

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Bernard & Shirley Feierstein :
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 - 1975. :
AFFIDAVIT OF MAILING

State of New York
County of Albany

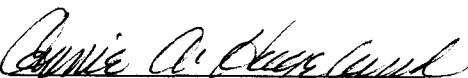
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Bernard & Shirley Feierstein, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

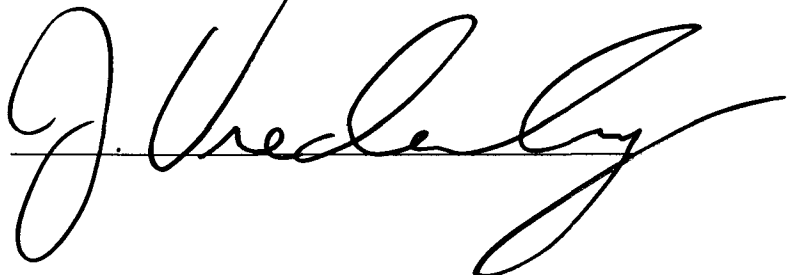
Bernard & Shirley Feierstein
30 Walters Place
Great Neck, NY 11023

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
6th day of October, 1982.


AUTHORISED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 114



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Bernard & Shirley Feierstein :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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& UBT under Article 22 & 23 of the Tax Law for :
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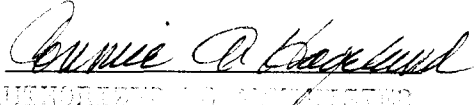
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Morris W. Herbst the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

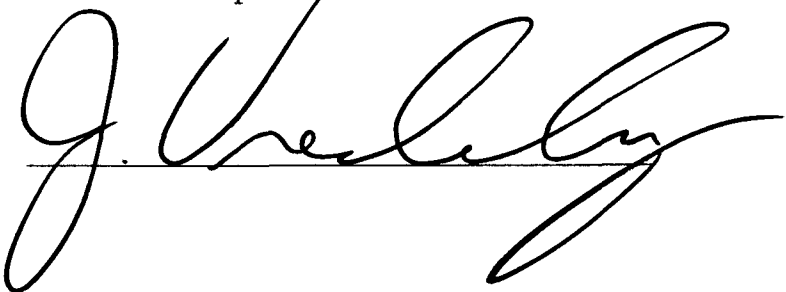
Morris W. Herbst
450 7th Ave., Rm. 409
New York, NY 10001

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 October, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO THE NEW
SECTION 174



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

October 6, 1982

Bernard & Shirley Feierstein
30 Walters Place
Great Neck, NY 11023

Dear Mr. & Mrs. Feierstein:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Morris W. Herbst
450 7th Ave., Rm. 409
New York, NY 10001
Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 17, 1981 at 10:45 A.M. Petitioners appeared by Morris W. Herbst, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner Bernard Feierstein is entitled to a refund of unincorporated business taxes paid, if his activities are deemed not subject to the unincorporated business tax.

II. Whether petitioners claim for refund of 1975 personal income tax was acted upon by the Audit Division.

FINDINGS OF FACT

1. Petitioners, Bernard and Shirley Feierstein, timely filed New York State combined income tax returns for 1973, 1974 and 1975. Attached to each

return was a copy of Federal Schedule D - Capital Gains and Losses - on which petitioners reported a long-term capital loss carryover from years beginning before 1970. Petitioner Bernard Feierstein filed form IT-202 - New York State Unincorporated Business Tax Returns - for 1973, 1974 and 1975. He paid the tax determined on said returns. During the years at issue, he described himself as a salesman, sales representative and travelling salesman.

2. On September 25, 1978 the Audit Division issued to petitioners a Notice of Disallowance in reference to refunds for taxable years 1973 and 1974. Said notice indicated the following:

<u>Tax Year</u>	<u>1973</u>	<u>1974</u>
Amount Claimed	\$1,855.64	\$1,884.25
Amount Allowed	125.00	110.00
Amount Disallowed	1,730.64	1,774.25

The Audit Division issued to petitioners a Voucher For Income Tax Refund with the following explanation:

"The refund claimed for personal income tax (1973 and 1974) based on a carryover of a 1970 long term capital loss is being allowed as claimed.

The refund claimed for unincorporated business tax (1973 and 1974) is being disallowed, since the information submitted does not establish that an employer-employee relationship existed. The income received from your services rendered as a commissioned salesman is held subject to the New York State unincorporated business tax under Article 23 of the business tax law."

3. On or about April 4, 1979 petitioners filed form IT-113X (Claim for Credit or Refund of Personal Income Tax and/or Unincorporated Business Income Tax) for 1975. They claimed a refund of personal income tax of \$92.25 plus interest; based on a pre-1970 long term capital loss carryover which they deducted on their return in the amount of only \$500.00 each instead of in the

amount of \$1,000.00 each. Mr. Feierstein also claimed a refund of unincorporated business tax of \$1,962.80 plus interest; based on his claim that he was an employee and that he erroneously paid the unincorporated business tax.

4. On November 26, 1979, the Audit Division issued a Notice of Disallowance to petitioner Bernard Feierstein. Said notice referenced tax year 1975 and the amount of \$1,962.80. Petitioners claimed that they have not received from the Audit Division any information in reference to their claim for refund of personal income tax for 1975, and at the hearing no documents were presented with reference to what action the Audit Division had taken with regards to said tax.

5. Petitioner Bernard Feierstein alleged in his petitions that he erroneously paid unincorporated business tax because:

(a) He was an employee.

(b) His employer had the right to control and direct him and did so control and direct him as to the results to be accomplished, territory allocated, discounts permitted, delivery time and many other details.

(c) His employment was at the option of the employer (who could discharge at will) and his territory could be changed or limited by employer.

(d) Employer furnished a place to work at employer's office and employer supplied telephone and other services at the office including equipment.

(e) He maintained no inventory and had no employees.

Petitioner Bernard Feierstein did not appear at the hearing to testify to the allegations in his petitions.

6. Petitioner's representative submitted a letter from Mr. Feierstein's purported employer which stated the same allegations as stated in the petitions. However, the letter did not refer to Mr. Feierstein as an employee and it

stated that he spent approximately 50 percent of the working year in their New York showroom and the other 50 percent on the road.

7. Other documentary evidence was submitted by the representative. However, said documents referred to tax years other than the years at issue.

8. Petitioner Bernard Feierstein filed federal schedule "C" - Profit or (Loss) From Business or Profession - with the Internal Revenue Service for 1973. He listed his business activity as sales representative. He filed federal schedule "SE" - Computation of Social Security Self - Employment Tax. He listed his business activity subject to self-employment tax as travelling salesman. He also filed Form 4848 - Annual Employer's Return for Employees' Pension or Profit-Sharing Plans. He listed himself as the employer with an employer identification number. He listed the name of the plan as Bernard Feierstein Self-Employed Profit Sharing Retirement Plan. No Federal or New York State income taxes were withheld from his commissions for the years at issue. For 1974 and 1975 he reported an adjustment to income for a retirement plan.

CONCLUSIONS OF LAW

A. That petitioner Bernard Feierstein has failed to submit any credible evidence and has failed to sustain the burden of proof imposed by sections 722 and 689(e) of the Tax Law in establishing that he was an employee and that his activities were not subject to unincorporated business tax for the years at issue.

B. That petitioners are entitled to a refund of personal income tax for 1975 in accordance with Treasury Regulation 1.1211-1(b)(7)(ii) and Rev. Rul. 72-105 1972-1 CB 228.

C. That the Audit Division is directed to authorize a refund of personal income tax for 1975 by allowing each petitioner an additional \$500.00 deduction for the pre-1970 long term capital loss.

D. That the petitions of Bernard and Shirley Feierstein in reference to the refund of unincorporated business tax are denied and the notices of disallowance are sustained. The petition of Bernard and Shirley Feierstein in reference to the refund of personal income tax for 1975 is granted as indicated in Conclusions of Law "B" and "C", supra.

DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER