

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

OESTREICHER REALTY

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article ~~(8)~~ 23 of the :
Tax Law for the Year(s) ~~XXXXXX~~ :
1965 and 1966.

State of New York
County of Albany

John Huhn

, 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 6th day of April, 1979, ~~he~~ served the within

Notice of Decision by (certified) mail upon Oestreicher Realty

~~(representative of)~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Oestreicher Realty
444 Madison Ave.
New York, New York 10022

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 ~~XXXXXXXXXXXXXXXXXXXX~~
~~XXXXXX~~ petitioner herein and that the address set forth on said wrapper is the
last known address of the ~~XXXXXXXXXXXXXXXXXXXX~~ petitioner.

Sworn to before me this

6th day of April, 1979

John Huhn

Maureen J. Papineau

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
OESTREICHER REALTY

AFFIDAVIT OF MAILING

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of Unincorporated Business :
Taxes under Article ~~(ss)~~ 23 of the :
Tax Law for the Year(s) ~~XXXXXX~~ :
1965 and 1966.

State of New York
County of Albany

John Huhn, 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 6th day of April, 1979, he served the within
Notice of Decision by (certified) mail upon Jesse Climenko, Esq. &
Allan J. Parker, Esq.
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Jesse Climenko, Esq. &
Allan J. Parker, Esq.
Shea, Gould, Climenko & Casey
330 Madison Ave.
New York, New York 10017
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

6th day of April, 1979.

Marilyn J. Papineau

John Huhn



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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

April 6, 1979

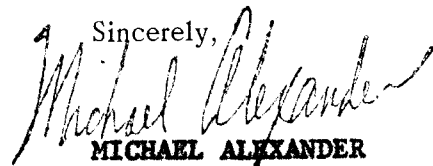
Oestreicher Realty
444 Madison Ave.
New York, New York 10022

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 ~~(8)~~ **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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

MICHAEL ALEXANDER
SUPERVISING TAX HEARING OFFICER

cc: Petitioner's Representative
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
OESTREICHER REALTY	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1965 and 1966.	:	
	:	

Petitioner, Oestreicher Realty, 444 Madison Avenue, New York, New York 10022, 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 1965 and 1966 (File No. 12290).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 21, 1977 at 9:15 A.M. Petitioner appeared by Jesse Climenko, Esq. and Allan J. Parker, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner is collaterally estopped from arguing that it had no unincorporated business tax liability for 1965 and 1966.

II. Whether the Income Tax Bureau is precluded by the applicable statute of limitations or by laches, from assessing petitioner for unincorporated business tax for 1965 and 1966.

III. Whether services rendered by Leonard and Gerard Oestreicher during 1965 and 1966, as officers of various corporations, were so interrelated and integrated with their activities in connection with their unincorporated business as real estate managers, as to constitute part of a business regularly carried on by them.

FINDINGS OF FACT

1. On June 30, 1975, based on a decision of the State Tax Commission for 1959 through 1964, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Oestreicher Realty. Said Statement concerned the income received by Leonard and Gerard Oestreicher, partners of petitioner, Oestreicher Realty, for their activities in managing several office buildings in 1965 and 1966. In accordance with the aforementioned Statement, the Bureau issued a Notice of Deficiency against petitioner, Oestreicher Realty, totaling \$11,445.13 for the years in question.

2. The decision of the State Tax Commission that was used as a basis for the Statement of Audit Changes was rendered on the merits of the case (pursuant to a submission by the petitioner, Oestreicher Realty) and on the facts presented, and was not rendered as a default judgment, as alleged by petitioner.

3. On February 18, 1969, Gerard Oestreicher, acting in his capacity as a partner of petitioner, Oestreicher Realty, signed a

"Consent Fixing Period of Limitation Upon Assessment of Unincorporated Business Taxes" for "1 year following the close of proceedings" for the taxable years ending December 31, 1965 and 1966. The close of proceedings was July 18, 1974, which was the date of the State Tax Commission's decision previously rendered against petitioner. The Notice of Deficiency was subsequently issued June 30, 1975.

4. Petitioner, Oestreicher Realty, failed to prove by documentary or other substantial evidence that the Income Tax Bureau's delay in asserting unincorporated business tax was unreasonable or that petitioner was prejudiced by the delay.

5. During the years in question, petitioner, Oestreicher Realty, was a partnership engaged in the business of real estate management. The partnership consisted of two brothers, Leonard and Gerard Oestreicher. Each brother had a 50% interest in the partnership and received a regular income from it.

6. During 1965 and 1966, Leonard and Gerard Oestreicher owned stock in several corporations, which in turn owned and operated certain parcels of real property. Leonard and Gerard Oestreicher owned 100% of the stock of Oestreicher Properties Inc., which owned and operated the 520 Eighth Avenue Building in New York. This corporation owned 100% of a) the stock of Forell Realty Corporation, which in turn owned and operated the 261 West 36th Street Building, in New York and b) the Nustoria Realty Corporation, which owned and operated the 534 Eighth Avenue

Building in New York. The 444 Madison Avenue Building was owned by a corporation in which the brothers had a substantial interest.

7. During the years in issue, Leonard and Gerard Oestreicher performed substantial services for the aforementioned corporations and managed the buildings owned by said corporations. They planned and executed major construction and remodeling of the buildings, arranged for financing and mortgages, negotiated with tenants and supervised the maintenance personnel of said buildings.

8. As compensation for their services, the corporation paid substantial remuneration to Gerard and Leonard Oestreicher in the years at issue. Although petitioner, Oestreicher Realty, filed partnership returns in 1965 and 1966, no unincorporated business tax was paid. Leonard and Gerard Oestreicher designated most of their compensation from the corporations to be money received for services rendered as officers and employees of the corporations, instead of compensation earned by the real estate management partnership, Oestreicher Realty.

9. Petitioner, Oestreicher Realty, failed to adequately differentiate the activities of Leonard and Gerard Oestreicher for it from their activities as officers of various other corporations. Petitioner also failed to prove by documentary or other substantial evidence that the services rendered by Leonard and Gerard Oestreicher as officers of said corporations were not so interrelated and integrated with their activities in connection with their unincorporated business (Oestreicher Realty), so as to constitute part of a business regularly carried on by them.

CONCLUSIONS OF LAW

A. That the Income Tax Bureau merely used a previous decision of the State Tax Commission (Petition of Oestreicher Realty, decision of the State Tax commission, July 18, 1974) as a basis for issuing a Statement of Audit Changes and Notice of Deficiency against petitioner, Oestreicher Realty, for 1965 and 1966. The Income Tax Bureau did not contend, nor is petitioner otherwise precluded by collateral estoppel, from relitigating issues and facts previously decided contrary to petitioner's contentions for previous tax years.

B. That the Income Tax Bureau is not precluded from assessing petitioner, Oestreicher Realty, for unpaid unincorporated business taxes because said assessment was not made within three years from the filing of a return as prescribed by section 683 of the Tax Law, since petitioner waived the Statute of Limitations with respect thereto. Gerard Oestreicher, acting as a partner and agent of petitioner, Oestreicher Realty, signed a valid "Consent" extending the time for assessment by the Income Tax Bureau. The Income Tax Bureau acted within the time limitation stipulated in the "Consent" and, therefore, properly assessed petitioner in accordance with section 683(c)(2) of the Tax Law.

C. That the Income Tax Bureau is not guilty of laches by virtue of its failure to assess petitioner, Oestreicher Realty, earlier. The general rule is that in tax cases, laches may not be imputed to the State in the absence of statutory authority (Jamestown

Lodge 1681 Loyal Order of Moose, Inc. v. Catherwood, 31 A.D. 2d 981, 297 N.Y.S. 2d 775). There is an absence of such statutory authority in the present case. The above equitable doctrine also does not apply because petitioner was not prejudiced by the Income Tax Bureau's inaction, nor did the Bureau unreasonably delay its assessment of petitioner (See N.Y. Jur sec. 153). Significantly, there was no deliberate delay by the Income Tax Bureau, nor did petitioner request the Bureau to speed the process. (See Scott-Textor Production v. Murphy, 34 A.D. 2d 1076, 1077, 312 N.Y.S. 421, 424 - concerning inaction by State Tax Commission).

D. That the services rendered by Leonard and Gerard Oestreicher during 1965 and 1966, in managing and operating parcels of real property, were so connected with the activities of the unincorporated business (Oestreicher Realty) as to constitute part of the real estate management business regularly carried on by it.

E. That the management fees received by Leonard and Gerard Oestreicher during 1965 and 1966 were subject to the unincorporated business tax, within the meaning and intent of section 703 of the Tax Law.

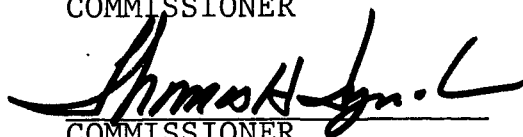
F. That the petition of Oestreicher Realty is denied and the Notice of Deficiency issued June 30, 1975 is sustained.

DATED: Albany, New York
April 6, 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER