

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

H. Meltzer & Sons :

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 Years 1972 - 1975. :

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 30th day of January, 1981, he served the within notice of Decision by certified mail upon H. Meltzer & Sons, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

H. Meltzer & Sons  
P.O. Box 53  
Cicero, NY 13039

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  
30th day of January, 1981.

Connie P. Hagellund

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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Unincorporated Business Tax :

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for the Years 1972 - 1975. :

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 30th day of January, 1981, he served the within notice of Decision by certified mail upon Donald J. Ball 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. Donald J. Ball  
472 S. Salina St.  
Syracuse, NY 13202

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  
30th day of January, 1981.

*Connie P. Hogeland*

*J. Vredenburg*

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

January 30, 1981

H. Meltzer & Sons  
P.O. Box 53  
Cicero, NY 13039

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  
Donald J. Ball  
472 S. Salina St.  
Syracuse, NY 13202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|---|---|----------|
| In the Matter of the Petitions              | : |          |
|   | : |          |
| of  | : |          |
|   | : |          |
| H. MELTZER & SONS                           | : | DECISION |
|   | : |          |
| for Redetermination of Deficiencies or      | : |          |
| for Refund of Unincorporated Business Tax : | : |          |
| under Article 23 of the Tax Law for the     | : |          |
| Years 1972 through 1975.                    | : |          |

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Petitioner, H. Meltzer & Sons, P.O. Box 53, Cicero, New York 13039, filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1972 through 1975 (File Nos. 15587 and 20319).

A formal hearing was held before David Evans, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 333 East Washington Street, Syracuse, New York, on February 7, 1980 at 9:15 A.M. Petitioner appeared by Donald J. Ball, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

#### ISSUE

Whether income which arose from the real estate activities of Jacob and Benjamin Meltzer, partners in the firm H. Meltzer & Sons, constituted partnership income, subject to unincorporated business tax.

#### FINDINGS OF FACT

1. On April 12, 1976, the Audit Division issued to petitioner, H. Meltzer & Sons, a Notice of Deficiency, asserting additional unincorporated business taxes due for the years 1972 through 1974 in the amount of \$12,660.79, plus interest. On September 26, 1977, the Audit Division issued a second Notice of Deficiency to H. Meltzer & Sons, asserting additional unincorporated business tax for 1975 in the amount of \$1,743.48, plus interest.

2. On March 15, 1948, Hyman Meltzer and his sons, Jacob and Benjamin, filed a Business Certificate for Partners, doing business as H. Meltzer & Sons. On March 24, 1958, Jacob Meltzer and Benjamin Meltzer filed an amended Business Certificate for Partners, doing business as H. Meltzer & Sons. It is the latter entity which is petitioner herein. Jacob and Benjamin Meltzer did not have a written partnership agreement.

3. At the time the business certificate was filed in 1948, the partnership was operating a farm located on Route 11 in the town of Cicero, Onondaga County, and was also engaged in buying and selling livestock. In 1953, the firm entered the auction business, primarily selling cattle and farm machinery. The firm conducted livestock auctions at the Route 11 location until about 1971. During the years at issue, petitioner conducted auctions for the bankruptcy court and for attorneys liquidating assets, which auctions were held at the location of the assets. The office of the auction business was maintained at the Route 11 site. Income from the business was reported on petitioner's New York State partnership returns for 1972 through 1975.

4. During the years at issue, the Meltzers engaged in a number of real estate transactions. Title to the subject properties was held by Jacob and Benjamin as tenants in common, by one of them individually or by Jacob, Benjamin and Jeanette (Mrs. Jacob) Meltzer. Some properties were sold on an installment basis, others were sold with a mortgage held by the Meltzers and still others were rented. Mortgages on nine parcels yielded interest income during some or all of the years herein involved, as follows:

| <u>MORTGAGE</u> | <u>1972</u> | <u>1973</u> | <u>1974</u> | <u>1975</u> |
|-----------------|-------------|-------------|-------------|-------------|
| Younglove       | \$ 591.00   | \$ 452.00   | \$ 251.00   | --          |
| Mufale          | 8,682.00    | 5,089.00    | --          | --          |
| Reed            | 283.00      | --          | --          | --          |
| O'Connor/Odai   | 4,883.00    | 4,920.00    | 4,353.00    | 3,786.00    |
| Elderbloom      | --          | --          | --          | 9,720.00    |
| Gamlen          | 2,457.00    | 2,414.00    | 2,369.00    | 2,320.00    |
| Janowski        | 2,320.00    | 1,990.00    | 1,852.00    | 1,953.00    |
| Storer          | --          | --          | 166.00      | 97.00       |
| Ouderdonk       | --          | --          | --          | 423.00      |

Sales of eleven parcels gave rise to capital gain income, as follows:

| <u>SALE OF PROPERTY</u> | <u>1972</u> | <u>1973</u> | <u>1974</u> | <u>1975</u> |
|-------------------------|-------------|-------------|-------------|-------------|
| Carey                   | \$ 858.00   | \$ 755.00   | \$7,485.00  | --          |
| Stearns (Mufale)        | 40,984.00   | 90,377.00   | --          | --          |
| Bosworth                | 5,344.00    | --          | --          | --          |
| Carley (O'Connor)       | 7,783.00    | 5,882.00    | 5,882.00    | \$5,882.00  |
| Chandler (Elderbloom)   | 15,696.00   | --          | --          | 4,683.00    |
| Route 11                | 515.00      | 555.00      | 598.00      | 644.00      |
| Route 11                | --          | 1,235.00    | --          | --          |
| Toth                    | 757.00      | 821.00      | 792.00      | 859.00      |
| Storer                  | --          | --          | 116.00      | 115.00      |
| Standard (Ouderdonk)    | --          | --          | --          | 2,153.00    |
| Perry (Toth)            | --          | --          | --          | 2,404.00    |

Petitioner did not offer any evidence as to the amount or source of consideration for its purchases of real property. Monies received were reflected on the books of H. Meltzer & Sons; income was deposited in savings accounts maintained by Jacob or Benjamin, and half of said income was reported by each on his individual personal income tax return.

5. Jacob Meltzer made some investments in partnership with persons other than Benjamin; income from these activities was not reflected on petitioner's books.

6. Jacob and Benjamin Meltzer owned and operated Cicero Golf, a golf practice range, one-half the income from which was reported by each of the brothers on his personal income tax return.

7. The Meltzers maintained one checking account, for their business and personal activities, in the name of petitioner, H. Meltzer & Sons. Checks for expenses such as real estate taxes, labor for auctions, advertising fees, automobile expenses and charitable contributions were written on this account. In addition, Jacob and Benjamin made cash withdrawals for their personal use. For 1972, said cash draws from the H. Meltzer & Sons account totaled \$61,797.00; for that year, gross profit from the auction business was \$17,175.00. For 1973, the personal draw was \$93,180.00, while the gross profit for the auction operation was \$25,309.00. In 1974, personal draws were in the amount of

\$134,846.00; the gross profit for the auction business equaled \$50,805.00. Finally, in 1975, the personal draw was \$47,631.00, and the auction gross profit, \$35,297.00.

8. A savings account was maintained at the Merchants National Bank & Trust Company in the name "Jacob Meltzer or Ben Meltzer". Handwritten notations made by Benjamin Meltzer indicated the sources from which deposits arose and the broad purposes for withdrawals.

Numerous transfers were made to the H. Meltzer & Sons checking account. By way of example, on March 26, 1971, a withdrawal of \$2,366.00 was made and deposited to the checking account; similar withdrawals were made on April 16, 1971 and on January 3, 1972 in the amounts of \$2,000.00 and \$24,397.90, respectively. At the formal hearing, Benjamin Meltzer could not recall the purposes for which most of the transfers were made.

On July 2, 1973, a withdrawal of \$17,483.07 was made; the handwritten notation is "Merchants Bank Loan". At the hearing, Benjamin Meltzer presumed the withdrawal was made to pay a loan he and Jacob had taken, but he could not remember the purpose for that loan.

Deposits of rental income were made to this account; for example, on September 17, October 5, November 5 and November 8, 1971, deposits were made in the amounts of \$445.00, \$245.00, \$245.11 and \$125.00, respectively.

9. Benjamin Meltzer maintained a savings account at the Onondaga County Savings Bank, which account, according to a handwritten notation, was closed on March 31, 1972 and the balance of \$52,730.01 deposited to the H. Meltzer & Sons checking account. At the hearing, Benjamin Meltzer testified that he had not made said notation and that he could not recall what happened to the funds.

10. Benjamin and Jacob Meltzer retained an accounting firm, to which they turned over the receipts and disbursements from the aforementioned savings and

checking accounts. From these records and from consultation with the Meltzers, the accountants prepared cash receipt and cash disbursement journals for H. Meltzer & Sons. The accountants delineated the activities of petitioner and the real estate activities of the Meltzers, and prepared the required tax returns for petitioner, for Jacob and for Benjamin.

11. The cash disbursement records of H. Meltzer & Sons reflect payments made to various individuals and entities in connection with the real estate transactions of Jacob and Benjamin. For example, on January 22, 1973 and May 16, 1973, payments in the respective amounts of \$3,654.00 and \$5,097.00 were made to Brown and Turk Excavating. Although Benjamin could not recollect the specific purpose for said payments, he testified that he and his brother may have been "assisting Mr. Gamlen in getting a building started." Payments were made on April 6 and April 19, 1973 in the amounts of \$10,000.00 and \$12,789.00, respectively, to Gamlen. Benjamin recalled that these may have constituted loans.

