

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Henry Krieger & Co. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Unincorporated :  
Business Tax under Article 23 of the Tax Law for :  
the Fiscal Year Ended November 30, 1981. :  
\_\_\_\_\_:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 8th day of May, 1985, he served the within notice of Decision by certified mail upon Henry Krieger & Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Henry Krieger & Co.  
50 Broadway  
New York, NY 10004

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
8th day of May, 1985.

David Parchuck

James A. Hagelund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Henry Krieger & Co.

for Redetermination of a Deficiency or Revision  
of a Determination or Refund of Unincorporated  
Business Tax under Article 23 of the Tax Law for  
the Fiscal Year Ended November 30, 1981.

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 8th day of May, 1985, he served the within notice of Decision by certified mail upon Jesse Fishkin, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jesse Fishkin  
Bruehl & Graber  
1100 Franklin Ave.  
Garden City, NY 11530

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
8th day of May, 1985.

David Parchuck

James A. Harkness

Authorized to administer oaths  
pursuant to Tax Law section 174

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

May 8, 1985

Henry Krieger & Co.  
50 Broadway  
New York, NY 10004

Gentlemen:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Jesse Fishkin  
Bruell & Graber  
1100 Franklin Ave.  
Garden City, NY 11530  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	DECISION
HENRY KRIEGER & CO.	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Fiscal Year	:	
Ended November 30, 1981	:	

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Petitioner, Henry Krieger & Co., 50 Broadway, New York, New York 10004, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the fiscal year ended November 30, 1981 (File No. 46863).

A formal hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 4, 1984 at 9:15 A.M., with all briefs to be submitted by January 22, 1985. Petitioner appeared by Jesse Fishkin, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq. of counsel).

#### ISSUE

Whether the proper tax rate has been applied to petitioner's unincorporated business taxable income reported on its partnership return for the fiscal year ended November 30, 1981.

#### FINDINGS OF FACT

1. Henry Krieger & Co. (hereinafter "petitioner"), a New York State security brokerage partnership organized and existing under the laws of the State of New York, filed a New York State Partnership Return for the fiscal year ended November 30, 1981. On such return, petitioner's reported taxable

business income of \$2,901,213.00 was multiplied by a tax rate of 4% to yield an unincorporated business tax liability of \$116,049.00. Said tax was paid by four (4) estimated tax payments of \$3,000.00 each, and a payment of \$109,973.00 made on March 12, 1982. This payment, which was made "under protest", was comprised of the balance of tax due of \$104,049.00 and a penalty for nonpayment of estimated tax of \$5,924.00.

2. On February 3, 1983, petitioner filed a Claim For Credit or Refund of Personal Income Tax And/Or Unincorporated Business Income Tax wherein it claimed a refund of \$111,809.00 for the taxable year at issue. Its basis for filing said claim was as follows:

"As no tax is imposed for taxable years beginning after 1980 and the tax base included 11 months of 1982<sup>1</sup>, a claim is being made for 11/12 of the tax paid of \$121,973.00<sup>2</sup> or \$111,809.00. Of this amount \$109,973.00 was paid under protest."

3. On March 25, 1983, the Audit Division issued a notice to petitioner advising that its claim was disallowed in full on the grounds that:

"Since the partnership's fiscal year began in 1980, you would be required to file a return and compute and pay the tax using the tax rate in effect for 1980.

No proration between periods is allowed for Unincorporated Business Tax purposes."

4. On June 27, 1983, the Audit Division issued a formal notice of disallowance to petitioner wherein it advised that petitioner's claim was disallowed in full.

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1 The 11 month period within the taxable year at issue fell within calendar year 1981, not 1982, as stated.

2 The total paid of \$121,973.00 included penalty of \$5,924.00, leaving a total tax paid of \$116,049.00.

5. Petitioner claimed that although Article 23 makes no provision for the proration of the tax rate where a return filed on a fiscal year basis includes portions of two calendar years with different applicable tax rates, it does provide for such proration in the case of an unincorporated farming business under section 701(a)(5). Accordingly, petitioner argued that this results in discrimination against non-farming businesses and is unconstitutional.

6. Petitioner further argued that section 702 of the Tax Law, "blankets in the provisions of section 21 of the Internal Revenue Code" (with respect to the proration of tax rates) thereby allowing such proration for New York State unincorporated business tax purposes.

CONCLUSIONS OF LAW

A. That section 701(a) of the Tax Law, as in effect during the period at issue herein, provides that:

"(6) Notwithstanding the provisions of paragraph two of this subsection, the tax imposed under this section for taxable years beginning after December thirty-first, nineteen hundred seventy-seven, shall be at the rates set forth in the following table:

For taxable years beginning in:	The rate of tax shall be:
nineteen hundred seventy-eight	five percent
nineteen hundred seventy-nine	four and one-half percent
nineteen hundred eighty	four percent
nineteen hundred eighty-one	zero percent

No tax shall be imposed for taxable years beginning after December thirty-first, nineteen hundred eighty-one".

B. That pursuant to section 701(a)(6) of the Tax Law, the applicable rate of tax for petitioner's return filed for the fiscal year ended November 30, 1981 is four (4) percent, since the taxable year at issue began in 1980.

C. That petitioner's argument that section 702 of the Tax Law "blankets in the provisions of section 21 of the Internal Revenue Code" is without merit.

Section 702 of the Tax Law provides as follows:

"Meaning of terms - Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Any reference in this article to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred fifty-four, and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective at any time or from time to time for the taxable year."

The principal of Federal conformity does not relate to the legislated tax rates. Furthermore, section 702 deals only with the meaning of terms used in Article 23.

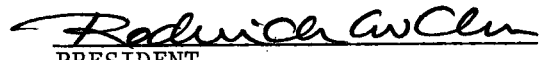

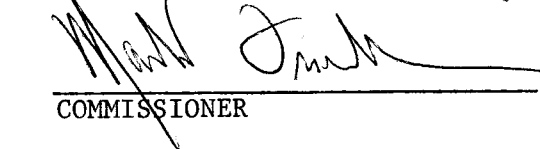
D. That the constitutionality of the Tax Law is presumed at the administrative level of the State Tax Commission.

E. That the petition of Henry Krieger & Co. is denied and the formal notice of disallowance issued June 27, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 08 1985

  
PRESIDENT  
  
COMMISSIONER  
  
COMMISSIONER