Opinion No. 942

DISTRICT OF COLUMBIA TAX COURT

BEN LAR ASSOCIATES HARRY HIRSCH JACOB H. HIRSCH HYMAN AVRUNIN HERMAN F. BERNSTEIN, Petitioners	)	FILED NOV 15 1957 District of Columbia Tax Court
vs.	:	DOCKET NO. 1599
DISTRICT OF COLUMBIA, Respondent	)	

FINDINGS OF FACT AND OPINION

Four persons together acquired parcels of real estate and associated themselves under the name of "Ben Lar Associates." They subsequently sold the real estate at a profit. The Assessor determined that the transactions by the four persons were carried by an entity in the nature of a partnership or joint venture; and that such entity was an unincorporated business and liable for a franchise tax under the District of Columbia Income and Franchise Tax Act of 1947 (Chapter 15, Title 47, D. C. Code, 1951 Edition). The petitioners contend that the transactions involving the acquisition and disposition of the real estate was carried on by them as individual tenants in common, and that the profit therefrom was taxable as net income received by individuals.

Findings of Fact

1(a). Ben Lar Associates is an association of the four individual petitioners.

(b) The petitioner, Harry Hirsch, is an individual, residing in the District of Columbia. He is married. His wife is Ida Hirsch. He is engaged in the retail liquor business in partnership with the petitioner, Hyman Avrunin. He has no real estate broker's or business chance broker's license.

(c) The petitioner, Jacob Hirsch, is an individual, residing in the District of Columbia. He is engaged in the profession of dentistry. He has no real estate xx broker's or business chance broker's license. He is the brother of the petitioner, Harry Hirsch.

(d) The petitioner, Hyman Avrunin, is an individual, residing in the District of Columbia. He is engaged as a partner with the petitioner, Harry Hirsch, in the retail liquor business. He has no real estate broker's or business chance broker's license.

(e) The petitioner, Herman F. Bernstein, is an individual, residing in the District of Columbia. He is engaged in the profession of dentistry. He has no real estate broker's or business chance broker's license.

2. None of the petitioners sold any real estate, other than that here involved, from the year 1949 to the present time.

3. The four petitioners are close friends and associates. The petitioners, Jacob Hirsch and Herman F. Bernstein, both dentists, have confidence in the business acumen and judgment of the petitioners, Harry Hirsch and Hyman Avrunin, and follow the latters' suggestions and advice as to investment and business matters relating thereto.

4(a) Some time prior to the year 1947 the four petitioners associated themselves in the purchase of lot of ground improved by a small store at the corner of Twenty-first and E Streets, Northwest, Washington, D. C., which they acquired as tenants in common in equal interest. The store building was demolished and an office building was constructed in its place and leased to The National Academy of Sciences.

(b) In the acquisition, improvement and operation of the aforesaid property the petitioners used the firm or trade name of "Stanley Associates."[1]

(c) The rent from the office building was and still is collected by a real estate agent and divided in four parts, one part being sent to each of the petitioners.

5(a) In 1951 the petitioners, under the direction of Jacob F. Hirsch and Hyman Avrunin, began the acquisition of a group of contiguous lots of ground in Square 81, Washington, D. C.

(b) On May 1, 1951, Philip Diatz and wife conveyed to the four petitioners as tenants in common Lots 76, 77, A. E. 814, 816 and 818 (as designated for purposes of taxation) in Square 81. On the same day the individual petitioners, and the wives of all of them, except Herman J. Bernstein, who was unmarried, executed a deed of trust conveying the above mentioned lots to trustee to secure a loan of $60,000, used as a part of the purchase price thereof.

(c) On September 5, 1951, John Mosley and wife conveyed to the four individual petitioners as tenants in common Lot 817 (as designated for purposes of taxation) in Square 81. On the same day the four individual petitioners and the wives of all of them, except Herman J. Bernstein, who was unmarried, executed a deed of trust conveying Lot 817 in Square 81 to trustees to secure a loan of $10,000 used as a part of the purchase price thereof.

(d) On September 28, 1951, Mary F. Higginson conveyed to the four individual petitioners as tenants in common lot 815 (as designated for purposes of taxation) in Square 81. On the same day the individual petitioners and

(1) Sentimentally so called after a baby boy born to one of the petitioners about the time of the acquisition.

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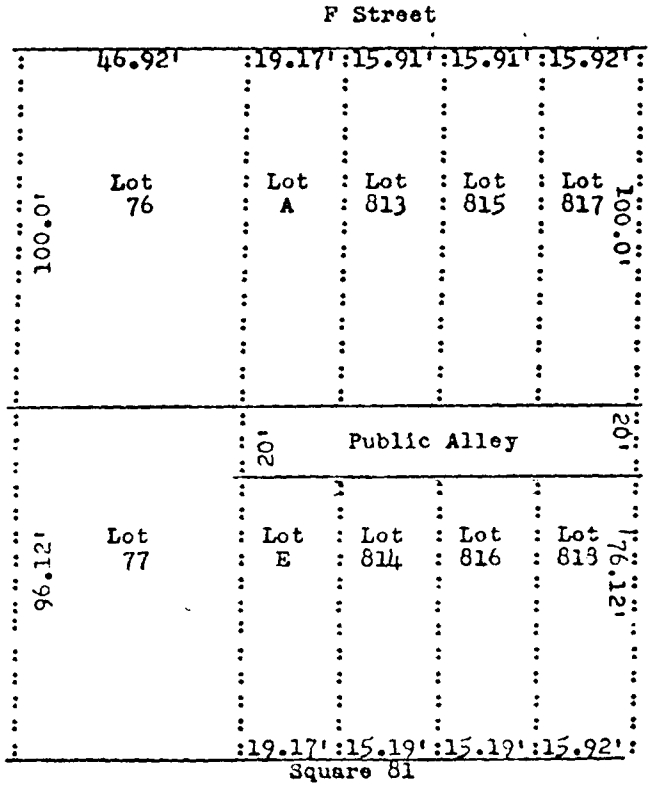
the the wives of all of them, except Herman J. Bernstein, who was unmarried, executed a deed of trust conveying Lot 815 in Square 81 to trustees to secure a loan of $8,500, used as a part of the purchase price thereof.

(e) On March 26, 1952, Bernice L. Grear conveyed to the four individual petitioners as tenants in common Lot 813 (as designated for purposes of taxation) in Square 81. On the same day the four individual petitioners and the wives of all of them, except Herman J. Bernstein, who was unmarried, executed a deed of trust conveying Lot 813 in Square 81 to secure a loan of $9,000, used as a part of the purchase price thereof.

(f) Upon the completion of the last of the above described transactions the four individual petitioners owned, as tenants in common, according to the record of transfer, a rectangle of ground comprising lots in Square 81 as shown on the following:



6. The purpose of acquisition of the several lots of ground comprising the above detailed rectangle was to acquire a parcel of ground of size and shape practically sufficient for the construction of an apartment building, to be owned and operated by the petitioners.

7(a) At the time of the acquisition of the aforesaid land the individual petitioners associated themselves under the trade name of "Ben-Lar Associates"[2], and thereafter all transactions relating to the property, except the hereinafter mentioned contract of sale, were carried on in that name.

(b) Several of the lots contained an apartment house and other rental structures, and several comprised an automobile parking lot. All pieces of property were leased in the name of Ben Lar Associates.

(c) The rents received from the property were paid to Ben Lar Associates and deposited in a bank account in that name. After payment of expenses, incident to the conduct of the venture, the net rents distributed to the members of the Association by one of them, who was designated as the manager or supervisor of the venture.

(d) Application for rent increase was made to the Administrator of Rent Control in the name of Ben Lar Associates.

(e) All financial and bookkeeping records and accounts relating to the property were kept in the name of Ben Lar Associates.

(f) For the year 1952 Ben Lar Associates filed with the Assessor an "Unincorporated Business Franchise Tax Return" in which it was designated as a partnership formed

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(2) Still sentimental, the individual petitioners conceived the name "Ben-Lar" by combining the first syllables of the names of two sons of one of the individual petitioners.

in May, 1951, and in which net income of $2,868.10, based on rentals from real property, was reported.

(g) On August 19, 1952, there was executed an authorization in the language following:

"H. L. Rust Company
1001 15th Street, N. W.
Washington, D. C.

Dear Sir:

You are hereby authorized to offer for sale my property being lots 76-77-A-E-813-814-815-816-817-818 in square 81 of the D. C. for the sum of $20.00 per square foot.

We will pay a real estate commission of 5% on the first $50,000 and 3% on the balance of the sale price as based on the rate of $20. per square foot. This authorization will expire on September 5, 1952.

Very truly yours
Hyman Avrunin, J. E. Hirsch,
Harry Hirsch, Herman Bernstein,
a partnership
8/19/52 By Hyman Avrunin"

(h) On January 7, 1953, there was sent to Harry J. Benachowski, c/o National Parking Service, the notice to quit possession of the parking lot following:

"Dear Mr. Benachowski:

This will advise you that the premises known as vacant ground, the same being premises 2130 F Street, N. W., in the District of Columbia, (known for taxation purposes as Lots A, E, Rear 76, 77, 814, 818 in Square 81), has been sold. Settlement was effective January 6, 1953, and pursuant to the terms of the lease agreement between us dated July 19, 1951, under which you hold possession of said premises, we hereby give you notice to remove from and quit the same upon the expiration of Sixty (60) days after date of the service of this notice upon you.

Very truly yours
BEN-LAR ASSOCIATES
By Harry Hirsch"

8(a) The authorization set forth in Finding 7(g) was given to H. L. Rust Company by the petitioner Hyman Avrunin without any expectation of selling the rectangle of land at the price mentioned in the authorization, which was more than twice the cost thereof to the four individual petitioners; and was so fixed because the individual petitioners were not anxious to sell the property since they had acquired it for the purpose of erecting thereon an apartment building, and were astonished when there was submitted for their signatures the contract of sale described in Finding (b) hereof.

(b) On September 3, 1952, the four individual petitioners and the wives of all of them, except Herman J. Bernstein, who was unmarried, entered into a contract with H. L.

Rust Company, as agent for an undisclosed purchaser, for the sale of the above described rectangle of ground in Square 81 for the price of $350,000.

9(a) On January 7, 1953, the four individual petitioners, and the wives of all of them, except Herman J. Bernstein, who was unmarried, by deed conveyed the land comprising the above described rectangle in Square 81, with improvements, to the Potomac Electric Power Company.

(b) Upon the settlement of the transfer above detailed the net proceeds of the sale were distributed equally by the title company directly to the four individual petitioners.

10. For the year 1953 Ben Lar Associates filed with the Assessor a "Partnership Return of Income" in which it reported the receipt of net income of $174,407.72, represented by the gain from the sale of the above described rectangle of ground in Square 81, and in which it was reported that there had been distributed by Ben Lar Associates to each of the individual petitioners the sum of $43,667.67.

11(a) Upon receipt of the partnership return the office of the Assessor sent to the addressees therein the letter following:

"June 27, 1955
File No. 14277

Messrs. Jacob Hirsch, Hyman Bernstein, Harry Hirsch and Hyman Avrunin
T/A Ben Lar Associates
2123 E St. N. W.
Washington, D. C.

Gentlemen:

This office is reviewing your District of Columbia Partnership return for the year 1951. It is requested that the following information be furnished:

(1) Copy of Partnership Agreement.
(2) Copy of Balance Sheets at beginning and end of taxable year.
(3) Location of property or properties sold as reported in Schedule A of the Partnership return.

Very truly yours
J. C. Raedy, Examiner
Income and Franchise Tax Division."

(b) In reply to the above request the petitioners' certified public accountant transmitted the letter following:

"June 30, 1955

Government of the District of Columbia
Income and Franchise Tax Division
Office of the Assessor
Room 2033, Municipal Center
Washington, D. C.

Re: Ben Lar Associates
File No. 14277

Gentlemen:

(1) Please be advised that Ben Lar Associates is a joint venture, with the associates, Jacob Hirsch, Hyman Bernstein, Harry Hirsch and Hyman Avrunin sharing equally in the venture. The net rents are distributed equally to the associates. The proceeds from the sale of the properties sold were distributed equally to the four associates.

(2) Copy of the balance sheet at beginning and end of taxable year 1953 is enclosed.

(3) The properties sold as reported in Schedule A of the Partnership return are as follows:

a-2130-34	F Street, N.W.	Lots 76, 77 ae, 814 816-818, sq. 81
b-2124	F Street, N.W.	Lot 817
c-2126	F Street, N.W.	Lot 815, sq. 81
d-2128	F Street, N.W.	Lot 813

Note: Lot 67-68-69 sq. 81 known as 527-29-31 Johnson Court, N. W. is still owned by Ben Lar Associates.

If there are any further questions, please contact the undersigned.

Very truly yours
/s/ Charles A. Miller
John Berg and Company"

(c) Attached to the letter from the certified public accountant is the comparative balance sheet of Ben Lar Associates following:

BEN LAR ASSOCIATES
COMPARATIVE BALANCE SHEET

ASSETS	JANUARY 1, 1953	DECEMBER 31, 1953
Real Estate	$165,877.75	$7,735.35
LESS: Depreciation of Buildings	4,460.92	-
DEPRECIATED VALUE OF REAL ESTATE	$161,416.83	$7,735.35
Cash in Bank	1,495.60	1,000.98
TOTAL ASSETS	$162,912.43	$8,736.33
LIABILITIES		
Mortgages Payable	86,156.11	3,146.89
NET WORTH	$ 76,756.32	$5,589.44

12(a) Each of the four individual petitioners filed income tax returns with the Assessor. On each return there was reported income in the schedules and in amounts as follows[3]:

SCHEDULE D.- GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (4)

Description of property	Gross sales price	Cost or other basis	Gain or Loss	
Sched. attached	$19,000.14	$19,782.08	(Loss) 781.94	
" "	10,596.20	12,713.75		
Total net gain or loss			(Loss) 2,117.55	Loss 2899.47

SCHEDULE E - INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1.	Name and address of partnership, syndicate, etc.	Ben Lar Associates, amt. $43,667.61 Stanley Associates " 1,659.72
3.	Income from unincorporated business	4,654.67

(b) The "Schedule attached" in Schedule D of the return was of stocks, bonds and other securities, and did not relate to the real estate here involved.

(c) The individual petitioners paid income taxes for the year 1953 computed in accordance with the report of

(3) The excerpts following are from the income tax return of Harry Hirsch. The returns of the others as to capital gains are substantially the same, and identical as to income from partnerships, etc.

(4) "Capital Assets are those held for more than 2 years. The gain from the sale of non-capital assets only is taxable.

income in their individual income tax returns, respectively. The total amount of income taxes so paid by the four individual petitioners was $4,769.06.

13. In addition to the above described rectangle of land in Square 81, the individual petitioners, under the name of Ben Lar Associates, owned and leased, and still own and lease, as a parking lot for about 12 automobiles, Lots 67, 68 and 69 fronting on Johnson's Alley in that square.

14. The Assessor determined that the association of the individual petitioners under the name of Ben Lar Associates was an unincorporated business within the meaning of the District of Columbia Income and Franchise Tax Act of 1947, and on February 7, 1957, assessed Ben Lar Associates and the four individual petitioners a franchise tax for the year 1953 in the amount of $8,483.53, plus interest in the amount of $637.63 or a total of $9,121.16, subject to a credit for the total amount of income taxes paid by the four individual petitioners in the amount of $4,769.06, or a net amount of $4,352.10. On March 7, 1957, each of the individual petitioners paid one-fourth of said net amount or $1,088.02[5].

14. This proceeding was filed on May 17, 1957.

Opinion

The four individual petitioners are friends. They associated themselves in several joint ventures. The name "Ben Lar Associates" was adopted by them in connection with the property and the joint venture here involved. Two of the individual petitioners, Harry Hirsch and Hyman Avrunin, are partners engaged in the liquor business in

(5) Two of the individual petitioners paid $1,088.03.

the District of Columbia. The other two individual petitioners, Jacob H. Hirsch and Herman F. Bernstein, are practicing dentists in the District. Harry and Jacob Hirsch are brothers. The individual petitioners jointly acquired a tract of ground in the District of Columbia and sold it within a year at a substantial profit. They reported the gain and paid income taxes on their proportionate share thereof, respectively, as individuals. The Assessor determined that the petitioners in respect to that transaction were engaged as an unincorporated business, and assessed a franchise tax against them for the privilege of engaging in or carrying on a trade or business within the District. The petitioners here assail such assessment, which puts in issue its validity. Before determining that issue, however, the Court should review briefly the facts and circumstances relating to the transaction ~~sx~~ which might throw some light on the business character of the petitioners. As our Court of Appeals said in Stone v. District of Columbia, 91 U.S. App. D.C. 140, 198 F.2d 601, "whether or not a particular course of conduct constitutes engaging in business must necessarily depend upon the facts involved," citing Higgins v. Commissioner, 312 U.S. 212, 61 S.Ct. 475, 85 L.Ed. 783.

Some time in the month of May of 1951 the four individual petitioners, mostly upon reliance on the judgment and recommendation of the petitioners, Harry Hirsch and Hyman Avrutin, conceived the project of gradual or piecemeal purchase of lots in Square 81, Washington, D. C. of such shape and size practical for the erection of an apartment building, and not for resale. They promptly began to put such idea into effect and by series of purchases, and with their own funds and by financing they, as tenants in com n, acquired in the years 1951 and 1952 a number of lots, constituting a rectangle of ground, in Square 81

suitable for the erection of an apartment building.

The rectangle of ground acquired by the four individuals when purchased by them contained the following: (a) a small apartment building, which was operated by the four individual petitioners through a real estate agent; (b) an automobile parking lot not operated, but rented by the individual petitioners through a real estate agent; and (c) three small dwelling houses not operated, but rented by the individual petitioners through a real estate agent.

Shortly after they embarked upon the project of the acquisition of the rectangle of ground the individual petitioners assumed the name of "Ben Lar Associates", and thereafter all checks from the real estate agents in payment of rents, or net rents collected were made payable to the order of Ben Lar Associates and deposited in a bank account in that name. Such rents or net rents were used to pay interest on borrowed purchase money, taxes, curtails of loans and other expenses, and apparently from the record nothing by the way of rental income was personally received by any of the four individual petitioners. There were, however, as computed for tax purposes, approximately $4,000 of net income from all of the properties during the short period that they were held, used apparently to reduce indebtedness and the like. Several other steps or actions were taken by the individual petitioners in respect of the properties in the name of "Ben Lar Associates."

Although the individual petitioners merely received rentals from the parking lot and the three dwelling houses, and operated the apartment house only, they threw all of the rental income together, reported it as received by an unincorporated business, and paid a franchise tax thereon; all in the name of "Ben Lar Associates".

Some time in August, 1952, after the acquisition of all the lots in the rectangle of ground had been completed, a

representative of H. L. Rust Company, a real estate brokerage firm, visited the liquor store of Harry Hirsch and Hyman Avrunin, and, finding the latter in, inquired if the rectangle of ground was for sale and, if so, at what price. Mr. Avrunin, not being interested in selling and for the purpose, perhaps, of discouraging the inquirer and ending his importunity, informed him that the property was for sale at a ridiculous high price - in fact, more than twice as much as the individual petitioners had paid for it; and signed an authorization to H. L. Rust Company to that effect in the manner following:

"HYMAN AVRUNIN, J. H. HIRSCH, HARRY HIRSCH,
HERMAN BERNSTEIN, A PARTNERSHIP

By Hyman Avrunin"

To the surprise of the individual petitioners there was submitted by H. L. Rust Company to them a contract of sale of the rectangle of ground to an undisclosed principal for $350,000. The contract of sale was accepted and signed by each of the individual petitioners and by the wives of three of them - one being a bachelor. Shortly thereafter the deed conveying the property to Potomac Electric Power Company, the real purchaser, was executed by the individual petitioners, as tenants in common, and by the wives of three of them. One-fourth of the net proceeds of sale was paid directly to each of the individual petitioners at the settlement by the title company in January, 1953. The name "Ben Lar Associates" did not intrude in the sale transaction from its inception to its conclusion.

The gain to the individual petitioners from the sale of the properties to Potomac Electric Power Company was $174,670.68. Such gain was originally reported and taxes paid as follows: For the year 1953 the petitioners, under the name of "Ben Lar Associates", filed with the Assessor a partnership information return disclosing distribution to each of them one-fourth of the gain from the sale, that is to say, $43,667.67 to each. The individual petitioners each filed income tax returns with the

Assessor reporting the receipt of $43,667.67 with other income from partnerships and paid income taxes accordingly. Upon audit or examination of the returns and other information furnished him by the petitioners, the Assessor determined that the gain from the sale of the rectangle of ground was received by the petitioners, not as individuals and tenants in common, but by an unincorporated business carried on by them under the name of "Ben Lar Associates"; and, accordingly assessed them a franchise tax for the privilege of engaging in or carrying on trade or business in the District of Columbia, allowing as a credit thereon the total amount of income taxes which they had previously paid.

It should be added that some years prior to the transaction here involved the four petitioners, as tenants in common, acquired a lot of ground with improvements thereon at the corner of 21st and E Streets, N. W. They razed the improvements and erected instead an office building which is rented to the National Academy of Sciences. One-fourth of the rent is paid directly to each of the four individual petitioners. They do not operate the building or supply any services. That is done by the lessee. In connection with that building the petitioners call themselves "Stanley Associates".

The individual petitioners, as tenants in common, own three lots which they have leased to an individual for the operation of an automobile parking lot. The three lots are located on Johnson's Court, in Square 81, some distance from the rectangle of ground here involved. They were acquired by the individual petitioners in April, 1952. The rents are collected in the name of Ben Lar Associates, and distributed equally to the four individual petitioners. In relation to the three lots the individual petitioners are not conducting an unincorporated business. Zonne v. Minneapolis, 220 U.S. 187, 31 S.Ct. 361, 55 L. Ed. 428.

The individual petitioners had varying views of their relationship. Some believed they were partners, others merely investing tenants in common, and their certified public account believed them to be engaged in a joint venture. The Court believes that in respect of the project conceived by the petitioners of buying up land and building thereon an apartment, and the incidental renting and operating the property acquired in the meanwhile was a joint venture, which was abandoned when they agreed to sell the property. The Court does not believe, however, that the exact relationship of the parties is important, but rather the nature of their acts and conduct in relation to the property in order to determine whether the gain from the sale of the property was received by the petitioners as four individuals or by an unincorporated business within the meaning of the District of Columbia Income and Franchise Tax Act of 1947,(6) which imposes a franchise tax upon unincorporated businesses for the privilege of engaging in, or carrying on trade or business in the District of Columbia. "Unincorporated business" is defined in Section 47-1574 District of Columbia Code, 1951 Edition, as follows:

> "For the purposes of this article (not alone of this title) and unless otherwise required by the context, the words 'unincorporated business' mean any trade or business, conducted or engaged in by any individual, whether resident or non-resident, statutory or common-law trust, estate, partnership, or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, conservator, committee assignee, or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation; and include any trade or business which if conducted or engaged in by a corporation would be taxable under sections 47-1571 to 47-1571a. The words 'unincorporated business' do not include any trade or business which by law, customs, or ethics cannot be incorporated or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor. (July 16, 1947, 61 Stat. 345, ch. 253, Art. I, Title VIII, § 1.)"

(6) Chapter 15, Title 47, D. C. Code, 1951 Edition.

It will be seen that in the definition there is no distinction drawn between an individual or any group entity. This is true in respect of the operation of an apartment house. See Section 8-1(f) of the Income and Franchise Tax Regulations which provides:

"Rental of Real Estate.

The operation of one or more apartment houses, hotels, dwellings, boarding houses or other buildings or parts thereof is classed as an unincorporated business where conducted by an individual, partnership or other unincorporated entity." (Emphasis supplied)

If the conduct of an individual did not measure up to an unincorporated business, it did not become so by being done by a partnership or any other entity (other than a corporation, of course). If an individual should buy an apartment building, he would not in that transaction or at that point be carrying on an unincorporated business. If he should lease the building to some person and take no part in its operation, he still would not be carrying on an unincorporated business. District of Columbia v. Pickford, 86 U.S. App. D. C. 17, 179 F.2d 271; Zonne v. Minneapolis, supra. If, however, he should decide to operate the building with the supplying of services, etc., either by himself or through an agent, he would be engaged in an unincorporated business. District of Columbia v. Pickford, supra, CF. Flint v. Stone Tracy Co., 220 U.S. 107, 31 S. Ct. 342, 55 L.Ed. 389, Ann. Cas. 1912B, 1312; Littlehales v. District of Columbia, 75 U.S. App. D.C. 368, 130 F.2d 402. If after holding the property for some time he should sell the same, the unincorporated business in the case last mentioned would end. The sale transaction would not be an unincorporated business. It would be merely an individual selling property, who would be required to report and pay an income tax upon any taxable gain. The fact that he was engaged as an unincorporated business during his ownership of the apartment building would not legally subject him to an

unincorporated business franchise tax measured by the gain from the sale.

The principles just announced apply to the ownership, operation and sale of real property by a group entity, whether it is called a partnership, joint venture or some other name. In this case we find that the petitioners acquired the property as tenants in common. On one portion of the rectangle of ground was an apartment building which the individual petitioners operated through an agent. In respect of that operation the petitioners, as a group, were carrying on unincorporated business and they were required by the Income and Franchise Tax Act to file a franchise tax return, report the income from the rents and pay a franchise tax measured by the net income from the operation of the apartment building, all of which they did. They did more than that. They included in the franchise tax return income represented by the rents received from the other portions of the rectangle and paid a franchise tax measured thereby. They were not required to do so, because they merely collected the rents and had nothing to do with the operation of those portions of the property. It should be noted in passing that the petitioners, after the hearing herein, sought to have the Court reopen the case to permit evidence and a claim for refund of the tax paid in relation to the portions of the property, other than the apartment building. The Court refused to reopen the case. To do so would have been useless, because no claim for refund had been filed with the Assessor, and the time for filing such claim had expired; and this Court would have no jurisdiction to entertain such claim. American Security and Trust Co. v. District of Columbia, 93 U.S. App. D.C. 260, 235 F.2d 19.

The Court is of the opinion that, in the purchase and sale of real estate here involved, and in the holding and collecting of rents from the three dwelling houses and the area used as an

automobile parking lot, the petitioners were not conducting, or engaged in an unincorporated business; but that in respect of the operation of the apartment house they were conducting an unincorporated business, which terminated when they relinquished possession and title thereto upon sale. The Court is of the opinion further that the proceeds of the sale of the rectangle of ground was received by the individual petitioners as individuals in payment of their undivided interest in the real estate as tenants in common, and not as members of an unincorporated business, regardless of the method of tax accounting of gain employed by the petitioners or of any name used by them in relation to the acquisition, holding or sale of the property.

The Court has not overlooked Section 8-1(g) which reads as follows:

"Activities Constituting an Unincorporated Business.

> "Often the continuity, frequency and regularity of activities, as distinguished from transactions of an isolated or incidental nature, will be the factors which will determine whether or not the activities constitute the carrying on of an unincorporated business. For example, an individual would not be deemed to be engaged in an unincorporated business solely by reason of the purchase and sale of real estate for his own account, but if he makes a business of buying and selling real estate such activities would be subject to the unincorporated business tax. Similarly, where an individual devotes part of his time, energy and thought to stock and commodity markets and trades in securities and commodities, he is not carrying on an unincorporated business, providing such activities are of an isolated or incidental nature and are not conducted as a business."

The above quoted section of the regulations is but a restatement of the law. Stone v. District of Columbia, supra. It has pertinency to the fact that in 1947, about five years before the transaction here involved, the individual petitioners, as tenants in common, purchased a lot of ground, improved it by an office building, and rented it to the National Academy of Sciences, which operates the building and supplies all services, etc. In connection with that venture they utilized the name "Stanley Associates". They still own that property. Also to be

considered, but not necessarily as controlling, is the fact that the individual petitioners owned and still own three lots on Johnson's Court in Square 81, leased to a tenant as an automobile parking lot. In connection with Section 8-1(g), quoted above, it should be noted that the petitioners have not sold any real estate other than the rectangle of ground here involved; and that the only reason for that sale was the ridiculously high price which they could not afford in common sense to refuse.

The Court does not believe the petitioners' conduct in relation to their acquisition and sale of real estate had the continuity contemplated in Section 8-1(g) of the regulations, or frequency or regularity found in the Stone case; and that the Assessor was in error in his determination that the gain from the sale of the rectangle of ground was received by the petitioners as members of a group conducting an unincorporated business, and in assessing the franchise taxes here involved.

For the reasons stated the Court holds that a deficiency in franchise tax for the year 1953 assessed against "Ben Lar Associates" in the amount of $8,483.53, plus interest in the amount of $637.63, subject to a credit of $4,769.06, or a net amount of $4,352.10, was erroneously assessed and collected from the individual petitioners and that each of the individual petitioners, respectively, is entitled to a refund of the amount set opposite each of their names as follows:

Harry Hirsch	$1,088.02
Jacob H. Hirsch	1,088.02
Hyman Avrunin	1,088.03
Herman F. Bernstein	1,088.03

Plus interest thereon at the rate of 4 per centum per annum from March 7, 1957, to date of payment of refund.

Decision will be entered for petitioners.

Jo. V. Morgan,
Judge.

DISTRICT OF COLUMBIA TAX COURT

BEN LAR ASSOCIATES HARRY HIRSCH JACOB H. HIRSCH HYMAN AVRUNIN HERMAN F. BERNSTEIN, Petitioners, vs. DISTRICT OF COLUMBIA, Respondent.	))))))))))))))	FILED NOV 15 1957 District of Columbia Tax Court DOCKET NO. 1599

D E C I S I O N

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearing on said petition, it is by the Court this 15th day of November, 1957

ADJUDGED AND DETERMINED, that a deficiency in franchise tax for the year 1953 assessed against "Ben Lar Associates" in the amount of $8,483.53, plus interest in the amount of $637.63, subject to a credit of $4,769.06, or a net amount of $4,352.10, was erroneously assessed and collected from the individual petititioners and that each of the individual petitioners, respectively, is entitled to a refund of the amount set opposite each of their names as follows:

Harry Hirsch	$1,088.02
Jacob H. Hirsch	1,088.02
Hyman Avrunin	1,088.03
Herman F. Bernstein	1,088.03

Plus interest thereon at the rate of 4 per centum per annum from March 7, 1957, to date of payment of refund

Jo. J. Morgan,
Judge.

Findings of Fact, Opinion & Decision served as follows:
Milton I. Baldinger, Esq.,
Attorney for Petitioners,
700 Wyatt Building
Washington 5, D. C. (Mailed 11/15/57
Assessor, D. C. (Mailed 11/15/57)
Corporation Counsel, D. C. 11/15/57)
Phyllis M. Dimmick, Clerk