12. The types and amounts of income in dispute in the instant case can be summarized as follows:

| <u>TYPE OF INCOME</u> | <u>1972</u>     | <u>1973</u>     | <u>1974</u>     | <u>1975</u>     |
|-----------------------|-----------------|-----------------|-----------------|-----------------|
| Interest              | \$20,738.00     | \$ 22,182.00    | \$15,467.00     | \$21,566.00     |
| Rental                | 1,696.00        | 1,922.00        | (175.00)        | 2,081.00        |
| Capital Gain          | 70,665.00       | 98,248.00       | 13,366.00       | 12,968.00       |
| Schedule 4797         | <u>1,272.00</u> | <u>1,377.00</u> | <u>1,507.00</u> | <u>3,770.00</u> |
| Total                 | \$94,371.00     | \$123,729.00    | \$30,165.00     | \$40,385.00     |

With regard to this income, the Audit Report stated, in pertinent part:

"Partnership income should include any income received jointly by the taxpayers. Therefore, adjustment is made including rental income, installment sales income and interest income on UBT returns."

#### CONCLUSIONS OF LAW

A. That subdivision (a) of section 703 of the Tax Law provides, in relevant part:



"An unincorporated business means any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity, including a partnership.... If an individual or an unincorporated entity carries on two or more unincorporated businesses, all such businesses shall be treated as one unincorporated business for the purposes of this article."

B. That petitioner's contention that H. Meltzer & Sons was solely an auction business is untenable. Benjamin and Jacob Meltzer operated a golf range, rented properties, engaged in eleven sales of property over the years at issue and made substantial loans to a grantee for the purpose of developing the property sold to said grantee. The Meltzers maintained only one set of financial records for all their joint activities, under the name H. Meltzer & Sons. Petitioner made no evidentiary offering as to the source of funds for the various purchases of real property, Tax Law sections 689(e), 722; it thus does not appear that the funds were any other than those of the partnership. See Partnership Law section 12(2).

That one parcel was held in the names of Benjamin, Jacob and Jeanette Meltzer does not alter this conclusion.

"Real estate purchased for partnership purposes and appropriated to those purposes, and paid for by partnership funds, becomes partnership property, and it is not material in what manner or by what agency the land is purchased, or in what name it stands... If it has been paid for with partnership effects it is then a question of intention, whether the conveyance is to have its legal effect, and the parties are to be treated as tenants in common, or whether the land is to be treated as partnership property. The manner in which the accounts are kept, whether the purchase-money was severally charged to the members of the firm, or whether the accounts treat it the same as other firm property, as to purchase-money, income, expenses, etc., are controlling circumstances in determining such intention, and from these circumstances an agreement may be inferred." Fairchild v. Fairchild, 64 N.Y. 471, 477. See also Collumb v. Read, 24 N.Y. 505.

Petitioner also contended that the real properties (with the exception of the office located on the Route 11 parcel) were neither utilized nor connected in any manner with the auction business. On the contrary, the sale and lease of these properties was an integral part of the business activities conducted

by the partnership; and income arising therefrom is subject to unincorporated business tax. Cf., Matter of Melville Industrial Associates, State Tax Commission, October 19, 1979; Matter of Robert F. Roth, State Tax Commission, September 15, 1976.

C. That section 703 of the Tax Law, which furnishes the definition of an unincorporated business for purposes of Article 23, provides that the following activities shall not be deemed to constitute an unincorporated business:

"(d) Purchase and sale for own account. -- An individual or other unincorporated entity, except a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall not be deemed engaged in an unincorporated business solely by reason of the purchase and sale of property...for his own account...

"(e) Holding, leasing or managing real property. -- An owner of real property, a lessee or a fiduciary shall not be deemed engaged in an unincorporated business solely by reason of holding, leasing or managing real property."

Petitioner has failed to demonstrate that the real estate activities of the Meltzers fell within the purview of either subdivision (d) or (e). See Tax Law sections 689(e), 722. As heretofore stated, the real estate transactions were an integral part of the partnership business, carried on with regularity. Also, petitioner was not a passive investor: it actively managed the properties, collected rents thereon, maintained an office at one of the properties and to some extent, participated in the financing of development of property.

D. That the petitions of H. Meltzer & Sons are hereby denied; and the notices of deficiency issued April 12, 1976 and September 26, 1977 are sustained in full.


DATED: Albany, New York

JAN 30 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER