

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Deane Metal Co.

AFFIDAVIT OF MAILING

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 Year 1973.

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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Deane Metal Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Deane Metal Co.
c/o C.H. Deane
192 Country Ridge Dr.
Port Chester, NY 10573

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
2nd day of October, 1981.

Bernice A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Deane Metal Co. :

AFFIDAVIT OF MAILING

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 Year 1973.

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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Charles H. Deane the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles H. Deane
192 Country Ridge Dr.
Port Chester, NY 10573

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
2nd day of October, 1981.

Connie P. Haglund

J. Vredenburg

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

October 2, 1981

Deane Metal Co.
c/o C.H. Deane
192 Country Ridge Dr.
Port Chester, NY 10573

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,

Kathy Pfaffenbach

STATE TAX COMMISSION

cc: Petitioner's Representative
Charles H. Deane
192 Country Ridge Dr.
Port Chester, NY 10573
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
DEANE METAL COMPANY
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1973.

DECISION

Petitioner, Deane Metal Company, a partnership, c/o C. H. Deane, 192 Country Ridge Drive, Port Chester, New York 10573, filed a petition for the redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1973 (File No. 18690).

A formal hearing was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 15, 1979, before Edward L. Johnson, Hearing Officer. Petitioner appeared by Charles H. Deane, one of its employees and an officer of one of its corporate partners. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether and to what extent petitioner, a partnership, is entitled to an additional exemption under section 709(2) of the Tax Law for amounts included in the net income or the taxable income of its partners.

FINDINGS OF FACT

1. A Notice of Deficiency for unincorporated business tax under Article 23 of the Tax Law for the year 1973 was issued on February 28, 1977 to petitioner, Deane Metal Company, c/o Deane Commodities Corp., 100 Wall Street, New York, New York. The notice was in the amount of \$28,875.00, plus interest of \$6,223.72, for a total of \$35,098.72.

2. The petitioner, Deane Metal Company, was a partnership which did business as a commodity dealer at 77 Water Street, New York, New York. It had five member partners. They were: Deane Metal Corp., J.T. Cremer Associates, Inc., Jelliffe Corp., Beedee Equities, Inc. and Hawthorn Partners (a partnership).

3. The petitioner suffered substantial operating losses in 1974 and 1975 and went out of business in early 1976. At least one of its partners, Deane Metal Corp., has also gone out of business.

4. Four of the petitioner's partners, Deane Metals Corp., J.T. Cremer Associates, Inc., Jelliffe Corp. and Beedee Equities, Inc., are corporations subject to franchise taxes under Article 9-A of the Tax Law. Hawthorn Partners is an investment group and is not subject to tax under either Article 9-A or Article 23 of the Tax Law.

5. Petitioner filed a tax return under Article 23 of the Tax Law for the year 1973. It reported income totaling \$741,565.00 derived from net profit from commodity trading, commissions and interest. It incurred commission expenses of \$441,923.00 and office and other expenses, etc., so that total deductions as claimed on petitioner's Federal returns amounted to \$886,422.00. Thus, petitioner had an operating loss on its tax return of \$144,857.00. In addition, however, the partnership had a long term capital gain of \$690,750.00, other income of \$24,000.00 and other deductions of \$24,893.00, so that a net income of \$545,000.00 resulted from the business.

6. Petitioner claimed an additional exemption under section 709(2) of the Tax Law for amounts claimed to be included in the income of its partners. These amounts were the difference between each partner's share of the long term capital gain of \$690,750.00 and its share of the loss of \$144,857.00. For each partner, such amounts were:

Deane Metal Corp.	\$136,473.00
J.T. Cremer Associates, Inc.	136,473.00
Jelliffe Corp.	136,473.00
Beedee Equities, Inc.	95,531.00
Hawthorn Partners	40,942.00
TOTAL	\$545,892.00

7. The tax returns for Deane Metal Corp., J.T. Cremer Associates, Inc. and Jelliffe Corp., Inc., all showed net losses.

8. The tax return for Beedee Equities, Inc. was not in evidence.

9. Hawthorn Partners (a partnership) was an investment partnership and is not taxable under Article 23 of the Tax Law.

CONCLUSIONS OF LAW

A. That Tax Law section 709, subdivision 2, in part, provides:

"If a partner in an unincorporated business is itself taxable under this article or under articles nine-a [corporate franchise tax]... an exemption [shall be allowed] for the amount of the partner's proportionate interest in the excess of the unincorporated business gross income over the deductions allowed under sections 706 and 708, but this exemption shall be limited to the amount which is... included in a corporate partner's net income allocable to this state." (Emphasis added.)

Thus the statute speaks of an "amount" of income and it follows that only any amount of income from the joint venture that exceeds the amount of total corporate income allocable to New York for corporate franchise tax purposes is subject to unincorporated business tax. (Fischbach and Moore, Inc., et al. v. State Tax Commission, 36 N.Y.2d 605 rev'g. 43 A.D.2d 81). Therefore, since the franchise tax return of Deane Metal Corp., J.T. Cremer Associates, Inc. and Jelliffe Corp. showed net losses (Finding of Fact "7" supra) and the franchise tax return of Beedee Equities, Inc. was not in evidence and Hawthorn Partners was not itself a taxable entity under Article 23 of the Tax Law, no additional exemption is allowed within the meaning and intent of section 709(2) of the Tax Law and 20 NYCRR 209.2.

B. That the petition of Deane Metal Company is denied and the Notice of Deficiency issued on February 28, 1977 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION

James A. Tulla
PRESIDENT

Frank R. Koenig
COMMISSIONER

Mark J. Tull
COMMISSIONER