

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Estate of Ernest Pokel :
Joan Pokel, Executrix : 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 Year 1972. :

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 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Estate of Ernest Pokel, Joan Pokel, Executrix, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Ernest Pokel
Joan Pokel, Executrix
Pine St.
East Moriches, NY 11940

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
3rd day of October, 1980.

Dottie Brink



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Estate of Ernest Pokel :
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Personal Income & UBT :
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for the Year 1972. :

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 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Morris Knapp, Jr. 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. Morris Knapp, Jr.
195 Willis Ave.
Mineola, NY 11501

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
3rd day of October, 1980.

Ruthie Bank

J. Vredenburg

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

October 3, 1980

Estate of Ernest Pokel
Joan Pokel, Executrix
Pine St.
East Moriches, NY 11940

Dear Ms. Pokel:

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
Morris Knapp, Jr.
195 Willis Ave.
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
THE ESTATE OF ERNEST POKEL	:	DECISION
(Joan Pokel, Executrix)	:	
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 Year 1972.	:	

Petitioner, Estate of Ernest Pokel, (Joan Pokel, Executrix), Pine Street, East Moriches, New York 11940, 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 year 1972 (File No. 15567).

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 June 22, 1978 at 9:15 A.M. Petitioner appeared by Morris Knapp, Jr., CPA. The Audit Division appeared by Peter Crotty, Esq. (James Morris, Esq., of counsel).

ISSUES

I. Whether Joan Pokel was a partner in a business conducted by her deceased husband.

II. Whether gain on sale of a business conducted by Ernest Pokel constituted a return of capital to Joan Pokel as a partner or joint venturer or whether said gain was derived from the liquidation of a business.

FINDINGS OF FACT

1. Ernest Pokel (now deceased) and Joan Pokel filed a joint Federal income tax return for 1972. They filed a New York State Combined Income Tax Return for 1972 (Form IT-208). On their New York State return for 1972,

Ernest Pokel reported business income and gain on the sale of his business.

2. On or about March 17, 1974, the Internal Revenue Service audited Mr. and Mrs. Pokel's U.S. Individual Income Tax Return wherein it made audit changes which increased their federal taxable income from \$14,936.53 to \$23,039.55. Ernest Pokel died on June 13, 1975 and Joan Pokel was appointed Executrix of her husband's estate pursuant to Letters Testamentary issued by Suffolk County Surrogate's Court on July 14, 1975.

3. On April 12, 1976, the Audit Division issued a Statement of Audit Changes against Ernest Pokel for 1972, imposing additional personal income tax of \$1,580.41, unincorporated business tax of \$1,837.83, plus penalty, pursuant to section 685(b) of the Tax Law, of \$79.15 and interest of \$766.98, for a total of \$4,264.37. Accordingly, it issued a Notice of Deficiency on which it stated that adjustments were made to conform with the audit of Mr. Pokel's Federal income tax return, that gain on the sale of Mr. Pokel's business was held subject to unincorporated business tax at 100 percent, and that the untaxed portion of net long-term capital gain was held subject to New York State minimum income tax. Petitioner Joan Pokel, as Executrix of the Estate of Ernest Pokel, filed a timely petition with respect to the Notice of Deficiency. After the mailing of the Notice of Deficiency, a payment was made in the amount of \$2,235.59 which represented the tax shown due on the amended personal income tax return and the partnership unincorporated business tax returns described in Finding of Fact No. 5, infra.

5. On May 20, 1976, Joan Pokel filed an amended IT-208 for 1972, wherein she reported New York income of \$17,273.17 as compared to \$1,411.60 on her original return and paid \$600.95 in additional personal income taxes. She also filed a New York State partnership return (IT-204) and unincorporated business tax return for 1972, marked "as amended". No New York State partnership

or unincorporated business tax return for 1972 had previously been filed. The partnership return was not signed. It indicated that Ernest Pokel and Joan Pokel shared income of the partnership equally. Unincorporated business tax of \$1,634.64 was paid with the filing of said partnership return.

6. Joan Pokel did not attend the hearing. She submitted an affidavit, sworn to on April 29, 1976 "for the purpose of showing to the State Tax Commission that the delicatessen was owned by Ernest Pokel, however, the operation of the delicatessen was a joint venture up until 1972 when the operation of the delicatessen was managed by your deponent." The affidavit stated that a) Mrs. Pokel participated in earning one-half of all profits of the delicatessen, b) she cooked and prepared food for sale at the delicatessen, c) she kept the books and managed the cash, d) in 1972 she ran the delicatessen for the majority of her available working time, and e) she participated in the negotiations for the sale of the delicatessen. Nowhere in the affidavit does she allege that she was a partner or joint venturer in the business of her deceased husband.

7. No Federal partnership returns were filed for prior years. There was no partnership agreement. The Certificate of Doing Business was filed in the name of the husband only. Although it is claimed that Joan Pokel advanced her own funds for use by her husband in the conduct of his business, there was no substantiation that such funds were in fact used in the business. Not until after the issuance of the Notice of Deficiency on April 12, 1976 was there any claim that Joan Pokel was a partner or had any interest in the business formerly conducted by her deceased husband.

CONCLUSIONS OF LAW

A. That the rendition of services by Joan Pokel for her husband in the conduct of his business during the periods of his illness was gratuitous and was not intended to create a partnership interest or joint venture therein.

The use of joint funds of husband and wife by Ernest Pokel in his business did not constitute a capital investment in said business. The advancement of money by a wife to her husband, in the absence of proof to the contrary, may be considered a gift and not the creation of a capital interest in a partnership.

B. That petitioner has failed to establish that the parties in good faith and acting with a business purpose intended to join together in the conduct of a business enterprise (Commissioner v. Culbertson, 337 U.S. 733, 93 L. Ed. 1659; Commissioner of Internal Revenue v. Tower, 327 U.S. 280, 90 L. Ed. 670; Mertens-Law of Federal Income Taxation, Vol 2 §18.08(a).

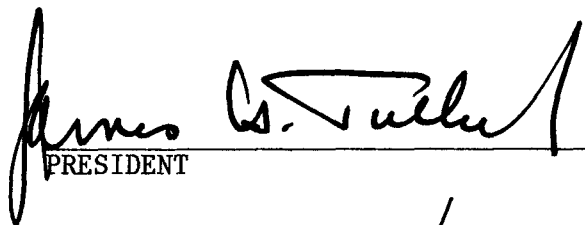
C. That the gain on the sale of business assets of Ernest Pokel was subject to unincorporated business tax under Article 23 of the Tax Law and properly attributable to the individual personal income and unincorporated business taxes of the decedent, Ernest A. Pokel.

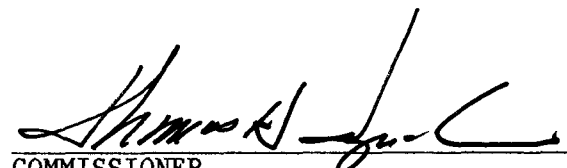
D. That the petition of Joan Pokel, as Executrix of the Estate of Ernest Pokel, is hereby denied and the Notice of Deficiency is sustained.

DATED: Albany, New York

OCT 03 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER