

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

ARBESFELD, GOLDSTEIN, et. al.

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article(s) 23 of the :
Tax Law for the Year(s) or Period(s) :
1968 through 1972.

AFFIDAVIT OF MAILING

State of New York
County of Albany

Bruce Batchelor, being duly sworn, deposes and says that
he is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 7th day of March, 1977, he served the within
Notice of Decision by (certified) mail upon Arbesfeld, Goldstein,
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: Arbesfeld, Goldstein, et. al.
118 East 40th Street
New York, New York 10016
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)~~
~~XXXXXX~~ 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

7th day of March, 1977.

Bruce Batchelor

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

AFFIDAVIT OF MAILING

ARBESFELD, GOLDSTEIN, et. al.
For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article ~~(22)~~ 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1968 through 1972.

State of New York
County of Albany

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~~he~~ is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 7th day of March, 1977, ~~he~~ served the within
Notice of Decision by (certified) mail upon Aranow, Brodsky, Bohlinger,
Benetar & Einhorn
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Aranow, Brodsky, Bohlinger, Benetar & Einhorn
469 Fifth Avenue
New York, New York 10017
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

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Bruce Batchelor

Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

TAX APPEALS BUREAU

STATE CAMPUS
ALBANY, N.Y. 12227

ADDRESS YOUR REPLY TO

March 7, 1977

TELEPHONE: (518) **457-1723**

Arbesfeld, Goldstein, et. al.
118 East 40th Street
New York, New York 10016

Gentlemen:

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

Please take further notice that pursuant to
Section(5) **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.

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. They
will be referred to the proper party for reply.

Very truly yours,

Paul S. Coburn
Supervising Tax
Hearing Officer

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ARBESFELD, GOLDSTEIN, et. al.	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Taxes under Article 23 of the Tax Law	:	
for the Years 1968 through 1972.	:	

The petitioners, Arbesfeld, Goldstein, et. al., 118 East 40th Street, New York, New York 10016, 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 1968 through 1972. (File No. 00086).

A formal hearing was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 26, 1976, at 1:30 P.M., before Nigel G. Wright, Hearing Officer. The petitioners appeared by Aranow, Brodsky, Bohlinger, Benetar and Einhorn, Esqs., (Samuel Brodsky, Esq. of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq., (Solomon Sies, Esq. of counsel).

ISSUES

I. Whether the period of limitations for the assessment of any deficiency for unincorporated business taxes for the years 1968 and 1969 had expired prior to March 25, 1974.

II. Whether the joint venture of Arbesfeld, Goldstein, et. al. constituted a partnership subject to unincorporated business tax in accordance with the provisions of section 703(a) of the Tax Law.

III. Whether the deduction of management fees in each of the years in issue was proper.

IV. Whether the penalties imposed pursuant to sections 685(a)(1) and (2) of the Tax Law should be cancelled.

V. Whether proper allowance was given for partners' services.

FINDINGS OF FACT

1. The joint venture of Arbesfeld, Goldstein, et. al. filed New York State partnership returns for the years 1968 through 1972 but did not fill out any portion of the unincorporated business tax part of said returns and paid no unincorporated business tax for the years 1968 through 1972. The only notation on the U.B.T. returns was "N/A" (Not applicable).

2. On March 25, 1976, the Income Tax Bureau issued a Statement of Audit Changes against the joint venture of Arbesfeld,

Goldstein, et.al. individually and as co-partners imposing unincorporated business tax in the amount of \$33,298.06, plus interest in the amount of \$5,434.03 and penalties pursuant to sections 685(a)(1) and (2) of the Tax Law in the amount of \$12,073.87, for a total of \$50,805.96. It accordingly issued a Notice of Deficiency therefor, upon the ground that the partnership income from hotel management activities is subject to unincorporated business tax, and also stated that the deductions of management fees constituted payments to a partner and, therefore, were not proper deductions. Only \$5,000.00 was allowed for partners' services.

3. On July 27, 1967, Hyman Arbesfeld entered into an agreement with 127 West 49th Corporation, later known as Beverly 50 St. Corp., owner of the Beverly Hotel. By this agreement, Arbesfeld was appointed managing director of the Beverly Hotel located at the corner of Lexington and East 50 Street, New York, New York, and was to act as the operating, renting and managing agent of said hotel. The agreement was to terminate on August 31, 1977 unless terminated sooner by mutual consent or as otherwise provided in the agreement. The Managing Director's duties consisted of employing and supervising all persons and firms necessary for the operation and maintenance of the hotel and discharging same,

although such employees were to be deemed employees of the owner; collecting rents and entering into leases for portions of the premises; causing the hotel to be maintained in good condition by making repairs and alterations; entering into contracts for utilities and maintenance, such as electricity, gas, steam, telephone, window cleaning, garbage removal, air conditioning, etc., and securing necessary insurance for the premises and its operation as a hotel.

4. As a condition of the agreement, the petitioner, Hyman Arbesfeld, was required to lend to the owner the amount of \$150,000.00 with interest at the rate of 4% per annum as evidenced by a note to be executed by the owner guaranteed by Frederick Dreier, and to be repaid in installments of \$7,500.00 per year commencing September 1, 1968 and on the 1st of September of each succeeding year, except that the entire unpaid principal and interest shall become due and payable 20 days after the termination of the agreement.

5. The agreement provided that the Managing Director was to receive as compensation for his services each year one-half of the net profits in excess of \$259,000.00 as the term "net profits" is defined in the agreement, exclusive of depreciation of the building fixtures and furniture, interest payable on mortgages on

the premises, Federal and State income taxes and salaries or other compensation paid to any officers of the owner.

6. The agreement further provided, in part, as follows:

"In order to induce Owner to enter into this Agreement, Managing Director has agreed to pay to Owner one-half the cost of all capital improvements made to the Premises, as mutually agreed in writing by Owner and Managing Director from time to time, after the expenditure of an initial sum of Seventy-Five Thousand (\$75,000.) Dollars by Owner for capital improvements to the Premises, which the parties anticipate will be expended during the first two years of the term of this Agreement. Said capital improvements shall, immediately upon installation at the Premises, become the sole property of Owner, free and clear of any claims or rights of Managing Director or anyone claiming under or through Managing Director."

7. On August 10, 1967, the petitioner, Hyman Arbesfeld, entered into an agreement with Nathan Berger, Solomon Berger, Abraham Geliebter, Herbert Goldstein, Abe Miller, Ben Miller and Max Singer each of whom advanced to Arbesfeld the amount of \$10,000.00, and with Saul Greenberg, Robert Kaminsky and Morris Miller each of whom advance to Arbesfeld the amount of \$15,000.00, whereby such advances plus \$35,000.00 advanced by Arbesfeld was to be used by said Arbesfeld for the purpose of making a loan by him (Arbesfeld) to the owner of the Beverly Hotel, as provided in the agreement between Arbesfeld and the owner of the hotel as previously set forth herein.

8. The so-called "contributors" or "partners" agreed to be bound by the agreement between Arbesfeld and the owner of the hotel. The income or profits received by Arbesfeld were to be distributed to the "contributors" in the proportion that the contribution of each bears to the amount of \$150,000.00, provided that for each year of the term of the agreement in addition to retaining his share of profits, income and repayments of the loan, Arbesfeld was to retain for himself for his services as Managing Director without participation by the other "contributors" the first \$7500.00 received by him pursuant to the agreement with the owner in payment of the loan or otherwise.

9. The agreement between the "contributors" further provided, in part, as follows:

"Each of the parties and their assignees or legatees, as herein permitted, agrees that he will not sell or assign his participating interest without the written consent of the Managing Director, provided, however, that each may transfer his interest to a member of his family or bequeath the same to a member of his family without such written consent. Such permitted assignee or legatee shall hold the participating interest subject to all the terms, covenants and conditions of this agreement. Each participating interest shall be subject to all the terms, covenants and agreements contained in the agreement, a copy of which is attached.

"For each year or years during the term of this agreement for which a Contributor has received as a division of profits hereunder an amount equal to twenty (20%) per cent of his original contribution,

or as said contribution may be increased or decreased, as herein provided, the next five (5%) per cent of distributions of profits hereunder for such year or years shall be retained by the Managing Director free from any participation. The excess above twenty-five (25%) per cent profit distributions for each year shall be distributed and paid as herein provided for the distribution of the twenty (20%) per cent of yearly profits. Where profits are paid for a partial year the percentage figures of twenty (20), five (5) and twenty-five (25) shall be reduced to the figures arrived at by multiplying such percentage figures by a fraction with the number of months (partial months to be included) which have elapsed in such year as a numerator and twelve (12) as a denominator."

10. One of the "contributors", Herbert Goldstein, was employed as sales director of Beverly Hotel and another "contributor", Robert Kaminsky was employed as assistant manager of said hotel. In addition to their salaries from the Beverly Hotel and to the distribution of profits from the joint venture, Goldstein and Kaminsky also received bonuses at the end of each year. Mr. Arbesfeld also received a bonus, in addition to the \$7500.00 for his services.

11. Prior to 1967, the petitioner, Hyman Arbesfeld, owned a 15% interest in the Bedford Hotel located at 118 East 40 Street, New York, New York, and was employed as the managing director of said hotel at a salary of \$150.00 per week. During the years in issue, Mr. Arbesfeld continued to be employed as manager of the Bedford at the same time that he was operating and managing the Beverly Hotel.

12. Mr. Goldstein and Mr. Kaminsky also owned interests in the Bedford Hotel and were employees of said hotel while employed by the Beverly Hotel.

13. Most of the "contributors" under the agreement with Hyman Arbesfeld were either "partners" in the Bedford Hotel or relations or business associates of Arbesfeld.

14. Hyman Arbesfeld, Herbert Goldstein and Robert Kaminsky rendered services to the joint venture or partnership in the management activities of the Hotel Beverly which produced the management income reported on the partnership returns for the years in issue.

15. The joint venture or partnership was engaged in the operation and management of the Hotel Beverly during the years in issue, and such operation was conducted with continuity and regularity.

16. The joint venture or partnership was advised by its accountant that it was not liable for unincorporated business tax, and it relied on such advice.

CONCLUSIONS OF LAW

A. That the period of limitations for the assessment of any deficiency of unincorporated business tax for the years 1968

and 1969 did not expire prior to March 25, 1974, since the filing of a partnership information return does not constitute the filing of a return where the partnership fails to complete the unincorporated business tax portion of the form filed.

(1955, Op. Atty. Gen. 233; Peters v. S.T.C. 18AD2d886, 237 NYS 2d 613, aff'd. 13NY2d1148; Hewitt v. Bates 297NY239.

B. That for the years in issue, the joint venture of Arbesfeld, Goldstein, et. al. was engaged in the operation and management of the Hotel Beverly, sharing in profits and losses pursuant to the agreement between Arbesfeld and the owner of the Beverly Hotel, and that this agreement constituted a partnership carrying on an unincorporated business within the intent and meaning of section 703(a) of the Tax Law.

C. That the deduction of management fees constituted amounts paid to a partner or partners for services rendered and was, therefore, properly disallowed in accordance with the provisions of section 706(3) of the Tax Law.

D. That reasonable cause existed for failure to file unincorporated business tax returns and pay the unincorporated business tax, and that the penalties imposed pursuant to section 685(a)(1) and (2) of the Tax Law be and the same are hereby cancelled.

(10)

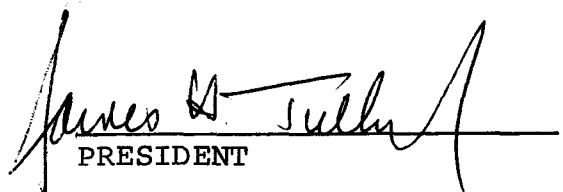
E. That the partnership of Arbesfeld, Goldstein, et.al. was entitled to a deduction for partners' services of the active partners, i.e. Arbesfeld, Goldstein and Kaminsky to the extent of 20% of total income for the year 1968 and \$15,000.00 for each of the years 1969 through 1972.

F. That the Income Tax Bureau is directed to recompute the unincorporated business tax indicated above.

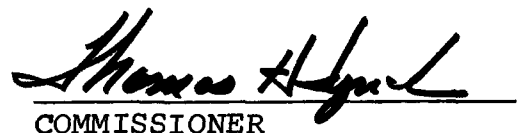
G. That the petition of Arbesfeld, Goldstein, et.al., and Hyman Arbesfeld is granted to the extent indicated in Conclusions (D) and (E) and is in all other respects denied; that pursuant to the Tax Law interest shall be added to the total amount due until paid.

DATED: Albany, New York
March 7, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER