

BUREAU OF LAW

MEMORANDUM

Esformes
UBT
1970

TO: **State Tax Commission**

FROM: **Solomon Sies, Hearing Officer**

SUBJECT: **Jack Esformes, Murray Esformes,
and Nathan Esformes,
Co-partners c/a/a**

**Jack Esformes (a partnership)
1955 Assessment No. B597134
1956 Assessment No. B599309
Article 16-A**

**Jack Esformes
1956 Assessment No. B599309
Article 16**

**Nathan Esformes
1956 Assessment No. B599301
Article 16**

The issues involved herein are: (1) whether the salary income received by the individual members of the subject partnership from a Florida corporation in which the capital stock was owned by said partnership, constituted additional partnership income subject to unincorporated business tax; and (2) whether income received by Jack Esformes and Nathan Esformes from the aforementioned corporation constituted a distribution of additional partnership income subject to tax under Article 16 of the Tax Law.

The partnership of Jack Esformes was organized in 1934 and consisted of two brothers, Jack and Murray, and their father, Nathan Esformes. It was located at the Bronx Terminal Market, Bronx, New York and was engaged in the business of repacking and selling of tomatoes. The partnership bought tomatoes either at auction terminals in New York City or at points located outside the State of New York in truck loads or car lots. The tomatoes would be unwashed, stripped of their wrappings and placed in big rooms until they reached maturity. Thereafter, they were graded and put through a belt assembly line, packed in different size packages and sold to supermarkets and individual produce markets within the Metropolitan New York area.

In 1950, the individual members of the partnership filed a certificate of incorporation under the name of Jack Esformes Corporation pursuant to the laws of the State of Florida. The

TO : SAC, NEW YORK
FROM : SAC, NEW YORK
SUBJECT: [Illegible]

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RE: [Illegible]
[Illegible text block]

Very truly yours,
[Illegible signature]

corporation maintained its principal and sole place of business at Miami Beach, Florida and was engaged in the business of buying tomatoes in Florida directly from growers either for its own account or as a commission broker to be sold throughout the United States. The corporation was capitalized for \$25,000. All of the shares of the stock of the corporation were owned by the partnership. It is claimed that this was done in order not to impair the credit of the partnership.

The individual members of the partnership were also officers and directors of the Florida corporation. The corporation kept its books on a fiscal year basis ending October 31 whereas the partnership maintained its books on a calendar year basis. Jack Hefernan was president of the corporation. His duties were chiefly executive. He would also solicit business by phone. Murray Hefernan was secretary. His duties consisted of visiting packing houses and arranging for the purchase of tomatoes. Nathan Hefernan was vice-president and in charge of customer relations on behalf of the corporation. There are two growing seasons in Florida, one in the Fall from October through January and one in the Spring from April through May. The total amount of salaries received by the individual partners from the corporation was \$25,000 in 1953 and \$30,000 in 1954. The partnership commenced liquidating its assets in 1957 and in connection therewith transferred its stock in the corporation to the individual members thereof. The corporation withheld income and social security taxes from the salaries paid to the members of the partnership who were also covered by unemployment insurance.

For a portion of 1955, the above-mentioned individuals also operated a farm under the name of Immokalee Farm in Immokalee, Florida for the purpose of growing tomatoes. This operation was confined solely to Florida and had nothing to do with the corporation. It was in existence only for a short period of time.

On November 17, 1958 an assessment was issued against the partnership for the year 1955 (Assessment No. S 497136) in which it was held that the salaries received by the member partners constituted additional receipts of the partnership business. The assessment further disallowed travel and entertainment expenses in the amount of \$7,000 and included partnership distributive income from the partnership of Immokalee Farm. Upon Federal audit, travel and entertainment expenses of the partnership was disallowed in the amount of \$3,100 for each of the years 1953 and 1954. As a result, the Income Tax Bureau cancelled a portion of the 1955 assessment in the amount of \$115.92. On February 13, 1959, an assessment was issued against the partnership for 1956 (Assessment No. S 509309) in which it was held that

the salaries received by the member partners from Jack Hefernan Corporation constituted additional receipts of the partnership business. The assessment also included an increase in partnership income based on the disallowance of travel and entertainment expense.

Jack and Nathan Hefernan filed nonresident returns for the year 1956. Assessments were issued against them for 1956 on February 13, 1959. Assessment No. B 56950 against Jack Hefernan and Assessment No. B 56951 against Nathan Hefernan, on the basis of the 1956 assessment against the partnership for said year increasing their distributive share of partnership income. The taxpayers are only contesting the assessments with respect to salary income included in partnership income.

It does not appear that the payment of salaries by the corporation to its officers was a means of distributing profits of the partnership.

Section 306 of the Tax Law provides, in part, that:

" * * * It is not intended * * * that an individual shall be deemed so engaged (in an unincorporated business) with respect to compensation for services rendered by him as an employee, or as an officer of a corporation * * * unless such compensation constitutes income of such individual derived from the business. " * * * (emphasis supplied)

In formal hearing determination in Matter of Libarik Brothers dated April 30, 1960 (New York State Tax Bulletin No. 1960-2), the taxpayer partnership consisted of three brothers engaged in the manufacture of Indian jewelry cases. They were also officers and the only stockholders of a corporation, which was engaged solely in the sale of Indian jewelry cases. The corporation sold only the merchandise manufactured by the taxpayers' partnership. It was held that the salary income received by the individual members of the partnership from the corporation was not integrated with the partnership business income and therefore not subject to unincorporated business tax.

The taxpayers contend that the salaries received by them from Jack Hefernan Corporation were not subject to unincorporated business tax; that the corporate activities were completely separate and apart from the partnership activities; that, if by any remote possibility the corporate activities could in some way be construed as being attributable to the

partnership, the latter would be entitled to an allocation of income to sources without the State with respect to the salary income, which would result in a refund of taxes paid.

I am of the opinion that the operation of the corporation was separate, apart and distinct from the operation of the partnership; that the compensation received by the individual members from the corporation was not in any way integrated with the partnership business nor did the same constitute part of a business regularly carried on by the partnership. The assessments should therefore be modified by partially expelling the unincorporated business losses in the amounts of \$700 and \$600 for the years 1955 and 1956, respectively, and further expelling part of the assessments against Jack Lawrence and Norman Lawrence in the amounts of \$1,035.32 and \$348.25, respectively.

For the reasons stated above, I recommend that the determinations of the State Tax Commission be substantially in the form submitted herewith.

ENDING OFFICE

MS:cc
Enc.

January 16, 1970

**STATE OF NEW YORK
STATE TAX COMMISSION**

**IN THE MATTER OF THE APPLICATIONS
OF
JACK ESFORMES, MURRAY ESFORMES,
AND NATHAN ESFORMES, CO-PARTNERS,
D/B/A, JACK ESFORMES, A PARTNERSHIP
FOR REVISION OR REFUND OF UNINCORPO-
RATED BUSINESS TAXES UNDER ARTICLE
16-A OF THE TAX LAW FOR THE YEARS
1955 AND 1956**

DETERMINATION

Jack Esformes, a partnership, having filed applications for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the years 1955 and 1956, and hearings having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on May 19, 1964 and January 18, 1965 before Solomon Sins, Hearing Officer, at which last mentioned hearing, Jack Esformes, co-partner, appeared and the taxpayers having been represented by Albert J. Hassen and Company, Accountants, by Albert J. Hassen, C.P.A., and Myron W. Siskin, Esq., and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) Jack Esformes, a partnership, filed partnership and unincorporated business tax returns for the years 1955 and 1956 in which it reported net income in the amounts of \$24,974.77 and \$20,684.94 for said respective years from its business as "produce merchants".

(2) On November 17, 1958 the Department of Taxation and Finance made an additional assessment of unincorporated business taxes (Assessment No. B-497134) against Jack Esformes, a partnership, for the year 1955 in the amount of \$1,067.88. It was

determined that salaries received by the members of the partnership taxpayer from Jack Reforms Corporation constituted additional receipts of the partnership business and, therefore, includible in the computation of the balance subject to unincorporated business tax in the amount of \$25,000. In addition, the assessment disallowed travel and entertainment expense in the amount of \$7,000. Adjustments were also made for the exclusion of partnership distributive share of income from Immanuel Farm in the amount of \$3,127.49 and for additional contributions. On February 2, 1959 the aforementioned assessment was cancelled, in part, to the extent of \$115.52 based upon Federal audit reducing the disallowance of travel and entertainment expense to \$3,200.

(3) On February 13, 1959 the Department of Taxation and Finance made an additional assessment of unincorporated business tax against the partnership of Jack Reforms (Assessment No. B-549389) for the year 1956 in the amount of \$1,006.24 on the basis that salaries in the total amount of \$30,000 received by the members of the partnership taxpayer from Jack Reforms Corporation constituted additional receipts of the partnership business includible in income subject to unincorporated business tax. The assessment also included \$3,100 travel and entertainment disallowed on Federal audit and adjustment of contributions. The taxpayers are only contesting that portion of the assessments which included salaries as partnership income.

