

STATE OF NEW YORK
STATE TAX COMMISSION

U.S.T. Determinations
H-2
Feldman, Simon

In the Matter of the Petition

of

SIMON FELDMAN

For a Redetermination of a Deficiency or
a Refund of Unincorporated Business :
Taxes under Article(s) 16-A of the
Tax Law for the (Year(s) 1947 & 1948 :

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

LYNN HORODOWICH, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 24th day of October, 1969, she served the within
Notice of ~~Decision~~ (or Determination) by ~~(certified)~~ mail upon Simon Feldman
(~~representative of~~) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Mr. Simon Feldman, 42 East Avenue,
Rochester, New York
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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (~~representative~~
~~of~~) 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

27th day of October, 1969

Grace E. Pritchard

Lynn Horodowich

STATE OF NEW YORK
STATE TAX COMMISSION

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LYNN HORODOWICH, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of October, 1969, she served the within Notice of ~~Decision~~ (or Determination) by ~~(certified)~~ mail upon Simon Feldman (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Mr. Bernard P. Birnbaum, c/o Birnbaum and Birnbaum, 510 Reynolds Arcade Bldg., Rochester, New York 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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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

27th day of October, 1969

Grace E. Pritchard

Lynn Horodowich


To Mr. Edward Rook

Proposed Determination, old
matter.

See memo ~~in folder~~
Associate with "Jonas Berg"
case.

September 23, 1969

FXB:pw



From Francis X. Boylan

PATCH T (FILE A)



BUREAU OF LAW

MEMORANDUM

*U. B. T. Determinations**A-2**Feldman, Simon*

TO: Commissioners Murphy, Palestin and Macduff

FROM: E. H. Best, Counsel

SUBJECT: SIMON FELDMAN

1947 and 1948 Assessments
Article 16-A of the Tax Law

This case of Simon Feldman on which the hearing was held in 1957 is being decided with the case of A. Jonas Berg also held at that time and with that of Harold D. Farber, on which the hearing was held in 1962. All three were general agents of the Security Mutual Insurance Company in different localities. The proposed determinations uniformly hold them to be employees of that company and not liable for UBT on their earnings from that source. The proposed determination, which was that of the hearing officer, was recommended by Mr. Gifford in his memorandum to Deputy Commissioner Igoe dated April 25, 1963, and was approved.

I concur in the proposed determination's holdings that the taxpayer was an employee of the Security Mutual Life Insurance Company and Simon Feldman Agency, Inc. and not an independent contractor engaged in an unincorporated business and that his earnings from both sources were not subject to unincorporated business income taxes under Article 16-A.

The salient facts are these: The taxpayer was a general agent of the company and was also an officer of Simon Feldman Agency, Inc., a close corporation owned by him and members of his family. Simon Feldman Agency, Inc. was engaged in selling general insurance but not life insurance.

Under his contract with Security Mutual Life Insurance Company the taxpayer was denominated an employee. The contract's provision for his full-time services was waived in practice, but he was not permitted to place life insurance with another company unless the account was refused by Security Mutual. He was paid by commissions on his own sales and overriding commissions on the sales of sub-agents working out of his office. The sub-agents were also employed under written contracts directly executed by the Company. The taxpayer hired the clerical help with the Company's approval. Both the sub-agents and the clerical help were paid by the taxpayer on a weekly basis and he deducted Social Security, withholding taxes and Unemployment Insurance in the first instance but was reimbursed on a monthly basis by the Company both for the commissions and salaries paid out and for Social Security, etc. payments made by him. He was also reimbursed for telephone, postage, rent, advertising, travel and entertainment expenses under a voucher system. He had additional expenses not reimbursed by the Company.

The conclusion of the hearing officer that the taxpayer was an employee was reviewed in a memorandum by Mr. Heckelman of this office dated September 23, 1959. He supported the proposed conclusions on the basis of the case law rule of control. (People ex rel. Wittich v. Browne, 270 App. Div. 774, aff'd 296 N. Y. 720; People ex rel. Feinberg v. Chapman, 274 App. Div. 715)

The proposed determination is not out of line with our current guideline on the question whether general agents of a life insurance company are to be considered employees which is set forth at 20 NYCRR 281.3 b. By that criterion although the expenses of operation of the office are reimbursed rather than paid at the first instance, the taxpayer's operation may be regarded as being more nearly of the "managerial" than the independent type warranting a conclusion that he was an employee. The decision is also in line with the current ruling holding soliciting agents of life insurance to be employees as to their principal company under these circumstances.

Accordingly, the proposed determination cancelling the assessments is approved. Kindly return the entire file after disposition.

Counsel

FB:mt
Enc.

April 9, 1964

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Applications
of

SIMON FELDMAN

DETERMINATION

For Revision or Refund of Unincorporated Business Taxes under Article 16-A of the Tax Law for the Years 1947 and 1948

Simon Feldman, the taxpayer herein, having filed applications for revision or refund of unincorporated business income taxes assessed under Article 16-A of the Tax Law for the years 1947 and 1948, and a hearing having been held in connection therewith at the office of the State Tax Commission, 55 Broad Street, Rochester, New York on July 27, 1956 before Samuel Michelson, Senior Tax Administrative Supervisor, Income Tax Bureau, Department of Taxation and Finance, at which hearing the taxpayer appeared personally together with his representative, Mr. Bernard P. Birnbaum, and the facts and record having been duly examined and considered by the State Tax Commission, it is hereby


DETERMINED:

(A) That during the years 1947 and 1948 Simon Feldman the taxpayer herein, was an employee of the Security Mutual Life Insurance Co. and Simon Feldman Agency Inc. and was not an independent contractor engaged in an unincorporated business as it is found; his income from the Security Mutual Life Insurance Co. and Simon Feldman Agency Inc. therefore was not subject to unincorporated business taxes imposed by Article 16-A of the Tax Law.

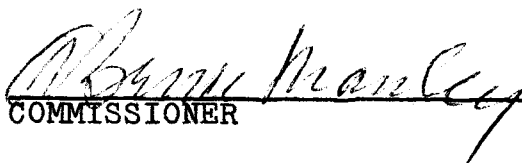
(B) That accordingly the unincorporated business taxes assessed against the taxpayer under Article 16-A of the Tax Law for the year 1947 in the sum of \$450.66 by Assessment numbered AA-263740, and for the year 1948 in the sum of \$342.25 by Assessment numbered AA-263741, are hereby cancelled in full.

Dated: Albany, N.Y., October 23 , 1969.

STATE TAX COMMISSION



PRESIDENT



COMMISSIONER



COMMISSIONER