

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
James P. & Frank J. Clark (Estates of)
James P. Clark, Jr., Executor : 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 1967 & 1968.

State of New York
County of Albany

David Parchuck, 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 February, 1983, he served the within notice of Decision by certified mail upon James P. & Frank J. Clark (Estates of), James P. Clark, Jr., Executor the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James P. & Frank J. Clark (Estates of)
James P. Clark, Jr., Executor
127 Nassau Ave.
Brooklyn, NY 11222

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 February, 1983.

David Parchuck

Connie A. Huggins

**AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174**

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
James P. & Frank J. Clark (Estates of) :
James P. Clark, Jr., Executor

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 1967 & 1968.

State of New York
County of Albany

David Parchuck, 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 February, 1983, he served the within notice of Decision by certified mail upon Sidney Meyers the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney Meyers
51 Chambers St.
New York, NY 10007

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 February, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

February 11, 1983

James P. & Frank J. Clark (Estates of)
James P. Clark, Jr., Executor
127 Nassau Ave.
Brooklyn, NY 11222

Dear Mr. Clark:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Sidney Meyers
51 Chambers St.
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JAMES P. & FRANK J. CLARK (ESTATES OF)
JAMES P. CLARK, JR., EXECUTOR
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1967
and 1968.

DECISION

Petitioners, James P. & Frank J. Clark (Estates of), James P. Clark, Jr., Executor, 127 Nassau Avenue, Brooklyn, New York 11222, 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 1967 and 1968 (File Nos. 23830 and 23831).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 26, 1981 at 1:15 P.M. Petitioners appeared by Sidney Meyers, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether rental income received by James P. & Frank J. Clark Joint Venture during the years 1967 and 1968 is subject to the imposition of unincorporated business tax.

FINDINGS OF FACT:

1. During the years 1967 and 1968 James P. Clark and Frank J. Clark were the sole members of a partnership known as "James P. & Frank J. Clark" (hereinafter the partnership). Additionally, they were the sole members of a joint venture

known as "James P. & Frank J. Clark Joint Venture" (hereinafter the joint venture).

2. The partnership timely filed a New York State Partnership Return for each of the years 1967 and 1968 wherein it reported gross income of \$5,610.53 and \$5,417.13 respectively from its activities described as real estate brokerage, appraisals and management and insurance brokerage. On each of said returns the computed net income was too nominal to yield an unincorporated business tax liability. The joint venture timely filed a New York State Partnership Return for each of the years 1967 and 1968 whereon it reported gross income from rents of \$54,766.75 and \$66,341.49 respectively. On each of said returns the unincorporated business tax portion was marked "rental income not subject to UBT".

3. On December 29, 1969 the Audit Division issued a Statement of Audit Changes for each of the years 1967 and 1968 wherein it held that "income reported from realty commissions, insurance fees, real estate rentals and other business income is combined in computing the unincorporated business tax liability". Accordingly, separate notices of deficiency were issued under the same date for each of said years asserting unincorporated business tax for 1967 of \$1,767.76, plus interest of \$180.84, for a total due for said year of \$1,948.60; and unincorporated business tax for 1968 of \$2,682.49, plus interest of \$113.47, for a total due for said year of \$2,795.96.

4. Although the partnership and the joint venture used the same business office located at 127 Nassau Avenue, Brooklyn, New York, separate records and bank accounts were maintained for each activity.

5. James P. Clark and Frank J. Clark (both deceased) were cousins. They commenced their partnership and joint venture activities in or about 1946. The rental income of the joint venture was derived from thirty three parcels of

industrial property located in Brooklyn and Queens, New York. Most parcels were purchased as vacant land on which one story factory type structures were subsequently constructed. All properties were purchased as tenants in common predominantly in the 1950's.

6. All properties purchased by the joint venture were held for investment purposes. No properties were sold although offers were received on several occasions.

7. The Audit Division maintained that the activities of the partnership and the joint venture "were so interrelated and integrated that they cannot be separated and must be considered one business".

CONCLUSIONS OF LAW

A. That section 703(e) of the Tax Law provides that:

"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".

Accordingly, the rental income of James P. & Frank J. Clark Joint Venture, when considered separately from the partnership income of James P. & Frank J. Clark, is exempt from the unincorporated business tax pursuant to section 703(e).

B. That the fact that separate records and bank accounts were maintained by each entity, coupled with the fact that the income derived by the partnership, James P. & Frank J. Clark from its unincorporated business activities constituted a relatively minor amount, leads to the conclusion that the activities of the two entities were separate and distinguishable. Accordingly, they may not be combined and considered one business for unincorporated business tax purposes. (Matter of Speros, Ted, John and Nick Dellas, Partnership, State Tax Commission decision, January 11, 1980).

C. That the petition of James P. & Frank J. Clark (Estates of) is granted and the notices of deficiency dated December 29, 1969 are hereby cancelled.

DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER