

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
FISCHBACH & MOORE INC.  
J. LIVINGSTON & COMPANY  
SLATTERY CONTRACTING COMPANY, A Joint  
For a Redetermination of a Deficiency or Venture  
a Refund of Unincorporated Business:  
Taxes under Article(s) 23 of the  
Tax Law for the (Year(s) 1961

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

State of New York  
County of Albany

Lynn Wilson , 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 23rd day of June , 1972 , she served the within  
Notice of Decision (or Determination) by (certified) mail upon FISCHBACH & MOORE  
INC., et al. (representative of) the petitioner in the within

proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Fischbach & Moore Inc., et al.

545 Madison Avenue  
New York, New York

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 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

23rd day of June , 19 72

*Joyce S. Ken Patten*

*Lynn Wilson*

STATE OF NEW YORK  
STATE TAX COMMISSION

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of  
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J. LIVINGSTON & COMPANY  
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State of New York  
County of Albany

Lynn Wilson, 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 23rd day of June, 1972, she served the within Notice of Decision (or Determination) by (certified) mail upon WEISMAN, CELLAR, ALLAN, SPETT & SCHEINBERG (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Weisman, Cellar, Allan, Spett & Sheinberg  
1501 Broadway  
New York, New York 10036  
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 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

23rd day of June, 1972

*James S. Van Katten*

*Lynn Wilson*



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A

STATE CAMPUS  
ALBANY, N. Y. 12226

AREA CODE 518

457-2655, 6, 7

STATE TAX COMMISSION  
HEARING UNIT

EDWARD ROOK  
SECRETARY TO  
COMMISSION

STATE TAX COMMISSION

NORMAN F. GALLMAN, ACTING PRESIDENT

A. BRUCE MANLEY

MILTON KOERNER

ADDRESS YOUR REPLY TO

**DATED:** Albany, New York  
**June 23, 1972**

**Fischbach & Moore Inc., et al.**  
**545 Madison Avenue**  
**New York, New York**

**Gentlemen:**

Please take notice of the **DECISION**  
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to  
Section(s) **722** of the Tax Law, any  
proceeding in court to review an adverse deci-  
sion must be commenced within **4 months**  
from the date of this notice.

Any inquiries concerning the computation of tax  
due or refund allowed in accordance with this  
decision or concerning any other matter relative  
hereto may be addressed to the undersigned.  
These will be referred to the proper party for  
reply.

Very truly yours,

**Nigel G. Wright**  
HEARING OFFICER

Enc.

cc: Petitioner's Representative  
Law Bureau

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
FISCHBACH & MOORE INC.	:	
J. LIVINGSTON & COMPANY	:	
SLATTERY CONTRACTING COMPANY	:	DECISION
A Joint Venture	:	
for a Redetermination of a Deficiency	:	
or for Refund of Unincorporated Business	:	
Taxes under Article 23 of the Tax Law for	:	
the Year 1961.	:	

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Fischbach & Moore Inc., J. Livingston & Company, and Slattery Contracting Company, A Joint Venture, filed a petition under section 689 of the Tax Law for the redetermination of a deficiency of unincorporated business tax under Article 23 of the Tax Law for the year 1961. A hearing was duly held on March 19, 1971 at the offices of the State Tax Commission, State Office Building, Campus, Albany, New York, before Nigel G. Wright, Hearing Officer. Herbert R. Berk, Esq. of Weisman, Celler, Allan, Spett & Sheinberg represented the petitioners and Edward H. Best, Esq., (Francis X. Boylan, Esq., of Counsel) represented the Income Tax Bureau. The record of such hearing has been duly examined and considered.

ISSUES

The petitioner argues as follows:

(a) that the association of the three corporations herein did not constitute a joint venture or partnership and should not be subject to tax as an entity;

(b) that the three corporations were together engaged solely in one "isolated" or "single" transaction and therefore, was not a business within the purview of the Tax Law (see Regulation 20 NYCRR 281.5(b) promulgated under Article 16-A of the Tax Law);

(c) that the "additional exemption" provided under section 709(2) of the Tax Law should be computed so as to reduce the joint venture's unincorporated business tax income by the full amount of such income which is included in the income of its corporate partners instead of by only that portion of such income attributable to New York by the corporation's allocation ratio;

(d) that the computation of the additional exemption under section 709(2) of the Tax Law violates the United States Constitution in that it imposes a burden on interstate commerce, and deprives the petitioner of the due process of law and of the equal protection of the laws;

(e) that the penalty for late filing of a tax return should not have been applied.

#### FINDINGS OF FACT

1. Fischbach & Moore, Inc., J. Livingston & Company, and Slattery Contracting Co., Inc. filed a New York partnership and unincorporated business tax return (IT-204) for the year 1961 on March 10, 1965. On such return they described themselves as joint venturers on a contract with the New York City Transit Authority. A federal partnership return had also been filed.

2. The contract with the New York City Transit Authority is dated November, 1956 and calls for the furnishing and installing of an underground electrical transmission system between Brooklyn and Manhattan at or near the location of the Williamsburg Bridge. The contract totals about 90 pages in length and the specifications total about 140 pages in length. It calls for partial and final payments to the contractor based on separate prices for at least 75 items. The liability on this contract was joint and several and the performance bonds were signed by all three corporations. The work on the contract began in 1956 and ended in 1961 and was reported for tax purposes under the "completed contract" method of accounting.

3. The joint venture had an income of \$2,023,042.89 which was divided equally with each joint venturer receiving \$674,347.63. Such income was included in the income of the corporation and each corporation paid a franchise tax under Article 9-A thereon. For purposes of the franchise tax the three corporations allocated their income to New York in 1961 according to the following ratios:

Fischbach & Moore Inc.	16.3159%
J. Livingston & Company	38.7184%
Slattery Contracting Co., Inc.	. 100%

4. The notice of deficiency is dated September 26, 1966, and computes a tax due from the joint venture on its income less an exemption of \$5,000.00 under section 709(1) of the Tax Law and less an additional exemption of \$1,045,470.69 computed under section 709(2) of the Tax Law. The additional exemption was computed by applying each corporation's allocation ratio to its share of the joint venture income as follows: 16.3159% of \$674,347.63, equalling \$110,025.88 (for Fishbach & Moore Inc.); 38.7184% of \$674,347.63, equalling \$261,096.61 (for J. Livingston & Company); 100% of \$674,347.63, equalling \$674,347.63 (for Slattery Contracting Co., Inc.) for a total of \$1,045,402.69.

5. The tax is computed to be \$38,909.91 plus a penalty under section 685(a) of the Tax Law for late filing of 25%, computed to be \$9,725.73 plus interest to the date of the deficiency.

#### CONCLUSIONS OF LAW

A. The association of the three corporations herein constitutes a joint venture.

B. The participation in a single construction contract over a prolonged period of time is not an isolated or incidental transaction and in fact implies the participation by the petitioner in each one of the multitude of individual activities and transactions which are necessary because of the complexity of the duties required. Such

activities constitute a taxable business under Article 23 of the Tax Law (see Regulation 20 NYCRR 281.5(b) promulgated under Article 16-A of the Tax Law).

C. The computation of the additional exemption under section 709(2) of the Tax Law so as to limit the exemption to only the income which will be taxable to the corporate partners as measured by their franchise tax allocation ratios is required by both the clear language and the purpose of the statute. The purpose of the exemption is merely to avoid double taxation by giving an allowance on the tax return for unincorporated business tax for the amount of income which will also be taxed again on the franchise tax return of any corporate partner. Since the corporate partner pays a franchise tax to New York on only its income as allocated to New York by its allocation ratio, it is proper that the allowance be limited to such amount. (see New York State Legislative Annual, 1949, page 300-301 relating to Chapter 387 of the Laws of 1949 amending section 386-f of Article 16-A of the Tax Law).

D. No persuasive argument has been presented that the tax imposed herein is unconstitutional. The imposition of a tax upon a joint venture as an entity is valid especially when its activities affect the construction, repair and capital improvement of real property in the State of New York. The exemption provided by section 709(2) is a matter of legislative grace and, in any event, helps the taxpayer. Such exemption can be validly limited by its purpose to avoid "double" taxation. The net result of the taxes imposed by New York on the corporation under Article 9-A and on the joint venture under Article 23 is very similar to the requirement of other states that corporations engaged in construction projects in the state pay a tax on the income from such activities on a

"separate accounting" basis (see e.g. Utah Construction and Mining Co. v. Oregon State Tax Commission, Oregon Tax Court, Feb. 14, 1969, C.C.H. Oregon State Tax Rep. ¶202,092; affvt. 465 P 2d 712).

E. No reason appears for the late filing of the return and the penalty, therefore, is proper

DECISION

The petition is denied and the notice of deficiency is affirmed, together with such interest, if any, as may be due under section 684 of the Tax Law.

DATED: Albany, New York

*June 23, 1972,*

STATE TAX COMMISSION

*Norman Gallman*  
\_\_\_\_\_  
COMMISSIONER

*Bruce Menley*  
\_\_\_\_\_  
COMMISSIONER

*Milton Koehn*  
\_\_\_\_\_  
COMMISSIONER