

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Zembrzuski Brothers :
Thomas J. & Bernie Zembrzuski, Ind. & Officers
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Unincorporated Business Tax :
under Article 23 of the Tax Law
for the Years 1968 & 1969. :

State of New York
County of Albany

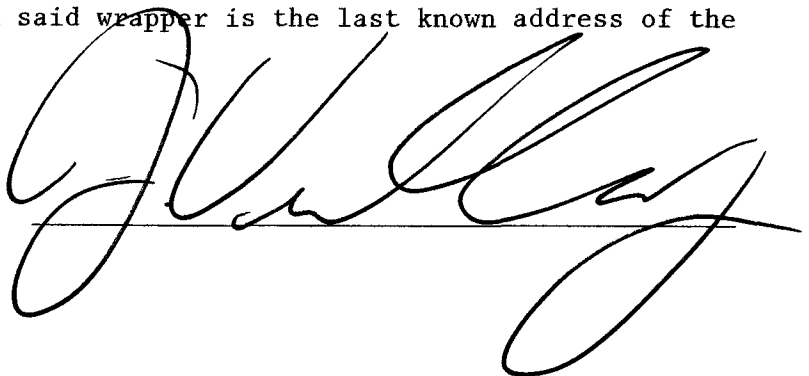
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of January, 1980, he served the within notice of Decision by certified mail upon Zembrzuski Brothers, Thomas J. & Bernie Zembrzuski, Ind. & Officers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Zembrzuski Brothers
Thomas J. & Bernie Zembrzuski, Ind. & Officers
c/o Thomas Zembrzuski
Clifton Park, NY 12065
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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
11th day of January, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Zembrzuski Brothers :
Thomas J. & Bernie Zembrzuski, Ind. & Officers
for Redetermination of a Deficiency or a Revision :
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Unincorporated Business Tax :
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County of Albany

Jay Vredenburg, 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 11th day of January, 1980, he served the within notice of Decision by certified mail upon Edward A. Bogdan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

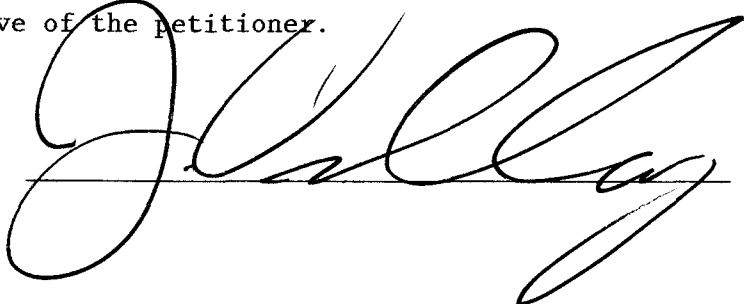
Mr. Edward A. Bogdan
c/o Bogdan, Fivel & Volk
150 State St.
Albany, NY 12207

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
11th day of January, 1980.

Joanne Knapp



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

January 11, 1980

Zembrzuski Brothers
Thomas J. & Bernie Zembrzuski, Ind. & Officers
c/o Thomas Zembrzuski
Boyack Rd.
Clifton Park, NY 12065

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(s) 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Edward A. Bogdan
c/o Bogdan, Fivel & Volk
150 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Thomas J. Zembrzuski and Bernie Zembrzuski,	:	DECISION
Individually and as co-partners d/b/u	:	
the firm name and style of:	:	
ZEMBRZUSKI BROTHERS	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1968	:	
and 1969.	:	

Petitioner, Zembrzuski Brothers, c/o Thomas Zembrzuski, Boyack Road, Clifton Park, New York 12065, and Bernie Zembrzuski, 14 Willoughby Drive, Albany, New York 12205, 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 and 1969 (File No. 12500).

On August 17, 1978, petitioners advised the State Tax Commission that they desired to waive a small claims hearing and to submit the case to the State Tax Commission based on the entire record contained in the file.

ISSUES

I. Whether Zembrzuski Brothers, a partnership, was subject to unincorporated business tax after its dissolution on December 29, 1967.

II. Whether the entire gain derived from the sale of land employed in the unincorporated business of Zembrzuski Brothers was subject to unincorporated business tax.

FINDINGS OF FACT

1. Thomas Zembrzuski and Bernie Zembrzuski were co-partners in Zembrzuski Brothers, a partnership. The partnership was engaged in the unincorporated business of farming. The farm land used by the partnership consisted of 36 acres and was located on Wolf Road, Colonie, New York. The farm was sold on February 24, 1969.

2. The partnership filed unincorporated business tax returns, Form IT-204, for the year 1966, the year in which it was formed, and for 1967. It did not file unincorporated business tax returns for 1968 and 1969. The partners filed their own individual unincorporated business tax returns, (Form IT-202), for the year 1968 on which they reported income from farm operations. They did not file individual unincorporated business tax returns for 1969 but did file separate personal income tax returns for said year on which they equally reported, with their wives, the gain from the sale of the farm as a capital gain.

3. The Income Tax Bureau contended that the land was a business asset of the partnership used in its business and that the gain derived from the installment sale of said farm land was subject to unincorporated business tax. On January 31, 1972, the Income Tax Bureau issued a Notice of Deficiency against the partnership for \$3,061.77 unincorporated business tax, plus \$344.09 interest, for a sum of \$3,405.86. The partnership did not file a petition within the time prescribed and on June 23, 1972, the Income Tax Bureau issued a Notice and Demand for Payment of Tax Due. On August 15, 1973, petitioner paid the amount due on the Notice and Demand plus accrued interest and on August 28, 1973, filed Form IT-113x, Claim For Credit or Refund of Unincorporated Business Tax. On April 11, 1975, the Income Tax Bureau denied said refund claim and on October 21, 1975, the partnership filed a timely petition for refund of unincorporated business tax paid, plus interest.

4. Petitioner contended that half of the land used in the business belonged to the partners and the other half to the partners' wives, and since the wives did not participate in the unincorporated business, only half of the land should be considered a business asset. Petitioners further contended that the partnership was dissolved on December 29, 1967; therefore, the farm land was not an asset of the partnership during 1968 and 1969. Petitioners contended that no partnership unincorporated business tax returns were required to be filed for 1968 and 1969.

5. For many years prior to the years at issue, petitioners Thomas J. and Bernie Zembrzuski and their mother operated the farm as co-partners. On May 18, 1964, petitioners' mother transferred the farm by gift to Thomas J. Zembrzuski and his wife Stella and Bernie Zembrzuski and his wife Frances, as tenants in common. The farm was appraised at \$50,000.00 for gift tax purposes. On December 31, 1965, the original partnership dissolved and on January 1, 1966, the brothers formed a new partnership under the name of Zembrzuski Brothers. No evidence was submitted to show whether or not an agreement was entered into between the brothers and their wives regarding the use of the property by the partnership. The partnership derived all its income, which was distributed equally to the brothers, from the use of the farm property and claimed all the expenses of the farm on its partnership return.

6. In anticipation of the sale of the farm, the partnership dissolved on December 29, 1967, and no new crops were planted. The proceeds from the sale of livestock and machinery were distributed equally to the brothers. An established crop of asparagus was subsequently harvested and the proceeds derived from its sale were divided equally between the brothers. All farming operations terminated by June 15, 1968. On September 26, 1968, an Agreement

of Sale was executed for the sum of \$393,000.00. Transfer of title was executed by warranty deed on February 24, 1969.

CONCLUSIONS OF LAW

A. That for Federal income tax purposes, a partnership shall terminate when the operations of the partnership are discontinued and no part of any business, financial operation, or venture of the partnership continues to be carried on by any of its partners during a winding-up period or otherwise [Treas. Reg. Sec. 1.708-1(b) (1) (i)]. The partners in Zembrzuski Brothers continued to carry on the unincorporated business (within the meaning and intent of section 703(a) of the Tax Law) through a winding-up period, after which the partnership terminated its business operations.

B. That the land contributed by the partners and their wives to the partnership at the time it was formed, was a business asset used by the partnership. Irrespective of any agreement (if there was such agreement) between the partners and their wives, each of whom held an undivided one-fourth interest in the land, the character of said asset never changed and the entire gain derived from the sale of the land was subject to unincorporated business tax in accordance with the meaning and intent of section 705(a) of the Tax Law (See: *Canavan v. State Tax Commission*, 385 N.Y.S.2d201).

C. That the petition of Thomas J. Zembrzuski and Bernie Zembrzuski, individually and as co-partners d/b/u the firm name and style of: Zembrzuski Brothers is denied and the Notice of Disallowance issued April 11, 1975, is sustained.

DATED: Albany, New York

JAN 11 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER