

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Estate of Harold Feinberg :
c/o Edward R. Feinberg : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income & UBT :
under Article 22 & 23 of the Tax Law :
for the Years 1972 - 1974. :

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 5th day of September, 1980, he served the within notice of Decision by certified mail upon Estate of Harold Feinberg, c/o Edward R. Feinberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Harold Feinberg
c/o Edward R. Feinberg
1419 E. Genesee St.
Syracuse, NY 13210

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
5th day of September, 1980.

Robert Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Estate of Harold Feinberg :
c/o Edward R. Feinberg : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income & UBT :
under Article 22 & 23 of the Tax Law
for the Years 1972 - 1974. :

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 5th day of September, 1980, he served the within notice of Decision by certified mail upon Israel Kalish the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Israel Kalish
50 Broadway
New York, NY 10004

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
5th day of September, 1980.

W. H. Brink

J. Vredenburg

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

September 5, 1980

Estate of Harold Feinberg
c/o Edward R. Feinberg
1419 E. Genesee St.
Syracuse, NY 13210

Dear Mr. Feinberg:

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 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
Israel Kalish
50 Broadway
New York, NY 10004
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
HAROLD FEINBERG
for Redetermination of a Deficiency or
for Refund of Personal Income and
Unincorporated Business Taxes under
Articles 22 and 23 of the Tax Law for
the Years 1972, 1973 and 1974.

DECISION

Petitioner, Harold Feinberg, c/o Edward Feinberg, Executor of the Last Will and Testament of Harold Feinberg, 1419 E. Genesee Street, Syracuse, New York 13210, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1972, 1973 and 1974 (File No. 19303).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 22, 1979 at 9:30 A.M. Petitioner appeared by Israel Kalish, CPA. The Audit Division appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioner's earnings from activities in real estate management were subject to unincorporated business tax.

II. Whether a certain capital gain on the sale of stock was subject to unincorporated business tax.

III. Whether the aforesaid capital gain could be split between petitioner and his wife for personal income tax purposes.

FINDINGS OF FACT

1. Petitioner, Harold Feinberg, and his wife, Rhoda Feinberg, filed a joint New York State Income Tax Resident Return for 1972, on which petitioner reported \$9,000.00 in salary income from four different sources:

420 W. 206th St. Corp.	\$5,625.00
Willbet-Riverside Corp.	3,125.00
Isbet Management Co.	200.00
Hilltop Management Co.	50.00
Total	<u>\$9,000.00</u>

The wage and tax statements all show the same address for the sources, i.e., 2575 Jerome Avenue, Bronx, New York. Petitioner also reported \$25,340.96 in business income from "Real Estate". He filed a Federal Schedule "C" on which he stated his principal business activity to be "Real Estate Management" and on which he deducted \$5,615.00 in depreciation and other business expenses in arriving at the \$25,340.96 in business income. Petitioner and Mrs. Feinberg also reported \$10,000.00 in "Other Income" for 1972.

2. Petitioner and his wife filed a New York State combined income tax return for 1973 on which petitioner reported \$15,323.06 in salary income from five different sources:

Estate of Israel Weinraub, Deceased	\$ 6,750.00
Isbet Management Co.	1,200.00
420 W. 206th St. Corp.	2,700.00
Willbet-Riverside Corp.	1,500.00
Castle Coal & Oil Co., Inc.	3,173.06
Total	<u>\$15,323.06</u>

With the exception of Castle Coal & Oil Co., Inc., the wage and tax statements show the same address for the sources i.e., 2575 Jerome Avenue, Bronx, New York. Petitioner also reported business income from "Real Estate" of \$19,971.00. He filed a Federal Schedule "C" for 1973 indicating his principal business activity was "Real Estate Mgmt." and deducted \$4,778.00 in depreciation and other business expenses in arriving at the \$19,971.00 in business income. Petitioner also reported \$25,000.00 in "Other Income" for 1973.

3. Petitioner and his wife filed a New York State Combined Income Tax Return for 1974 on which petitioner reported \$16,634.00 in salary income from Castle Coal & Oil Co., Inc. and Air-O-Vac. He reported that he had no business income. Petitioner reported \$13,684.00 in capital gain income and his wife reported \$13,685.00 in capital gain income. Their Federal Schedule "D" stated that the gain was attributable to "Willbet-Riverside", an asset acquired in 1960 with a cost or other basis of \$100.00 which was sold in 1974 for \$54,839.00.

4. Petitioner did not file unincorporated business tax returns for the years at issue. He had relied upon the advice of his certified public accountant.

5. On February 4, 1977, the Audit Division issued a Statement of Audit Changes against petitioner, asserting unincorporated business tax for 1972, 1973 and 1974 and additional personal income tax and minimum income tax for 1974. The adjustments were made on the grounds that:

(a) petitioner's wage income, business income and the "Other Income" for 1972 and 1973 were all business related and subject to unincorporated business tax;

(b) the capital gain for 1974 was on property owned by petitioner and could not properly be split between husband and wife;

(c) the capital gain was from the sale of a business and subject to unincorporated business tax;

(d) the portion of the 1974 long-term capital gain not subject to income tax was an item of tax preference and subject to minimum income tax;

(e) modification for allocable expenses attributable to items of tax preference in excess of specific deduction;

(f) penalties for failure to file unincorporated business tax returns and pay the taxes due.

6. On March 28, 1977, the Audit Division issued a Notice of Deficiency against petitioner, Harold Feinberg, for \$7,115.56 in unincorporated business tax, \$1,514.95 in personal income tax and \$858.15 in minimum income tax, a total of \$9,488.66, plus penalties and interest.

7. Petitioner managed a number of apartment houses for Dr. Israel Weinraub, a physician, from 1948 until Dr. Weinraub's death in 1970 and for Dr. Weinraub's Estate from 1970 until the last of the properties were disposed of in 1973. Mr. Feinberg managed four buildings for Dr. Weinraub in 1948 and as many as fourteen buildings for him in subsequent years. After the properties were disposed of in 1973, Mr. Feinberg went to work as a salesman for Castle Coal & Oil Co., Inc.

8. Petitioner's representative contended that the capital gain arose from the sale of property located at 158-18 Riverside Drive in New York City. It was claimed that the property "was originally owned by Lafayette-Riverside Corp., which was dissolved in July, 1971" and which corporation "became Willbert (sic) Riverside Corp.". It was further claimed that the property was sold in 1973, after which Willbet-Riverside Corp. was dissolved and its assets were distributed in 1974.

Although petitioner's representative also contended that Mr. & Mrs. Feinberg jointly held 10 percent of the stock of Willbet-Riverside Corp., the only documentary evidence in the file on this point consists of the following:

- (a) stock certificate for 10 shares of Lafayette-Riverside Corp. dated November 19, 1951 in the name of Harold Feinberg;
- (b) stockholders' agreement between Israel Weinraub, Bettina R. Weinraub and Harold Feinberg which confirms that Harold Feinberg owned 10 percent of the stock of Lafayette-Riverside Corp., which corporation held title to a leasehold of real property located at 50-70-90 Riverside Drive West, known also as 158-18 and 159-34 Riverside Drive West and also as 881 West 158th Street, New York City.

9. Petitioner, Harold Feinberg, died on March 28, 1979, prior to the formal hearing. The only testimony in support of his petition was that of a

retired accountant who had been Mr. Feinberg's accountant prior to the years at issue.

CONCLUSIONS OF LAW

A. That petitioner has failed to sustain the burden of proof imposed by sections 722 and 689(e) of the Tax Law to show that all of his income from the management of real property was compensation for services as an employee of Dr. Israel Weinraub within the meaning of section 703(b) of the Tax Law. Moreover, the "Other Income" reported on Mr. & Mrs. Feinberg's 1972 and 1973 returns is not shown to be anything other than business income. The income of \$3,173.06 from Castle Coal & Oil Co., Inc. for 1973, however, was income earned as an employee and is not to be included in business income. Accordingly, all of Harold Feinberg's salary income for 1972 and 1973 (except for \$3,173.06 from Castle Coal & Oil Co., Inc. for 1973) and all of his business income for 1972 and 1973 and Mr. & Mrs. Feinberg's \$10,000.00 in "Other Income" for 1972 and Mr. Feinberg's \$25,000.00 in "Other Income" for 1973, constitute unincorporated business gross income within the meaning of section 705(a) of the Tax Law and are subject to unincorporated business tax under section 701(a) of the Tax Law.

B. That although the genesis of the Lafayette-Riverside/Willbet-Riverside Corp. is not entirely clear, the Audit Division seems to have conceded the amount of the gain itself, perhaps in view of the basis of only \$100.00 reported in Schedule "D" of the Federal return for 1974. The stock on which the gain was realized was not property used in petitioner's business, despite the fact that the corporation (of which he was a minority shareholder) owned an interest in one of the parcels of real estate he managed and from which corporation he received salary income.

C. That petitioner has not sustained the burden of proof to show that the stock on which the capital gain was realized was owned by both Harold Feinberg and his wife. In fact the only documentary evidence shows that Mr. Feinberg owned the 10 percent interest in Lafayette-Riverside Corp., the apparent predecessor of Willbet-Riverside Corp. Accordingly, the capital gain income cannot be split between husband and wife for 1974.

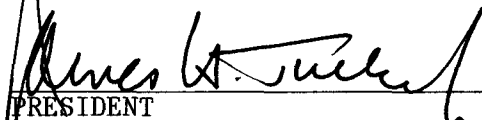
D. That the penalties imposed under sections 685(a)(1) and 685(a)(2) of the Tax Law are cancelled.

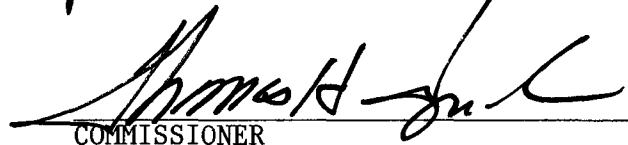
E. That the petition of the Estate of Harold Feinberg is granted to the extent that the salary income of \$3,173.06 from Castle Coal & Oil Co., Inc. for 1973 is to be excluded from Mr. Feinberg's unincorporated business gross income for said year; the capital gain on the sale of stock is to be excluded from unincorporated business gross income for 1974 and the penalties under sections 685(a)(1) and 685(a)(2) of the Tax Law are cancelled. Except as so granted, the petition is in all other respects denied and the Notice of Deficiency is sustained.

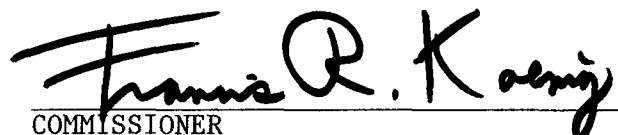
DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER