

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

635 ASSOCIATES

AFFIDAVIT OF MAILING

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, 1969 and 1970.

State of New York
County of Albany

Marsina Donnini, 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 26th day of August, 1977, she served the within

Notice of Decision by (certified) mail upon 635 Associates

~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: 635 Associates
c/o Philip Smith
20 Aspen Road
Scarsdale, New York 10583
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)~~
~~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

26th day of August, 1977.

Marsina Donnini

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

635 ASSOCIATES

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article ~~(8)~~ 23 of the :
Tax Law for the Year(s) ~~XXXX Period(s)~~ :
1968, 1969 and 1970.

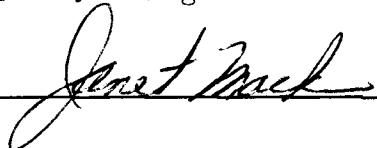
State of New York
County of Albany

Marsina Donnini, 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 26th day of August, 1977, she served the within
Notice of Decision by (certified) mail upon Frederick Wertheimer, CPA
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Frederick Wertheimer, CPA
370 Lexington 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.

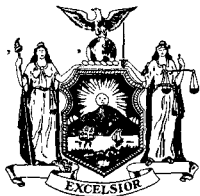
That deponent further says that the said addressee is the (representative
of the) petitioner herein and that the address set forth on said wrapper is the
last known address of the (representative of the) petitioner.

Sworn to before me this

26th day of August, 1977.







STATE OF NEW YORK
STATE TAX COMMISSION
TAX APPEALS BUREAU
ALBANY, NEW YORK 12227

August 26, 1977

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

635 Associates
c/o Philip Smith
20 Aspen Road
Scarsdale, New York 10583

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(8) 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within **4 Months** from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


PAUL B. COBURN
Supervising Tax
Hearing Officer

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
635 ASSOCIATES	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1968, 1969 and 1970.	:	

Petitioner, 635 Associates, c/o Philip Smith, 20 Aspen Road, Scarsdale, New York 10583, has filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1968, 1969 and 1970.
(File No. 13881)

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on February 23, 1977, at 2:45 p.m. Petitioner appeared by Frederick Wertheimer, Certified Public Accountant. The Income Tax Bureau appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of Counsel).

ISSUE

Whether petitioner's activities constitute the carrying on of a trade, business or occupation subject to the unincorporated business tax.

FINDINGS OF FACT

1. Petitioner paid unincorporated business tax for the following years in these amounts: 1968 (\$3,107.97), 1969 (\$4,529.60), and 1970 (\$4,185.85). On April 2, 1971, petitioner filed claims for refund of the unincorporated business tax paid by it for these years.

2. In its claims for refund, petitioner presented the following explanation as the basis of its claim:

"The joint venture was formed solely to acquire a mortgage and note (See p. 2 of Venture Agreement). As a result, it cannot be considered an unincorporated business under Article 23 of U.B.T.

"In addition, reference is made to p. 4 of the Venture Agreement, which states that the members of the joint venture have the authority to manage and control the interests and properties (a note) of said venture. To consider the venture as a real estate partnership would also exempt 635 Associates from the U.B.T. as a manager of real property (Sec. 703)."

3. By letter dated December 13, 1971, the Department of Taxation and Finance informed petitioner that it was disallowing petitioner's claim in full for this reason:

"It appears that the partnership is engaged in the business of managing real property. Exemption from unincorporated business tax will not be granted under Section 703 since the partnership is not the owner or leasee."

On September 25, 1972, the Department of Taxation and Finance issued a Notice of Disallowance in full to petitioner's claim.

4. Petitioner holds legal title to a mortgage and note pursuant to an Agreement of Joint Venture dated April 1, 1968. Section 3 of the agreement provides that the joint venture is formed "for the sole purpose of acquiring the ownership" of a leasehold mortgage dated June 30, 1958, made by 635 Madison Avenue Co. to 637 Madison Corp., in the principal sum of \$1 million (reduced to the principal sum of \$726,949.99), and a promissory note made by 59th & Madison Realty Corp. in the sum of \$850,000 dated April 1, 1968.

5. At the time of filing its New York State Partnership Returns for 1968 and 1969, petitioner stated its business to be "Investment". On its 1970 return, petitioner stated its business to be "Real Estate Management".

6. On its returns for each of these three years, petitioner entered as income certain "Management & Supervision Fees". The entire amount of these fees was paid to petitioner by two companies, National Cleaning Contractors (herein, "National") and Smith Affiliates Management Corp. (herein, "Smith"). The latter corporation was a joint venturer under the April 1, 1968, Agreement of Joint Venture.

Petitioner's total income for these three years breaks down as follows:

<u>Year</u>	<u>"Management and Supervision Fees"</u>	<u>\$ Interest</u>	<u>Total Income</u>
1968	\$19,099.01	\$41,173.77	\$ 60,272.78
1969	35,821.56	73,328.53	109,150.09
1970	32,080.44	68,688.87	100,769.31

7. Letters from National (dated August 16, 1972) and Smith (dated August 3, 1972) to the Department of Taxation and Finance state that each company paid petitioner a monthly check during the years 1968, 1969 and 1970. Both letters continue:

"Please be further advised that 635 Associates performed no services nor did they do any work for us.

"The said payments were made pursuant to an agreement with the owner of premises 635 Madison Avenue, New York City."

Petitioner's representative at the hearing, when asked why payments were made to petitioner by National and Smith, responded: "Supposedly under some agreement, a, call it what you may, royalty or a percentage of the money that they were getting for cleaning the building. I don't know what it is, but there were no services to be performed for the receipt of this money." (Transcript p. 14)

And later: "I don't know. I don't know and I really don't think it is relevant. The only thing relevant is whether they performed services." (Transcript, p. 20)

8. Petitioner's representative testified that petitioner had no employees, paid no rent, and had as its sole asset two notes.

CONCLUSIONS OF LAW

A. That Tax Law, §703(a), defines an unincorporated business as "any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity, including a partnership..."

B. That petitioner describes its activities as those of a passive investor. In actual fact, close to one-third of petitioner's total income for the years 1968, 1969 and 1970 was income from payments to petitioner for purposes petitioner has not wished to divulge. Presumably payments to petitioner totaling over \$85,000 by National and Smith were in some way linked to petitioner's investments in real estate. That petitioner may not have performed services for National and Smith is not conclusive as to petitioner's tax status. Petitioner was engaged in a business for the years 1968, 1969 and 1970, whatever its nature, and therefore is subject to the unincorporated business tax.

C. That petitioner has failed to sustain its burden of proof that it is entitled to refunds claimed for the years 1968, 1969 and 1970. Tax Law, §689(e).

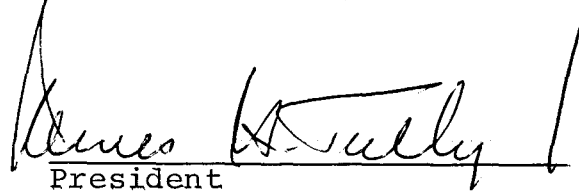
D. That petitioner seeks exemption under Tax Law, §703(e), which provides that an owner of real property, lessee, or fiduciary shall not be deemed engaged in an unincorporated business solely by reason of holding, leasing or managing real property. Since petitioner is not an owner, lessee or fiduciary, §703(e) is not applicable.

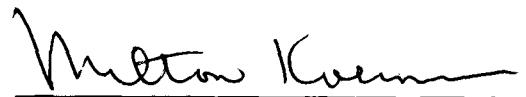
E. That petition of 635 Associates is denied. The Notice of Disallowance dated September 25, 1972, is sustained.

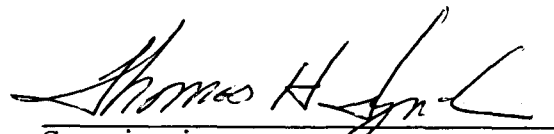
DATED: Albany, New York

August 26, 1977

STATE TAX COMMISSION


President


Commissioner


Commissioner