

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Edward W. Ferguson :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Unincorporated  
Business Tax under Article(s) 23 of the Tax Law :  
for the Year 1978.

\_\_\_\_\_  
State of New York :

ss.:

County of Albany :

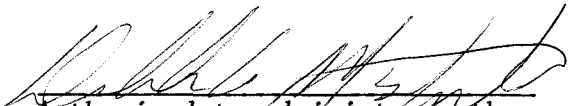
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 24th day of February, 1987, he/she served the within notice of decision by certified mail upon Edward Ferguson the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

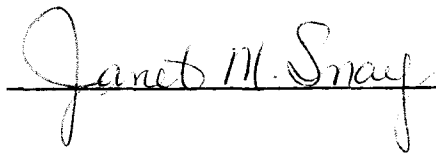
Edward Ferguson  
51 Haines Road  
Bedford Hills, NY 10507

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  
24th day of February, 1987.

  
\_\_\_\_\_  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
\_\_\_\_\_  
Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Edward W. Ferguson

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
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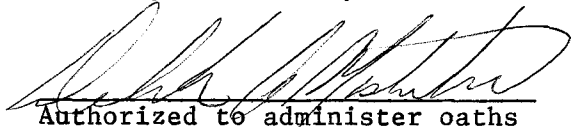
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 24th day of February, 1987, he served the within notice of decision by certified mail upon Paul Silberberg, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

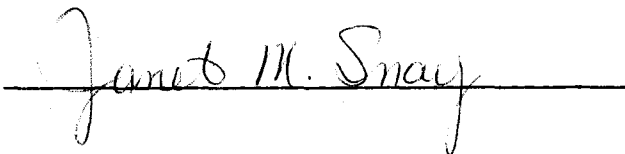
Paul Silberberg  
Berman, Koerner & Silberberg, P.C.  
33 Irving Place - 11th Floor  
New York, NY 10003

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  
24th day of February, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

February 24, 1987

Edward W. Ferguson  
51 Haines Road  
Bedford Hills, NY 10507

Dear Mr. Ferguson:

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 and 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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Paul Silberberg  
Berman, Koerner & Silberberg, P.C.  
33 Irving Place - 11th Floor  
New York, NY 10003

STATE OF NEW YORK

STATE TAX COMMISSION

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|  |   |          |
|--|---|----------|
| In the Matter of the Petition                | : |          |
| of   | : |          |
| EDWARD W. FERGUSON                           | : | DECISION |
| for Redetermination of a Deficiency or for   | : |          |
| Refund of Unincorporated Business Tax under  | : |          |
| Article 23 of the Tax Law for the Year 1978. | : |          |

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Petitioner, Edward W. Ferguson, 51 Haines Road, Bedford Hills, New York 10507, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1978 (File No. 63069).

A 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 September 8, 1986 at 1:15 P.M. Petitioner appeared by Paul Silberberg, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether petitioner's activities as a business broker constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Edward W. Ferguson (hereinafter "petitioner") filed a New York State Income Tax Resident Return with his wife, Adria Ferguson, for the year 1978 under filing status "Married filing separately on one Return". On such return petitioner reported business income of \$193,630.00. According to a copy of his Federal Schedule C annexed thereto, said income was derived from petitioner's

activities as a "business broker". Petitioner did not file an unincorporated business tax return for 1978.

2. On June 14, 1984, the Audit Division issued a Statement of Audit Changes to petitioner wherein his reported 1978 business income was held subject to the unincorporated business tax based on the following explanation:

"The fact that you did not receive any business income since you retired, except the \$400,000.00 in the taxable year 1978, does not except you from the New York State Unincorporated Business Tax.

As stated in my letter of 5/2/83 to your representative (which they did not answer) you filed Schedule C's [sic] for 1978, 1979, 1980 and 1981, showing your main business activity as a business broker and you claim business expenses thereon in pursuit of this business endeavor [sic].

Continuity, frequency and regularity of business activities is evidence [sic] by the filing of Schedule C's [sic] for the years 1978, 1979, 1980 and 1981.

Therefore, your business activity as business broker is subject to the New York State unincorporated business tax.

Penalty under Section 685(a)(1) and (a)(2) [is imposed] for failure to file an unincorporated business tax return and pay your tax when due."