(4) During the years 1955 and 1956 and prior thereto the partnership of Jack Reforms consisted of two brothers, Jack and Murray, and their father, Nathan Reforms, located at Bronx Terminal Market, Bronx, New York City. The interest of the partners in the partnership was as follows: Jack, 50%, Murray, 30% and Nathan, 20%. Profits and losses were shared in the same ratio. The partnership was engaged in the business of purchasing, repacking and selling of tomatoes to supermarkets and individual produce markets within the Metropolitan New York area.

(5) In 1950 the individual members of the partnership filed a certificate of incorporation under the name of Jack Esformes Corporation pursuant to the laws of the State of Florida. The corporation maintained its principal and sole place of business at Miami Beach, Florida and was engaged in the business of buying tomatoes in Florida directly from growers either for its own account or as a commission broker to be sold throughout the United States. It was capitalized for \$25,000. All of the shares of stock of the corporation were owned by the partnership. It was claimed that this was done in order not to impair the credit of the partnership.

(6) The individual members of the partnership were also officers and directors of the Florida Corporation. The corporation kept its books on a fiscal year basis ending October 31 whereas the partnership maintained its books on a calendar year basis. Jack Esformes was president of the corporation. His duties were chiefly executive. He would also solicit business by phone. Murray Esformes was secretary. His duties consisted of visiting packing houses and arranging for the purchase of tomatoes. Nathan Esformes was vice-president and in charge of customer relations on behalf of the corporation. The corporation employed three or four other individuals in addition to its officers. There are two growing seasons in Florida, one in the Fall, from October through January, and one in the Spring, from April through May. The total amount of salary received by the individual partners from the corporation was \$25,000 in 1955 and \$30,000 in 1956. The corporation withheld income and social security taxes from the salaries paid to the members of the partnership who were also covered by unemployment insurance. The corporation maintained separate books and records and employed various personnel other than the members of the partnership.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DETERMINES:

(A) The activities of the partners for the corporation were not interrelated or integrated with the activities of the partners for the partnership. The performance of services by the members of the partnership as officers of the corporation do not constitute an unincorporated business. Accordingly, the compensation paid to the members of the partnership by the corporation do not constitute receipts of an unincorporated business regularly carried on by the taxpayer partnership and was not subject to unincorporated business tax in accordance with the provisions of Section 306, Article 13-A of the Tax Law, then in effect.

(B) Accordingly, the unincorporated business tax assessments against the taxpayer partnership are hereby modified by cancelling 1935 Assessment No. E-497134 in the amount of \$768.00 and 1936 Assessment No. E-54038 in the amount of \$912.00. Additional unincorporated business tax is due on said assessments in the amounts of \$192.36 and \$94.24 for the respective years 1935 and 1936 exclusive of any accrued statutory charges that may be lawfully due and owing. The taxpayer's applications for revision or refund except as herein modified are denied.

Dated: Albany, New York the 9th day of February, 1970

STATE TAX COMMISSION

/s/ Norman Gallman

PRESIDENT

/s/ A. Bruce Manley

COMMISSIONER

/s/ Milton Koerner

COMMISSIONER

IN THE MATTER OF THE APPLICATION
OF
NATHAN RESFORD
FOR REVISION OR REFUND OF PERSONAL IN-
COME TAXES UNDER ARTICLE 16 OF THE TAX
LAW FOR THE YEAR 1956

The taxpayer having filed an application for revision or refund for personal income taxes under Article 16 of the Tax Law for the year 1955, and hearings having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on May 19, 1964 and January 18, 1965 before Solomon Sies, Hearing Officer, at which hearings testimony was taken and the taxpayer having been represented by Albert J. Hasson and Company, Accountants, by Albert J. Hasson, C.P.A., and Myron W. Siskin, Esq., in the matter having been duly examined and considered,

(1) During the years 1955 and 1956 and prior thereto, Jack Esformes, Murray Esformes, brothers, and their father, Nathan Esformes, were co-partners doing business under the name and style of Jack Esformes, a partnership, as "produce merchants" at Bronx Terminal Market, located in the Borough of Bronx, City and State of New York. The interest of the members of the partnership were as follows: Jack Esformes, 50%; Murray Esformes, 30% and Nathan Esformes, 20%. Profits and losses were shared in the same ratio.

(2) On February 13, 1959 the Department of Taxation and Finance made an additional assessment of unincorporated business taxes against the partnership for the year 1956 (Assessment No. B-549389) on the ground that the salaries received by Jack, Murray and Nathan Esformes in the total amount of \$30,000 from Jack Esformes Corporation constituted additional receipts of the partnership business includible in income subject to unincorporated business income taxes. The assessment also included a portion of travel and entertainment expenses disallowed on Federal audit and an adjustment of contributions.

(3) The taxpayer filed a nonresident income tax return for the year 1956. On February 13, 1959 an additional assessment was issued against the taxpayer for the year 1956 (Assessment No. B-549391), as a result of the assessment made against the partnership and more fully set forth in finding (2) above, thereby increasing the taxpayer's distributive share of partnership income. The taxpayer is only contesting that portion of the assessment which increases the partnership income by including therein the salary income of the member partners.

(4) The partnership was engaged in the business of purchasing, repacking and selling of tomatoes to supermarkets and individual produce markets within the Metropolitan New York area.

(5) In 1950 the individual members of the partnership filed a certificate of incorporation under the name of Jack Esformes Corporation pursuant to the laws of the State of Florida. The corporation maintained its principal and sole place of business at Miami Beach, Florida and was engaged in the business of buying tomatoes in Florida directly from growers either for its own account or as a commission broker to be sold throughout the United States. It was capitalized for \$25,000. All of the shares of stock of the corporation were owned by the partnership. It was claimed that this was done in order not to

impair the credit of the partnership.

(6) The individual members of the partnership were also officers and directors of the Florida Corporation. The corporation kept its books on a fiscal year basis ending October 31 whereas the partnership maintained its books on a calendar year basis. Jack Esformes was president of the corporation. His duties were chiefly executive. He would also solicit business by phone. Murray Esformes was secretary. His duties consisted of visiting packing houses and arranging for the purchase of tomatoes. Nathan Esformes was vice-president and in charge of customer relations on behalf of the corporation. There are two growing seasons in Florida, one in the Fall, from October through January, and one in the Spring, from April through May. The total amount of salary received by the individual partners from the corporation was \$25,000 in 1955 and \$30,000 in 1956. The corporation withheld income and social security taxes from the salaries paid to the members of the partnership who were also covered by unemployment insurance.

(7) The corporation maintained separate books and records and employed various personnel other than the member partners.

Based upon the foregoing findings and all the evidence presented herein, the State Tax Commission hereby

DETERMINES:

(A) The activities of the partners for the corporation were not interrelated or integrated with the activities of the partners for the partnership. The performance of services by the members of the partnership as officers of the corporation do not constitute an unincorporated business. The compensation paid to the members of the partnership by the corporation does not constitute receipts of an unincorporated business regularly carried on by the taxpayer partnership subject to unincorporated business tax in accordance with the provisions of Section 386,

Article 16-A of the Tax Law, then in effect.

(B) Accordingly, there was no increase in the taxpayer's distributive share of partnership income with respect to the salaries received by the member partners from the corporation. The assessment made against the taxpayer for the year 1956 (Assessment No. B-549391) is modified by excluding therefrom the taxpayer's proportionate share of the distribution of partnership income increased by including the salaries of the member partners received from Jack Hefornes Corporation. The assessment is therefore cancelled to the extent of \$348.85. There is due on said assessment the amount of \$23.14 exclusive of accrued statutory charges that may be lawfully due and owing. The taxpayer's application for revision or refund, except as herein modified, is denied.

DATED: Albany, New York this 9th day of February, 1970.

STATE TAX COMMISSION

/s/ Norman Gallman

PRESIDENT

/s/ A. Bruce Manley

COMMISSIONER

/s/ Milton Koerner

COMMISSIONER

IN THE MATTER OF THE APPLICATION
OF
JACK ESFORMES
FOR REVISION OR REFUND OF PERSONAL IN-
COME TAXES UNDER ARTICLE 16 OF THE TAX
LAW FOR YEAR 1956

Jack Esformes having filed an application for revision or refund of personal income tax under Article 16 of the Tax Law for the year 1956 and hearings having been held in connection herewith at the office of the State Tax Commission, 80 Centre Street, New York, New York, on May 19, 1964 and on January 8, 1965 before Solomon Sies, Hearing Officer, at which last mentioned hearing the taxpayer appeared and testified and said taxpayer having been represented by Albert J. Hasson and Company, Accountants, by Albert J. Hasson, C.P.A., and Myron W. Siskin, Esq., and the matter having been duly examined and considered,

(1) During the years 1955 and 1956 and prior thereto, Jack Esformes, Murray Esformes, brothers, and their father, Nathan Esformes, were co-partners doing business under the name and style of Jack Esformes, a Partnership, as "produce merchants" at Bronx Terminal Market, located in the Borough of Bronx, City and State of New York. The interest of the members of the partnership were as follows: Jack Esformes, 50%; Murray Esformes, 30% and Nathan Esformes, 20%. Profits and losses were shared in the same ratio.

(2) On February 13, 1959 the Department of Taxation and Finance made an additional assessment of unincorporated business tax against the partnership of Jack Esformes (Assessment No. B-549389)

for the year 1956 on the ground that salaries in the total amount of \$30,000.00 received by the members of the partnership from Jack Esformes Corporation constituted additional unincorporated business tax. The assessment also included a portion of travel and entertainment expenses disallowed on Federal audit and an adjustment of contributions. The taxpayer is only contesting that portion of the assessment which included salary income as additional partnership income attributable to the taxpayer's distributive share thereof.

(3) The taxpayer filed a nonresident income tax return for the year 1956. On February 13, 1959 an additional assessment (Assessment No. B-549390) was issued against the taxpayer for the year 1956 as a result of the assessment made against the partnership and more fully set forth in finding (2) above, thereby increasing the taxpayer's distributive share of partnership income. The taxpayer is only contesting that portion of the assessment which increases the partnership income by including therein the salary income of the member partners.

(4) The partnership was engaged in the business of purchasing, repacking and selling of tomatoes to supermarkets and individual produce markets within the Metropolitan New York area.

(5) In 1950 the individual members of the partnership filed a certificate of incorporation under the name of Jack Esformes Corporation pursuant to the laws of the State of Florida. The corporation maintained its principal and sole place of business at Miami Beach, Florida and was engaged in the business of buying tomatoes in Florida directly from growers either for its own account or as a commission broker to be sold throughout the United States. It was capitalized for \$25,000.00. All of the shares of stock of the corporation were owned by the partnership. It was claimed that this was done in order not to impair the credit of the partnership.

(6) The individual members of the partnership were also officers and directors of the Florida Corporation. The corporation kept its books on a fiscal year basis ending October 31 whereas the

partnership maintained its books on a calendar year basis. Jack Esformes was president of the corporation. His duties were chiefly executive. He would also solicit business by phone. Murray Esformes was secretary. His duties consisted of visiting packing houses and arranging for the purchase of tomatoes. Nathan Esformes was vice-president and in charge of customer relations on behalf of the corporation. The corporation employed three or four other individuals in addition to its officers. There are two growing seasons in Florida, one in the Fall, from October through January, and one in the Spring, from April through May. The total amount of salary received by the individual partners from the corporation was \$25,000.00 in 1955 and \$30,000.00 in 1956. The corporation withheld income and social security taxes from the salaries paid to the members of the partnership who were also covered by unemployment insurance.

(7) The corporation maintained separate books and records and employed various personnel other than the member partners.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DETERMINES:

(A) The activities of the partners for the corporation were not interrelated or integrated with the activities of the partners for the partnership. The performance of services by the members of the partnership as officers of the corporation do not constitute an unincorporated business. Accordingly, the compensation paid to the members of the partnership by the corporation do not constitute receipts of an unincorporated business regularly carried on by the taxpayer partnership subject to unincorporated business tax in accordance with the provisions of Section 386, Article 16-A of the Tax Law.

(B) There was no increase in the taxpayer's distributive share of partnership income with respect to the salaries received from the corporation. Accordingly, the assessment against the taxpayer for

the year 1956 is hereby modified by excluding therefrom the taxpayer's proportionate share of partnership income increased by including the salaries of the member partners received from Jack Esformes Corporation. The aforementioned assessment against the taxpayer for the year 1956 (Assessment No. B-549390) is hereby cancelled to the extent of \$1,035.32. There is due on said assessment the amount of \$74.93 exclusive of accrued statutory charges that may be lawfully due and owing. The taxpayer's application for revision or refund, except as herein modified, is denied.

Dated: Albany, New York the 9th day of February, 1970.

THE STATE TAX COMMISSION

/s/ Norman Gallman

PRESIDENT

/s/ A. Bruce Manley

COMMISSIONER

/s/ Milton Koerner

COMMISSIONER