

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Edward & Claire Borkowsky :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income & UBT :
under Article 22 & 23 of the Tax Law
for the Years 1973, 1974. :

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 Friday day of September 21, 1979, 1980, he served the within notice of Decision by certified mail upon Edward & Claire Borkowsky, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

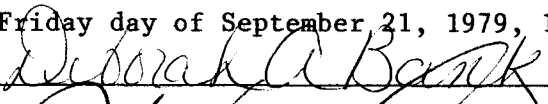
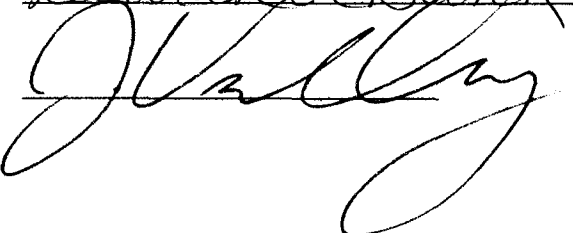
Edward & Claire Borkowsky
155 E. Mosholu Parkway
Bronx, NY 10467

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

Friday day of September 21, 1979, 1980.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
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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 Friday day of September 21, 1979, 1980, he served the within notice of Decision by certified mail upon Philip D. Brent the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

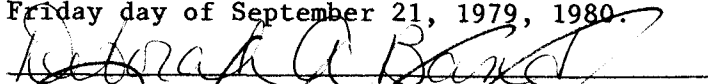

Mr. Philip D. Brent
Brent, Phillips, Dranoff & Davis, P.C.
20 Old Turnpike Rd., P.O. Box 53
Nanuet, NY

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

Friday day of September 21, 1979, 1980.

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

October 17, 1980

Edward & Claire Borkowsky
155 E. Mosholu Parkway
Bronx, NY 10467

Dear Mr. & Mrs. Borkowsky:

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, 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
Philip D. Brent
Brent, Phillips, Dranoff & Davis, P.C.
20 Old Turnpike Rd., P.O. Box 53
Nanuet, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
EDWARD BORKOWSKY and CLAIRE BORKOWSKY
for Redetermination of a Deficiency or
for Refund of Personal Income and
Unincorporated Business Taxes under
Articles 22 and 23 of the Tax Law for
the Years 1973 and 1974.

DECISION

Petitioners, Edward Borkowsky and Claire Borkowsky, 155 East Mosholu Parkway, Bronx, New York, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1973 and 1974 (File No. 17259).

A formal hearing was held before David L. Evans, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 21, 1979. Petitioners appeared by Brent, Phillips, Dranoff & Davis, P.C. (Philip D. Brent, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the petitioners were bona fide partners, for income tax purposes, during the years in issue.

FINDINGS OF FACT

1. Petitioners, Edward and Claire Borkowsky, filed original New York State joint resident returns for the years 1973 and 1974.

2. Petitioner Edward Borkowsky filed Federal Schedule "C" forms (Profit or Loss From Business or Profession as a Sole Proprietorship) for the years 1973 and 1974. Edward Borkowsky filed original New York State unincorporated business tax returns for the years 1973 and 1974.

3. On September 27, 1976, the Audit Division issued a Statement of Audit Changes and a Notice of Deficiency against Edward Borkowsky, as the result of a field audit, imposing additional unincorporated business taxes for the years 1973 and 1974 in the amounts of \$101.79 and \$109.62, respectively, with interest of \$32.25, for a total of \$243.66, based upon the disallowance of certain business expenses deemed to be personal.

4. On September 27, 1976, the Audit Division issued a Statement of Audit Changes and a Notice of Deficiency against Edward and Claire Borkowsky for the years 1973 and 1974 imposing additional personal income taxes in the amounts of \$277.60 and \$298.90, respectively, with interest of \$87.94, for a total of \$664.44, based upon a disallowance of business expenses deemed to be personal.

5. On June 18, 1976, petitioners filed amended combined income tax returns and amended partnership returns for the years 1973 and 1974 which resulted in a refund request for each year.

6. On September 27, 1976, the Audit Division disallowed in full petitioners' claims for refund for the years 1973 and 1974.

7. Petitioners timely filed petitions with respect to the notices of deficiency for the years 1973 and 1974 and with respect to the disallowance of their claims for refund for the years 1973 and 1974.

8. Petitioner Edward Borkowsky filed a certificate of doing business as an individual under the name of Better Made Woodworking with the County Clerk of Bronx County.

9. During the years in issue, Claire Borkowsky was authorized to sign checks in the checking account of Better Made Woodworking. Mrs. Borkowsky maintained the business books and records and signed sales tax returns of Better Made Woodworking as "owner".

10. Petitioners are not contesting the disallowance of business expenses. They claim that they were partners during the years 1973 and 1974 and filed amended returns splitting the income of Better Made Woodworking for the years in issue.

11. On their original returns for 1973 and 1974, they disclaimed the existence of a partnership although the unincorporated business tax returns were signed by both.

12. Petitioners did not have a written partnership agreement but claim they had an oral arrangement to be partners.

13. During the years 1973 and 1974, Claire Borkowsky did not receive a share of the profits of Better Made Woodworking.

14. Petitioners did not maintain capital accounts during the years 1973 and 1974.

15. No evidence was presented that Claire Borkowsky contributed capital to the business.

16. Petitioners contended that their former accountant was negligent in filing joint personal income tax returns and sole proprietor unincorporated business tax returns for petitioners during the years in issue.

CONCLUSIONS OF LAW

A. That an indispensable requirement of a partnership is the mutual promise or understanding of parties to share in the profits of a business and submit to the burden of making good the losses. In Re Wells' Will, 36 A.D.2d 471, 321 N.Y.S.2d 200, aff'd 29 N.Y.2d 931; Bennett v. Pierce Industries, Inc. 28 A.D.2d 944, 281 N.Y.S.2d 674.

B. That the existence of a partnership is to be determined by all of the facts and one of the tests is the intention of the parties determined by their acts and the character in which they have regarded their relationship. A

partnership may be proved by either a written or an oral agreement.

C. That although the rendition of services by the wife and the authorization to sign checks are criteria to be considered in determining whether a partnership between husband and wife existed during the years in issue, they are not conclusive. Mr. and Mrs. Borkowsky did not hold themselves out as partners to the persons with whom Mr. Borkowsky did business. Mrs. Borkowsky's name did not appear as a partner on the business stationery. The petitioners, for tax purposes, did not regard themselves as partners. The filing of amended returns was merely an afterthought. No distribution of profits was made to the wife. There were no capital accounts set up. This clearly demonstrates that during the years 1973 and 1974 the petitioners did not intend to be partners, did not regard themselves as such, and did not act in such a manner which would clearly indicate that a bona fide partnership did in fact exist.

D. That the person who alleges the existence of a partnership has the burden of proof of that fact. (Smith v. Maine, 145 Misc. 521, 260 N.Y.S. 425; Rizika v. Potter, 72 N.Y.S.2d 372).

E. That petitioners have failed to establish that they were bona fide partners during the years in issue.

F. That the petition of Edward Borkowsky and Claire Borkowsky is hereby denied.

DATED: Albany, New York

OCT 17 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER