

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Weiskopf, Silver, Singer & Co., :
Oscar Gruss & Son, Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Year 1979. :

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 3rd day of October, 1985, he served the within notice of Decision by certified mail upon Weiskopf, Silver, Singer & Co., Oscar Gruss & Son, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Weiskopf, Silver, Singer & Co.,
Oscar Gruss & Son, Inc.
74 Broad Street
New York, NY 10004

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
3rd day of October, 1985.

David Parchuck

Bernie D. Haychard
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Weiskopf, Silver, Singer & Co., :
Oscar Gruss & Son, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Year 1979. :

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 3rd day of October, 1985, he served the within notice of Decision by certified mail upon Phillip J. O'Reilly, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Phillip J. O'Reilly
Buckley, Kremer, O'Reilly, Pieper, Hoban & Marsh
1505 Kellum Place
Mineola, NY 11501

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
3rd day of October, 1985.

David Parchuck

Ann O'Haghen
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 3, 1985

Weiskopf, Silver, Singer & Co.,
Oscar Gruss & Son, Inc.
74 Broad Street
New York, NY 10004

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) 690 & 722 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Phillip J. O'Reilly
Buckley, Kremer, O'Reilly, Pieper, Hoban & Marsh
1505 Kellum Place
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WEISKOPF, SILVER, SINGER & CO.,	:	DECISION
OSCAR GRUSS & SON, INC.	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1979.	:	

Petitioner, Weiskopf, Silver, Singer & Co., Oscar Gruss & Son, Inc., 74 Broad Street, New York, New York 10004, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1979 (File No. 38542).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 10, 1984 at 3:15 P.M., with all documents to be submitted by June 7, 1985. Petitioner appeared by Buckley, Kremer, O'Reilly, Pieper, Hoban & Marsh, Esqs. (Philip J. O'Reilly, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner, a partnership, has substantiated the assertion that a portion of certain business expenses incurred by and claimed as deductions on the books and corporate tax returns of one of petitioner's member partners were properly allocable to and deductible by petitioner.

FINDINGS OF FACT

1. On May 13, 1982, the Audit Division issued to petitioner, Weiskopf, Silver, Singer & Co., Oscar Gruss & Son, Inc., Joint Account, a Notice of

Deficiency asserting additional unincorporated business tax due for 1979 in the amount of \$40,096.08, plus interest.

2. A Statement of Audit Changes previously issued to petitioner on December 1, 1981 provided the following explanation for the above-asserted deficiency:

"For unincorporated business tax purposes, the Section 709 exemption for a corporate partner is limited to the lesser of the following:

- (a) The corporate partner's interest in the Federal ordinary income of the Partnership.
- (b) The corporate partner's share of the after salary allowance partnership income.
- (c) The New York taxable income of the corporate partner.

Since the taxable income of Oscar Gruss & Son Inc., 144,457.00, is considerable (sic) less than the amount computed under Methods (a) & (b), their 709 exemption is limited to \$144,457.00.

Corporate 709 exemption previously	
claimed corrected	\$1,040,481.00
Corrected	<u>144,457.00</u>
Balance	\$ 896,024.00
Statutory Exemption	<u>5,000.00</u>

Income taxable on joint Venture return \$ 891,024.00

UNINCORPORATED BUSINESS TAX DUE @ $4\frac{1}{2}\%$ \$40,096.08"

3. Petitioner is a partnership, the partners in which are Mann, Sangarese, Drago & Co.; Greenwall Ingallinera; Weiskopf, Silver, Singer & Co.; and Oscar Gruss & Son, Inc. Oscar Gruss & Son, Inc. ("Gruss") is the only corporate partner in the partnership.

4. The three non-corporate partners engage in trading operations for a specialist book on the floor of the American Stock Exchange, while Gruss is the "upstairs operation", essentially providing the bookkeeping or transactions clearing for the specialist book. Gruss is the only partner not actually participating in the specialist book trading activities on the floor of the exchange. Gruss has one full-time representative in a "downstairs" office,

directly representing Gruss's interest in the specialist book operation, while Gruss's "upstairs" personnel provide the balance of services associated with the specialist book. A large percentage of Gruss's overall business pertains to trading for its own account, with the balance being partnership activities and a small retail business.

5. Petitioner filed a petition to contest the deficiency at issue, originally asserting that the partnership return was correct as filed. At the commencement of the hearing, petitioner conceded, in view of the Court of Appeals decision in Richmond Constructors v. Comm. of Finance for the City of New York (61 N.Y.2d 1), that the Audit Division's position regarding the Tax Law section 709 exemption, specifically that such exemption was limited to \$144,547.00, was correct. However, petitioner then maintained that a portion of certain expenses taken as deductions by Gruss were properly allocable to and deductible by petitioner, thereby reducing petitioner's income subject to unincorporated business tax. The following chart sets forth the amounts of expense and percentages thereof which, while not originally claimed as expenses by petitioner, are maintained to be properly allocable to and deductible by petitioner:

ALLOCATION OF CORPORATE EXPENSE TO JOINT ACCOUNT

<u>Expense</u>	<u>Gruss Total Expense</u>	<u>Percentage Asserted Allocable to Petitioner</u>	<u>Amount Asserted Allocable</u>
<u>Officers' Salaries:</u>			
Jack Helfenbein	\$ 20,000	100	\$ 20,000
E. Gruss	211,213	25	52,803
H. Gelfenbein	81,213	15	12,182
R. Mittleman	50,001	33-1/3	16,650
J. Amender	40,001	10	4,000
Vinnie Drohan	29,500	33-1/3	9,823
M. Anastino	31,000	20	6,200
H. Strong	19,700	5	985

Employees' Salaries:

P. Moy	9,118	20	1,824
() Ott - Margin	14,240	25	3,560
John Martin - Reorgs	15,820	10	1,582
Receptionist - Various	7,000	10	700
Total Salaries	\$ 980,140		\$130,309
Employee Benefits	84,526	13.29 ¹	11,234
Profit Sharing Plan	---	--	--

Other Expenses:

Rent	\$ 88,696	50	44,348
Utilities	8,265	50	4,133
Maintenance & Clean	3,297	50	1,649
Jack Helfenbein Expense	607	100	607
Depreciation	572	50	286
Stationery	25,277	73.43	18,561
Tickets	29,850	36.7	10,955
Office Expenses	20,338	73.43	14,934
Research	9,054	10	905
Regulatory Fees	42,256	25	10,564
Telephone	59,532	25	14,883
Entertainment	1,999	10	200
Professional Fees	18,345	10	1,835
Miscellaneous Expenses	331,680	20	66,336
Total Other Expenses	\$ 639,768		\$201,430
Total Salaries, Benefits & Other Expenses	\$1,704,434		\$331,739

6. In support of the above-claimed allocation of expenses to the petitioner, the testimony of Mr. Robert Mittleman and of Mr. Jack Helfenbein was offered. Mr. Mittleman, an officer of Gruss, is responsible for Gruss's trading activities and has been employed by Gruss for 21 years. With the exception of Mr. Helfenbein, Gruss's officers only become involved on a day-to-day basis in partnership activities if necessary, such as where all partners' approval is needed for a large trade, or to insure that all traders meet Securities and Exchange Commission capital requirements, etc. The officers of Gruss as listed in Finding of Fact "5" are responsible for different areas of Gruss's business and also participate

¹ $\frac{\text{Allocated Salary Expense}}{\text{Total Salary Expense}} = \frac{130,309}{980,140} = 13.29\%$

in various meetings of the partnership. The percentages upon which both officers' and employees' salaries are sought to be allocated to petitioner are based on an attempt to allocate Gruss's expenses attributable to the partnership on the basis of time spent working on partnership matters.

7. Mr. Mittleman testified that Gruss rents two floors of space, one of which is almost exclusively used for the specialist book operation. Allocation of tickets (buy and sell tickets, confirmation slips and computer services) and other items of expense was apparently made on the basis of comparing Gruss's business to the partnership's business, although a more specific description of how the various percentages were derived was not supplied.

8. No explanation was offered as to why these allocations were not made originally as opposed to being taken entirely as deductions by Gruss on its corporate returns, nor were Gruss's corporate tax returns (either Federal or New York State) offered in evidence. Neither Gruss's officers nor its employees kept time cards reflecting an allocation of time between partnership affairs and Gruss's affairs.

9. Mr. Helfenbein is Gruss's full-time representative in the partnership as a broker on the stock exchange floor and has been a specialist broker for approximately 17 years. During the year in issue he worked full time on matters pertaining to the partnership, received a Wage and Tax Statement (Form W-2) from Gruss representing his total compensation from Gruss and received no such W-2 from the partnership.

10. Notwithstanding the fact that the expenses now sought to be allocated were not so allocated when petitioner's return was filed, the Audit Division did not oppose petitioner's amendment to the petition insofar as the propriety of allocating to the partnership those of Gruss's expenses which, although

previously not allocated, were properly allocable thereto. However, it is the Audit Division's position that the amounts sought to be allocated are not substantiated by the evidence submitted at the hearing.

11. At the parties' request, a substantial period of time was allowed after the hearing upon the assertion that the matter could be closed without need for a decision by the State Tax Commission. Petitioner was also afforded a period of time, specifically until June 7, 1985, in order to submit any documents in substantiation of its claimed reallocation in addition to the evidence submitted at the hearing. No evidence in addition to that submitted at the hearing was submitted by petitioner.

CONCLUSIONS OF LAW

A. That, with certain specified exceptions none of which are applicable in this matter, section 689(e) of the Tax Law provides that the burden of proof in any case before the State Tax Commission is upon the petitioner. Tax Law section 689(e) is made applicable to Article 23 of the Tax Law by virtue of Tax Law section 722(a).

B. That, with the exception of the salary (\$20,000.00) and expenses (\$607.00) paid to and on behalf of Mr. Helfenbein and the allocation of fifty percent of rent, utilities and maintenance and cleaning expenses (totalling \$50,130.00) on the basis of area rented, the evidence presented by petitioner provides little or no clear basis in support of the claimed allocation. It is noted that testimony indicated that Gruss's officers spent comparatively little time on partnership affairs. Neither time records nor even affidavits specifying time allocations were submitted, nor were the activities of either the officers or the employees more than very generally described. No clear explanation of the basis for arriving at the varying percentages used to allocate other


expenses was provided, nor was the by-far single largest other expense sought to be allocated more clearly specified than "misc.". Notwithstanding an extended period of time afforded for the submission of more specific documentation in support of the claimed allocation, nothing was submitted.


C. That the petition of Weiskopf, Silver, Singer & Co., Oscar Gruss & Son, Inc. is granted to the extent indicated in Conclusion of Law "B" (such that petitioner's ordinary income is to be reduced by allocated expenses in the aggregate amount of \$70,737.00), but is in all other respects denied and the Notice of Deficiency dated May 13, 1982, as reduced in accordance herewith, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 03 1985


PRESIDENT


COMMISSIONER


COMMISSIONER