

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Israel H. Friedland :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax :
under Article 22 of the Tax Law :
for the Years 1968 & 1969. :

AFFIDAVIT OF MAILING

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 18th day of June, 1980, he served the within notice of Decision by certified mail upon Israel H. Friedland, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Israel H. Friedland
273 East 57th St.
Brooklyn, NY 11203

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
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
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AFFIDAVIT OF MAILING

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 18th day of June, 1980, he served the within notice of Decision by certified mail upon Albert M. Resnick 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. Albert M. Resnick
45 John St.
New York, NY 10038

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
18th day of June, 1980.

Joanne Krapp

J. J. Vredenburg

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

June 18, 1980

Israel H. Friedland
273 East 57th St.
Brooklyn, NY 11203

Dear Mr. Friedland:

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 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
Albert M. Resnick
45 John St.
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ISRAEL H. FRIEDLAND
for Redetermination of a Deficiency or
for Refund of Personal Income Tax under
Article 22 of the Tax Law for the Years
1968 and 1969.

DECISION

Petitioner, Israel H. Friedland, 273 East 57th Street, Brooklyn, New York 11203, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1968 and 1969 (File No. 16066).

A formal hearing was held before Edward Goodell, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 23, 1978 at 10:45 A.M. Petitioner appeared by Albert M. Resnick, CPA. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether petitioner and his wife conducted a drapery contracting business as partners and thus may split the income therefrom on their personal income tax returns.

FINDINGS OF FACT

1. Petitioner, Israel H. Friedland and his wife, Helen Friedland, filed a New York State Combined Income Tax Return (Form IT-208) for each of the years 1968 and 1969. Schedule A of said return for 1968 reported "business income" from the business of "drapery contractor" in the sum of \$22,632.57, and divided said business income equally between petitioner and his wife, to

wit, \$11,316.28 thereof to petitioner and \$11,316.29 thereof to his wife.

Schedule A of the said return for 1969 reported "business income" from the business of "drapery contractor" in the sum of \$16,672.08, and divided said business income equally between petitioner and his wife, to wit, \$8,336.04 thereof to petitioner and \$8,336.04 thereof to his wife.

2. On September 27, 1971, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against petitioner for 1968 in the amount of \$1,483.89, plus penalty of \$71.25 and interest of \$218.09, for a total of \$1,773.23. This was done on the grounds that "the splitting of your business income has been disallowed".

3. On September 25, 1972, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against petitioner for 1969 in the amount of \$403.38, plus penalty of \$4.18 and interest of \$2.45, for a total of \$410.01, less "overpayment on return" of \$386.65. This resulted in a net deficiency of \$23.36.

4.(a) In addition to the combined income tax returns filed by petitioner and his wife, petitioner filed a New York State Unincorporated Business Tax Return (Form IT-202) for each of the years 1968 and 1969. In each of said returns, petitioner alone was named as the "taxpayer", the "kind of business" was described as "Drapery Contractor" and the "Business name and address" was stated for 1968 as "Above" (referring to Israel H. Friedland) and "946 Dumont Avenue, Bklyn, NY". In the return for 1969, the address was stated to be "Israel H. Friedland, 3918 Church Avenue, Bklyn, New York".

(b) Neither petitioner nor his wife filed Federal partnership tax returns. As conceded by petitioner's representative, "the schedule C form which was filed with the Federal Government --- also indicates a sole proprietorship by Israel Friedland -- so that in all -- tax returns for the years in

question, Israel Friedland is the owner and operator of this business solely".

5.(a) Petitioner claims that his wife, Helen Friedland, was his partner in said drapery contractor business during 1968 and 1969.

(b) There was no express contract of partnership between petitioner and his wife with respect to said business.

(c) Petitioner claims that a contract of partnership between him and his wife with respect to said business should be implied.

6. Neither petitioner nor his wife testified at the hearing. Both were then in Israel, but no request for adjournment on that ground was made on their behalf, and no explanation was offered as to the necessity of their presence in Israel at a time scheduled for hearing.

7. Petitioner's business of drapery contractor was conducted during 1968 and 1969, until on or about August 29, 1969 at 946 Dumont Avenue, Brooklyn, New York. On or about August 29, 1969, it was moved to 3918 Church Avenue, Brooklyn, New York.

8. On July 21, 1950, an account was opened at the East New York office of Manufacturers Hanover Trust Company in the name of Israel H. or Helen Friedland, which account was transferred to the Church Avenue office of said bank on August 29, 1969.

9. On or about August 29, 1969, an account was opened with the Consolidated Edison Company for the supply of electric service to 3918 Church Avenue, and billing for such service was addressed by Consolidated Edison Company to "Helen Friedland, Mfg. Draperies".

10. No books of account with respect to the aforesaid business of drapery contractor were offered in evidence at the hearing, although books of account were kept by petitioner.

11. Evidence is missing from the record to establish a mutual promise or undertaking of petitioner and his wife to (a) share in the profits of the aforesaid business of drapery contractor and (b) submit to the burden of making good the losses of said business.

CONCLUSIONS OF LAW

A. That the burden of proving by a fair preponderance of the credible evidence the existence of a contract of partnership between petitioner and his wife, Helen Friedland, with respect to the aforesaid business of draper contractor, was on petitioner.

B. That as stated in the Matter of Wells' Will, 36 A.D.2d 471, aff'd 29 N.Y.2d 931, "an indispensable requirement of a partnership is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses".

In the present case, petitioner has failed to sustain the burden of proving a mutual promise or undertaking of himself and his wife to share in the profits of the business of drapery contractor and to submit to the burden of making good the losses of said business.

C. That section 11, subdivision 2 of the Partnership Law provides that:

"Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property or part ownership does not of itself, establish a partnership, whether such co-owners do or do not share any profits made by use of the property."

D. That while petitioner's wife may have been a devoted helpmate of petitioner, Israel Friedland has failed to sustain the burden of proof that he and his wife were partners in the legal sense, with respect to the said business of drapery contractor during 1968 and 1969.

E. That an additional and separate reason for the denial of the petition herein is the fact that neither petitioner nor his wife testified at the

hearing herein; therefore, every inference warranted by the evidence offered may be drawn against petitioner.

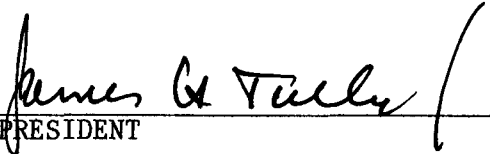
As stated in Dowling v. Hastings, 211 N.Y. 199, "where one party to an action knowing the truth of a matter in controversy and having the evidence in his possession omits to speak, every inference warranted by the evidence offered will be indulged against him". Similarly such inferences may be drawn in the case of witnesses who fail to testify as set forth, for example, in Mitler v. Friedenberg, 32 Misc. 2d 78.

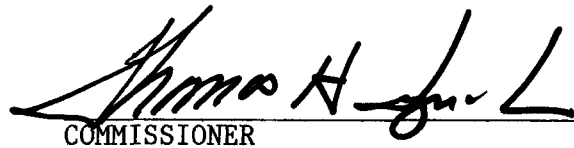
F. That the petition of Israel H. Friedland is denied and the notices of deficiency dated September 27, 1971 and September 25, 1972 are sustained.

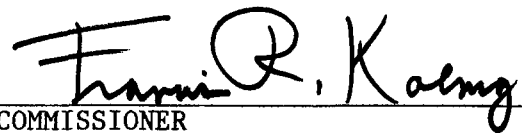
DATED: Albany, New York

STATE TAX COMMISSION

JUN 18 1980


PRESIDENT


COMMISSIONER


COMMISSIONER