle her affairs because of the fact that she had made up the tax returns; if any question came up she wanted a lawyer to represent her; so, on that basis, I met Miss Duff."

I am of the opinion that the joint ventures filed timely applications for revision or refund with respect to the assessments for 1955 and 1956. However, the joint ventures failed to file a timely demand for hearing within ninety days from the date of the letter of denial in accordance with the provisions of section 374 of the Tax Law.

I am of the further opinion that the activities of the joint venture for the purpose of entering puzzle contests and sharing in the winnings thereof constituted the carrying on of an unincorporated

business, the income of which was subject to unincorporated business tax within the intent and meaning of section 386, Article 16-A of the Tax Law, then in effect.

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

SOLOMON SIES
Hearing Officer

SS:dv
Enc.
February 3, 1970

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION OF JEAN CHARLES, IGINIO BIORIO, EARLE HUMMEL, BEN BATTEL, LARRY WINTERS AND SIDNEY MEISLIK Joint Venture FOR REVISION OR REFUND OF UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 16-A of THE TAX LAW FOR THE YEAR 1955	DETERMINATION

Hearings having been held in the above matter on November 9, 1966 and January 27, 1969 at the office of the State Tax Commission at 80 Centre Street, New York, New York before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearings the taxpayers, Iginio Biorio and Ben Battel, appeared and were represented by Jack Reichlin, Esq., and Charles McGarvey, Esq. and Jean Charles having appeared in person on January 27, 1969 and the taxpayers Earle Hummel, Larry Winters and Sidney Meislik having failed to appear at said hearings although duly notified by notices of hearing mailed to them, testimony having been taken and the matter having been duly considered,

The State Tax Commission hereby finds:

(1) On his resident New York State tax return for the year 1955 the taxpayer Iginio Biorio reported, in addition to salary compensation, income from contest winnings in the amount of $35,583.33. He attached a schedule of spreadsheet of salary income for the years 1951 through 1955 and reported the amount of $7,076.66 additional income attributable to the year 1955. He also deducted $200.00 legal fees paid to an attorney

[illegible]

named Martha Duff. The Department of Taxation and Finance disallowed the spreadback of income as claimed by the aforementioned Iginio Diorio and imposed additional personal income tax on his share of the total contest puzzle award received by him for the year 1955. In addition, an investigation was initiated with respect to the prize winnings.

(2) As a result of a field audit examination it was disclosed that the taxpayer, Jean Charles, received in 1955 the amount of $152,500.00 as second prize winner in "The American Puzzle Contest" awarded by Unicorn Press, Inc. Jean Charles entered this contest in 1951. This was a rebus type puzzle and consisted of a series of initial puzzles (relatively simple) followed by a series of progressively difficult "tie-breaker" puzzles until the winners were finally selected in 1955. As these puzzles had a numerical score value, it was possible to have more than one solution. Th six members of the group, Jean Charles, Iginio Diorio, Earle Hummel, Ben Battel, LarryfWinters and Sidney Meislik, worked together to obtain as many solutions as possible within a specified time or dead line. (Minutes of Hearing, 1/27/69, pp. 7 & 8.) The best solution was then selected and submitted by the nominee (the entrant) for the group. The next best solutions were then offered for sale to selected individuals in exchange for a portion of prize awards received by them. Jean Charles or one or more members of the group received $36,000.00 from E. Toshiharu Oka, fourth prize winner ($50,000.00) and $25,000.00 from Elizabeth C. Griffith, fifth prize winner ($35,000.00). The above mentioned $61,000.00 represented the sale of solutions to the aforementioned contestants. (Minutes of Hearing, 1/27/69, pp. 8 & 9.) The total income received by the group in 1955 was $213,500.00 (the winnings of Jean Charles, $152,500.00 plus the aforementioned $61,000.00) of which $1,200.00 was paid to Martha Duff for "legal services,"

leaving a balance of $212,300.00 of which $35,383.33 was distributed equally among the six members. (Minutes of Hearing, 1/27/69, p. 7; Minutes of Hearing, 11/9/66, p. 62.) No income was earned by the group during the years 1951 through 1954. No unincorporated business tax returns were filed by the above captioned joint venture. Martha Duff, Esq. participated in the field audit examination as a representative for the joint venture (Minutes of Hearing, 1/27/69, pp. 12 & 13.)

(3) On January 27, 1960 the Department of Taxation and Finance made an additional assessment against Jean Charles, Iginio Dierio, Earle Hummel, Ben Battel, Larry Winters and Sidney Meiklik, joint venture, (Assessment No. FA 85651) for the year 1955 based on field audit findings that: (a) the aforementioned individuals were engaged in a joint venture participating in puzzle contests and sharing in the winnings; (b) that said joint venture was conducted with regularity and continuity and constituted the carrying on of an unincorporated business and (c) that the gross income received by said entity in the amount of $213,500.00 was subject to unincorporated business tax. An allowance was made for fees paid to Martha Duff, Esq. in connection with the above mentioned income in the amount of $1,200.00. Maximum allowance for services of the six co-venturers was allowed in the amount of $30,000.00. Unincorporated business tax was assessed in the amount of $7,092.00 together with penalty and interest in the amount of $1,985.76, for a total of $9,077.76. The notice of assessment was mailed to the taxpayers care of Martha Duff, Esq., 8 W. 40th Street, New York, New York. On February 23, 1960 Martha Duff mailed a letter to the Department of Taxation and Finance in which she indicated that she had been requested by the taxpayers named in the aforementioned assessment to protest said assessment. On February 15, 1961 Martha Duff as attorney and agent for the joint venture of Jean

Charles, Iginio Dierio, Earle Hummel, Ben Battel, Larry Winters and Sidney Meislik filed an application for revision or refund on Form IT-113 with respect to the assessment of unincorporated business taxes issued against the joint venture herein.

(4) On August 30, 1961 the Department of Taxation and Finance mailed a letter of denial of said application for revision or refund to the aforementioned Martha Duff at the address set forth by her in the application for revision or refund. No demand for hearing was filed by Martha Duff, Esq. or any other member of the joint venture within 90 days from the date of the mailing of the aforementioned letter of denial as required by Section 374, Article 16-A of the Tax Law, then in effect.

(5) On June 30, 1965 Jack Reichlin, Esq. filed a power of attorney executed by Iginio Dierio authorizing Charles McGarvey, Esq. and Jack Reichlin, Esq. to represent him before the Department of Taxation and Finance in connection with proceedings involving unincorporated business taxes for the years 1955 and 1956. A similar power of attorney was filed on behalf of Ben Battel. It is contended that Martha Duff was not authorized to represent Iginio Dierio, Ben Battel or Jean Charles. However, Ben Battel testified as follows: "I called Miss Charles and she said that she had retained Martha Duff to handle her affairs because of the fact that she had made up the tax returns and if any question came up she wanted a lawyer to represent her; so, on that basis, I met Miss Duff." (Minutes of Hearing, 11/9/66, p. 70.) Prior to 1961, a representative for a taxpayer was not required to file a power of attorney. Although there was conflicting testimony as to the distribution of the proceeds from the winnings, Mr. Battel testified as follows: "As far as I understand I had the same as all of the others; there was no higher or lower, Miss Charles is a very

honorable woman." (Minutes of Hearing, 11/9/66, p. 62.) Iginio Dierio paid the assessment in December, 1965 and now seeks a refund thereof.

(5) The activities of the taxpayers, Jean Charles, Iginio Dierio, Earle Hummel, Ben Battel, Larry Winters and Sidney Meislik in 1955 and prior thereto constituted a joint venture for the purpose of participating in puzzle contests and sharing in the winnings thereof. The aforementioned activities continued from 1951 through 1955 and were conducted with regularity and continuity within the State of New York by the members of the aforementioned joint venture.

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

The State Tax Commission hereby

DETERMINES:

(A) One of more of the members of the above mentioned joint venture authorized Martha Duff, Esq. to act as attorney and agent for and represent the said joint venture.

(B) The joint venture filed a timely application for revision or refund with respect to Assessment No. PA 95651 for the year 1955.

(C) The joint venture failed to file a timely demand for a hearing within 90 days from the date of the letter of denial of the application for revision as more fully set forth in finding (4) above in accordance with the provisions of Section 374 of the Tax Law, then in effect. The application for revision or refund filed by the joint venture is therefore dismissed.

(D) Earle Hummel, Larry Winters and Sidney Meislik having defaulted in appearance at said hearings, the applications for revision with respect to said individuals are hereby dismissed for their nonappearance.

(E) In any event, the activities of the above named joint venture, as more fully set forth in findings (2) and (6) above, constituted the carrying on of an unincorporated business. The income derived therefrom was therefore subject to unincorporated business tax within the intent and meaning of Section 386, Article 16-A, of the Tax Law, then in effect.

DATED: Albany, New York this 9th day of March, 1979.

STATE TAX COMMISSION

/s/ Norman Gallman
PRESIDENT

/s/ A. Bruce Manley
COMMISSIONER

Milton Koerner
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION OF JEAN CHARLES, IGINIO BIORIO, MARIO HUMMEL AND BEN BATTEL JOINT VENTURE FOR REVISION OR REFUND OF UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 16-A OF THE TAX LAW FOR THE YEAR 1956	DETERMINATION

Hearings having been held in the above matter on November 9, 1966 and January 27, 1969 at the office of the State Tax Commission at 80 Centre Street, New York, New York before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearings the taxpayers Iginio Biorio and Ben Battel appeared and were represented by Jack Reichlin, Esq. and Charles McGarvey, Esq. and Jean Charles having appeared in person on January 27, 1969 and the taxpayer Mario Hummel having failed to appear at said hearings, although duly notified by notices of hearing mailed to him, testimony having been taken and the matter having been duly considered,

The State Tax Commission hereby finds:

(1) As a result of a field audit examination, it was disclosed that Jean Charles, Iginio Biorio, Mario Hummel and Ben Battel entered into a joint venture for the purpose of participating in puzzle contests, more particularly the Northwest Numerical Puzzle Contest and sharing in the winnings thereof. Mario Hummel, as nominee for this joint venture, entered this contest and in 1956 was awarded a prize of $21,500.00 which was divided equally among the four joint venturers. No unincorporated business tax returns were filed by the joint venture. Martin Ruff, Esq.

participated in the field audit examination as a representative for the joint venture and was authorized by one or more members of the group to represent said joint venture (Minutes of Hearing, 1/27/69, pp. 12 & 13).

(2) On January 27, 1960, an unincorporated business tax assessment was issued against the above mentioned joint venture for the year 1956 (Assessment No. 7A 89692) in the amount of $552.66 including penalty and interest on the ground that the activities of said joint venture constituted the carrying on of an unincorporated business, subject to unincorporated business tax. On February 23, 1960 Martha Duff mailed a letter to the Department of Taxation and Finance in which she indicated that she had been requested by the taxpayers named in the aforementioned assessment to protest said assessment. On February 15, 1961 Martha Duff, as attorney and agent for the joint venture of Juan Charles, Ignio Diorio, Earle Hummel and Ben Retzel, filed an application for revision or refund on Form TP-113 with respect to the assessment of unincorporated business taxes issued against the joint venture herein.

(3) On August 30, 1961 the Department of Taxation and Finance mailed a letter of denial of said application for revision or refund to the aforementioned Martha Duff at the address set forth by her in the application for revision or refund. No demand for hearing was filed by Martha Duff, Esq. or any other member of the joint venture within 90 days from the date of the mailing of the letter of denial as required by Section 374, Article 16-A of the Tax Law, then in effect.

(4) On June 30, 1965 Jack Reichlin, Esq. filed a power of attorney executed by Ignio Diorio authorizing Charles McHarvey, Esq. and Jack Reichlin, Esq. to represent him before the Department of Taxation and Finance in connection with proceedings involving unincorporated business taxes for the years 1955 and 1956. A

similar power of attorney was filed on behalf of Ben Bethel. It is contended that Martha Duff was not authorized to represent Ignatz Mierle, Ben Bethel or Joan Charles. However, Ben Bethel testified as follows: "I called Miss Charles and she said that she had retained Martha Duff to handle her affairs because of the fact that she had made up the tax returns and if any question came up she wanted a lawyer to represent her; so, on that basis, I met Miss Duff." (Minutes of Hearing, 11/9/66, p. 70.) Prior to 1961, a representative for a taxpayer was not required to file a power of attorney. Although there was conflicting testimony as to the distribution of the proceeds from the winnings, Mr. Bethel testified as follows: "As far as I understand I had the same as all of the others; there was no higher or lower, Miss Charles is a very honorable woman." (Minutes of Hearing, 11/9/66, p. 62.)

(5) The activities of the taxpayers, Joan Charles, Ignatz Mierle, Earle Hummel and Ben Bethel in 1956 and prior thereto constituted a joint venture for the purpose of participating in puzzle contests and sharing in the winnings thereof. The aforementioned activities were conducted with regularity and continuity within the State of New York by the members of the aforementioned joint venture.

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

The State Tax Commission hereby

DETERMINES:

(A) One or more of the members of the above mentioned joint venture authorized Martha Duff, Esq. to act as attorney and agent for and represent the said joint venture.

(B) The joint venture filed a timely application for revision or refund with respect to Assessment No. PA 8962 for the year 1956.

(C) The joint venture failed to file a timely demand

for a hearing within 90 days from the date of the letter of denial of the application for revision as more fully set forth in finding (3) above in accordance with the provisions of Section 374 of the Tax Law, then in effect. The application for revision or refund filed by the joint venture is therefore dismissed.

(D) Earle Hammel having defaulted in appearance at said hearings, the application for revision with respect to said individual is hereby dismissed for his nonappearance.

(E) In any event, the activities of the above named joint venture, as more fully set forth in findings (1) and (3) above, constituted the carrying on of an unincorporated business. The income derived therefrom was therefore subject to unincorporated business tax within the intent and meaning of Section 386, Article 16-A of the Tax Law, then in effect.

Dated: Albany, New York this 9th day of March, 1970.

STATE TAX COMMISSION

/s/ Norman Gallman
PRESIDENT

/s/ A. Bruce Manley
COMMISSIONER

/s/ Milton Koerner
COMMISSIONER