

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Robert S. Olnick	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Years 1969 - 1971.	:	

State of New York  
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Robert S. Olnick, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert S. Olnick  
303 East 57th Street  
New York, NY 10022

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  
27th day of May, 1983.

David Parchuck

Quinn A. Hapburn

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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Robert S. Olnick :  
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 1969 - 1971. :  
\_\_\_\_\_

State of New York  
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Robert B. Spring the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert B. Spring  
130 East 40th St.  
New York, NY 10016

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  
27th day of May, 1983.

David Parchuck

James A. Higginson

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 27, 1983

Robert S. Olnick  
303 East 57th Street  
New York, NY 10022

Dear Mr. Olnick:

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 Law 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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Robert B. Spring  
130 East 40th St.  
New York, NY 10016  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
ROBERT S. OLNICK : DECISION  
for a Redetermination of a Deficiency or for :  
Refund of Unincorporated Business Tax under :  
Article 23 of the Tax Law for the Years 1969, :  
1970 and 1971.

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Petitioner, Robert S. Olnick, 303 East 57th Street, New York, New York 10022, filed a petition for a redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1969, 1970 and 1971 (File Nos. 19708 and 19709).

A formal hearing was held before Herbert Carr, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 26, 1979 at 9:15 A.M. Petitioner appeared by Robert B. Spring, Esq. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether petitioner was engaged in an unincorporated business as a real estate manager with respect to income received in the form of salaries, fees and commissions.

FINDINGS OF FACT

1. On April 14, 1977, a Notice of Deficiency was issued to petitioner, Robert S. Olnick, asserting additional tax, penalty and interest as follows:

<u>YEAR</u>	<u>DEFICIENCY</u>	<u>PENALTY AND INTEREST</u>	<u>TOTAL</u>
1969	\$5,715.70	\$2,400.19	\$8,115.89
1970	3,786.75	1,362.96	5,149.71
1971	4,511.68	1,353.19	5,867.87

2. Consents extending periods of limitation were executed on December 30, 1972, January 22, 1975, December 12, 1974 and December 5, 1975.

Robert S. Olnick received W-2 income, management fees and commissions, as follows:

	<u>1969</u>	<u>1970</u>	<u>1971</u>
a) Starrett Brothers and Eken, Inc. 301 East 57th St., N.Y., N.Y.	\$43,076.76	\$45,000.00	\$56,769.10
b) Lenox Terrace Development Assoc. 10 W. 135th St., N.Y., N.Y.	15,000.00	15,000.00	15,000.00
c) Hampton Investors, Inc. c/o Hampton Management 2500 Johnson Ave., Riverdale, N.Y.	7,500.00	7,500.00	7,500.00
d) Fortune Funding Corporation 301 East 57th St. N.Y., N.Y.	<u>15,000.00</u>	<u>15,500.00</u>	<u>15,500.00</u>
TOTAL W-2 INCOME	\$80,576.76	\$83,000.00	\$94,769.10
e) Management fees	36,000.00		
Commissions	<u>3,341.00</u>		
TOTAL	<u>\$119,917.76</u>	<u>\$83,000.00</u>	<u>\$94,769.10</u>

3. The Department of Taxation and Finance ("Department") deemed such salaries, fees and commissions the income of an unincorporated business. Petitioner's contention that he was an employee of the above entities was not sustained by the Department because petitioner was employed simultaneously by two or more entities, that there was no "supervision and control" or "division of time" and that petitioner was an independent contractor.

4. Starrett Brothers and Iken, Inc., 301 East 57th Street, New York, New York ("Starrett") was a publicly held corporation primarily engaged in the construction business. Petitioner served as chairman of the board and president during 1969 and part of 1970 and thereafter solely as chairman of the board. Petitioner owns 11 percent of the outstanding shares of Starrett. Petitioner was hired by the board of directors with whom he negotiated the terms of employment on an annual basis. These terms were not memorialized in a written contract. The amount of petitioner's salary was affected by his part-time status. In 1970 the board of directors hired a full-time president at a salary of \$75,000.00. Petitioner maintained an office at Starrett, had assistants paid by Starrett and devoted as much as six days per week to his duties. He was covered by a pension plan as well as health and accident insurance paid for by Starrett. Petitioner did not claim reimbursement for some expenses but did for others.

5. Lenox Terrace Development Associates ("Lenox"), 10 West 135th Street, New York, New York was a partnership of which petitioner was a partner. It had previously been a corporation at which time petitioner served as president. Lenox was a housing development consisting of six buildings, comprising 1,716 apartments and five shopping centers. Petitioner performed services for Lenox every Wednesday morning. He signed all checks and negotiated every commercial lease and renewal.

6. Fortune Funding Corporation ("Fortune"), 301 East 57th Street, New York, New York was a corporation of which petitioner owned 100 percent of the outstanding shares. It was engaged in short-term mortgage loans and accounts receivable financing.

7. Hampton Investors, Inc. ("Hampton"), 2500 Johnson Avenue, Riverdale, New York was established in 1949 or 1950. It owned some real estate and other capital used for short-term investments. Petitioner was president and 50 percent shareholder of the corporation with the remaining shares owned by three other persons. Petitioner performed services for Hampton as circumstances required, but had no regular hours.

8. Hampton Management ("Management"), 2500 Johnson Avenue, Riverdale, New York was a partnership, of which petitioner was a partner, engaged in the management of one piece of real property owned by Hampton.

9. Petitioner received no fringe benefits such as pension plans, health or accident insurance from Lenox, Fortune, Hampton or Management even though Lenox had a pension plan and all of the foregoing entities had medical plans for employees.

10. Petitioner transacted business of Fortune and Hampton out of his law offices located next door to the offices of Starrett.

11. All of the foregoing entities withheld FICA tax for petitioner.

12. No federal income tax was withheld by any of the foregoing entities for the reason that petitioner was advised by his accountant that he would not be liable for such taxes for the years in question.

13. Starrett, Lenox and Fortune were separate entities having independent business purposes from each other and from Hampton and Management.

14. Hampton and Management were closely related business entities serving a unitary business purpose.

#### CONCLUSIONS OF LAW

A. That petitioner sustained the burden of proving an employer-employee relationship between himself and Starrett. Petitioner was hired by and under

the direct supervision and control of the Board of Directors of this publicly held corporation. He was covered by a pension plan and company health and accident benefits. A direct correlation between hours worked and amount of compensation need not be shown since petitioner was employed on a annual salary basis. Petitioner's part-time status was reflected in compensation paid to him. The mere involvement of petitioner in other unrelated business enterprises does not ipso facto render his employment by Starrett, the carrying on of an unincorporated business (Tax Law, §703); Matter of Harold and Isabel Feld, State Tax Commission, October 29, 1971; Matter of Leslie Geiger, State Tax Commission, December 31, 1970.

B. That petitioner established a bona fide employer-employee relationship between himself and Fortune. Petitioner was entitled to carry on Fortune's business activities in corporate form without incurring unincorporated business tax liability, since Fortune was unrelated to petitioner's other business activities.

C. That petitioner failed to establish a bona fide employer-employee relationship between himself and:

1. Lenox: Petitioner's performance of services in managing real property for this partnership constituted the carrying on of an unincorporated business. (Matter of Elikind v. State Tax Commission, 63 A.D.2d 789.)
2. Hampton and Management: Petitioner's alleged salary income from these two entities constituted income derived from the conduct of an unincorporated business having a unitary purpose in relation to which petitioner was a entrepreneur. (Tax Law, §703(b); Matter of Merrick v. Tully, 68 A.D.2d 289; Matter of Seifer v. State Tax Commission, 58 A.D.2d 726; Matter of Naroff v. Tully, 55 AD2d 755; Matter of Feld v. Gallman, 41 A.D.2d 882.)



D. That petitioner's claimed exemption under Tax Law, §703(e) is not sustained because petitioner failed to prove that he was the owner of any specific real property.

E. That the petition of Robert S. Olnick is granted to the extent indicated in Conclusions of Law "A" and "B" and is otherwise denied.

DATED: Albany, New York

MAY 27 1983

STATE TAX COMMISSION

*Richard A. Cline*  
PRESIDENT

*Frank R. Koenig*  
COMMISSIONER

*[Signature]*  
COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

☐ Moved, last address

☐ No such person

☒ Moved, not knowable

☐ Address unknown

NEW YORK, N.Y. 10016

Robert B. Spring  
130 East 40th St.  
New York, NY 10016

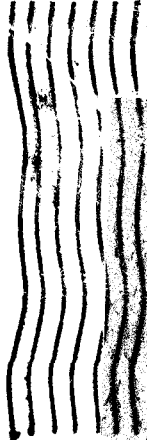
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Rep's Copy

CERTIFIED

P 481 207 904

MAIL



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

May 27, 1983

Robert S. Olnick  
303 East 57th Street  
New York, NY 10022

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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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Robert B. Spring  
130 East 40th St.  
New York, NY 10016  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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E. That the petition of Robert S. Olnick is granted to the extent indicated in Conclusions of Law "A" and "B" and is otherwise denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983

*Richard W. Clark*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*Mark J. Thell*  
COMMISSIONER