3. Based on the aforesaid statement, the Audit Division issued a Notice of Deficiency against petitioner on June 7, 1985 asserting 1978 unincorporated business tax of \$9,181.50, plus penalties of \$4,361.22 and interest of \$6,691.50, for a total due of \$20,234.22.

4. Petitioner retired in 1972 from his employment as a security analyst. At the time he retired he was 64 years old.

5. From 1972 to 1977 petitioner had no business or employment income.

6. In 1978 petitioner was instrumental in the acquisition by Wheel-Abrator, Fry Company of Whiting Corporation. Petitioner, being acquainted with the chief executive officer of each company, suggested the acquisition and arranged a meeting between the officers. For his services petitioner received \$400,000.00.

7. After petitioner's success with the Wheel-Abrator, Fry Co. acquisition he believed he was capable of arranging other similar acquisitions. During 1979, 1980 and 1981, petitioner spent a good deal of time attempting to arrange other specific acquisitions. Ultimately, his attempts were unsuccessful.

8. Petitioner argued that his 1978 activities did not constitute a trade, business or occupation. He further argued that the 1978 income was derived from an isolated transaction and, as such, said income is exempt from the imposition of unincorporated business tax.

9. On each of petitioner's Federal schedules C, filed for the years 1978 through 1981, he reported his main business activity as "business broker". His personal residence was reported as his business address. Income and deductions reported on each Schedule C were as follows:

| <u>1978</u>              |                     |
|--------------------------|---------------------|
| <u>Income</u>            | \$400,000.00        |
| <u>Deductions</u>        |                     |
| Commissions              | \$196,000.00        |
| Dues and publications    | 1,569.00            |
| Office supplies          | 744.00              |
| Postage                  | 50.00               |
| Telephone                | 981.00              |
| Travel and entertainment | 7,015.00            |
| Safe deposit box         | <u>11.00</u>        |
| <u>Total Deductions</u>  | <u>\$206,370.00</u> |
| <u>Net Profit</u>        | <u>\$193,630.00</u> |

1979

Income

-0-

Deductions

|                                  |                 |
|----------------------------------|-----------------|
| Dues and publications            | \$1,196.00      |
| Office supplies                  | 317.00          |
| Telephone                        | 879.00          |
| Travel and entertainment         | 3,216.00        |
| Acquisition promotion & research | <u>3,095.00</u> |

Total Deductions

\$8,703.00

Net Loss

\$(8,703.00)

1980

Income

-0-

Deductions

|                            |                 |
|----------------------------|-----------------|
| Dues and publications      | \$1,248.00      |
| Office supplies            | 291.00          |
| Telephone                  | 746.00          |
| Travel and entertainment   | 2,535.00        |
| Trans-Lux Corp.            | 110.00          |
| Use of Apartment as office | <u>1,620.00</u> |

Total Deductions

\$6,550.00

Net Loss

\$(6,550.00)

1981

Income

-0-

Deductions

|                             |                 |
|-----------------------------|-----------------|
| Dues and publications       | \$1,322.00      |
| Office supplies and postage | 327.00          |
| Travel and entertainment    | 3,928.00        |
| Utilities and telephone     | 828.00          |
| Trans-Lux Corp.             | 1,677.00        |
| N.Y. Stock Exchange Wire    | 1,294.00        |
| One room used as office     | <u>1,620.00</u> |

Total Deductions

\$10,996.00

Net Loss

\$(10,996.00)

10. Petitioner testified that "I was in a business that could be regarded as being a business broker, but I never thought I was a business broker."

CONCLUSIONS OF LAW

A. That in determining whether an activity constitutes an unincorporated business, 20 NYCRR 203.1(a) provides, inter alia, that:

"Where a doubt as to the status of an activity exists, all the relevant facts and circumstances must be considered in determining whether the activity or the transactions involved constitute a trade, business or occupation for the purposes of this section. Generally, the continuity, frequency and regularity of activities, as distinguished from casual or isolated transactions, and the amount of time, thought and energy devoted to the activities or transactions are the factors which are to be taken into consideration."

B. That petitioner's activities as a business broker were conducted on a continuous, frequent and regular basis during the year at issue, as well as during the three subsequent years. Accordingly, such activities constituted the carrying on of an unincorporated business during 1978.

C. That the petition of Edward W. Ferguson is denied and the Notice of Deficiency issued June 7, 1985 is sustained together with such additional penalty and interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 24 1987

Roderick W. Clem  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Walter J. [Signature]  
COMMISSIONER