

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Solomon Falk

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Unincorporated Business Tax :
under Article 23 of the Tax Law :
for the Years 1962, 1964 - 1968. :

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 16th day of May, 1980, he served the within notice of Decision by certified mail upon Solomon Falk, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

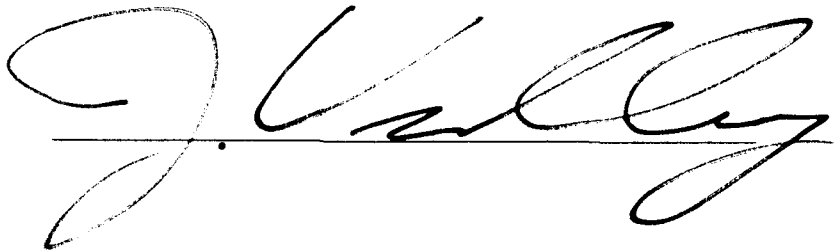
Solomon Falk
104 40-Queens Blvd.
Forest Hills, NY 11375

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
16th day of May, 1980.

Joanne Krapp



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

May 16, 1980

Solomon Falk
104 40-Queens Blvd.
Forest Hills, NY 11375

Dear Mr. Falk:

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) 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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
SOLOMON FALK
for Redetermination of a Deficiency or
for Refund of Unincorporated Business Tax :
under Article 23 of the Tax Law for the
Years 1962, 1964, 1965, 1966, 1967 and :
1968.

DECISION

Petitioner, Solomon Falk, 104-40 Queens Boulevard, Forest Hills, New York 11375, filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1962, 1964, 1965, 1966, 1967 and 1968 (File No. 01084).

On August 21, 1979, petitioner advised the State Tax Commission, in writing, that he desired to waive a small claims hearing and to submit the case to the State Tax Commission, based on the entire record contained in the file.

ISSUE

Whether petitioner's activities as a produce merchant and produce commission salesman constitute the carrying on of an unincorporated business, the income from which is subject to the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Solomon Falk, filed New York State combined income tax returns with his wife for the years 1962, 1964, 1965, 1966 and 1967. For the year 1968, he filed a New York State joint income tax return with his wife. He did not file unincorporated business tax returns for any of the years at issue.

2. On March 6, 1972, the Income Tax Bureau issued a Notice and Demand under jeopardy assessment against petitioner assessing unincorporated business tax due for the years 1962, 1964, 1965, 1966, 1967 and 1968. Attached thereto was a computation which explained the basis for said assessment as "Your activities as a produce merchant and produce commission salesman constitute the carrying on of an unincorporated business..." Accordingly, a Notice of Deficiency was issued April 14, 1972, imposing unincorporated business tax of \$1,404.98, plus interest of \$478.30, for a total due of \$1,883.28.

3. Petitioner contended that during the years at issue he was employed by J. W. Pfeiffer & Co., in the capacity of a "full-time salesman of fruit and produce, working on a commission basis", and that none of the attributes of doing business were present in his relationship with said firm.

4. Petitioner described his activities on his tax returns as: Commission Salesman (1962), Commission Salesman - Produce (1964), Commission Salesman - Produce (1965), Commission Salesman - Produce (1966), Commission Salesman and Produce Commission Merchant (1967), and Produce Merchant (1968).

5. In bankruptcy proceedings of petitioner, of which the State of New York had filed a priority claim for taxes, petitioner was listed as "Sol Falk, a/k/a Solomon Falk, a partner in Benjamin & Solomon Falk". In response to the above, petitioner contended that he was never a partner in such firm and, that his attorney "inadvertantly completed the papers in that way".

6. Petitioner reported the income at issue as wages on all his New York State returns. On his Federal tax returns for 1966, 1967 and 1968, the income at issue was reported as "Pensions and Annuities, Rents and Royalties, Partnerships, Estates or Trusts, etc." Furthermore, the nature of this income as reported on Schedule C-3, Form 1040, was designated, as being "From partnerships, joint ventures, etc.".

7. Petitioner's principal, J. W. Pfeiffer & Co., did not withhold income taxes or social security taxes from his compensation. Additionally, he was not covered for unemployment insurance benefits.

8. Petitioner contended that all agreements with his principal were oral and employment was on a week to week basis.

9. The record contains a letter from Prevor-Mayrsohn International, Inc., petitioner's principal since October 1969, wherein statements are made relevant to petitioner's relationship with J. W. Pfeiffer & Co. These statements did not indicate that the writer had first-hand knowledge of petitioner's activities with Pfeiffer during the years at issue.

10. The record is void of information concerning the degree of direction and control exercised over petitioner's activities. The petitioner did not submit information with respect to fringe benefits, required working hours, vacation and sick leave or other vital criteria determinative of whether or not a bona fide employer-employee relationship existed between petitioner and J. W. Pfeiffer & Co.

CONCLUSIONS OF LAW

A. That petitioner, Solomon Falk, has not sustained the burden of proof required under section 689(e) of the Tax Law to show that he was an employee of J. W. Pfeiffer & Co.

B. That petitioner's activities as a produce merchant and produce commission salesman during the years 1962, 1964, 1965, 1966, 1967 & 1968 constitute the carrying on of an unincorporated business, the income of which is subject to the imposition of unincorporated business tax.

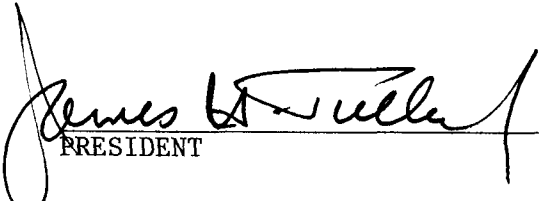
C. That the petition of Solomon Falk is denied and the Notice of Deficiency

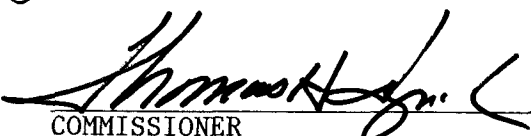
dated April 14, 1972 is sustained together with such additional interest as may be lawfully owing.

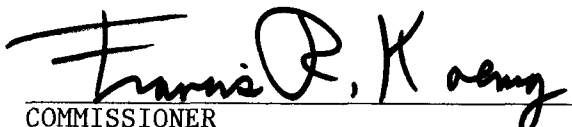
DATED: Albany, New York

STATE TAX COMMISSION

MAY 16 1980


PRESIDENT


COMMISSIONER


COMMISSIONER