

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JACK SHINNICK and JOAN SHINNICK

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax and Unincorporated :
Business Tax under Articles 22 and 23 of the
Tax Law for the Years 1975 through 1977.

Petitioners, Jack Shinnick and Joan Shinnick, 4765 Makyes Road, Syracuse, New York 13215, filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1975 through 1977 (File No. 46661).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on December 5, 1985 at 9:15 A.M. Petitioners appeared by Pastella & Heimerman (Richard W. Heimerman, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioners were partners, for income tax purposes, during the years at issue.

FINDINGS OF FACT

1. Petitioners, Jack Shinnick and Joan Shinnick, filed separately, on one form, a New York State Combined Income Tax Return for the year 1975. They filed separately, on one form, a New York State Income Tax Resident Return for each of the years 1976 and 1977. On each of these returns, Joan Shinnick reported wage income from "Jack E. Shinnick, Jr. Mr. Fixit Shnn ". In addition

to the income tax returns, Jack Shinnick filed a New York State Unincorporated Business Tax Return for each of the years in issue. On each of said returns, Jack Shinnick was named as the taxpayer, the business was described as appliance sales and service and the business name was reported as "Mr. Fixit Shop."

2. On April 5, 1979, the Audit Division issued a Notice of Deficiency to petitioners, Jack and Joan Shinnick, asserting a deficiency of unincorporated business tax for the years 1975 through 1977 in the amount of \$3,230.03, plus interest of \$472.93, for a total amount due of \$3,702.96. On April 13, 1979, the Audit Division issued separate notices of deficiency to Jack Shinnick and Joan Shinnick for the year 1977. The Notice of Deficiency issued to Jack Shinnick asserted personal income tax due in the amount of \$687.45, plus interest of \$39.06, for a total amount due of \$726.51. The Notice ~~of~~ Deficiency issued to Joan Shinnick asserted a deficiency of personal income tax in the amount of \$10.54. To the extent at issue herein, the asserted deficiency of unincorporated business tax was premised upon the Audit Division's conclusion that Jack Shinnick and Joan Shinnick were partners and, therefore, the salary paid to Joan Shinnick was subject to unincorporated business tax. No issue has been raised herein with respect to the asserted deficiencies of personal income tax.

3. On July 9, 1979, petitioners filed a petition challenging the asserted deficiencies of unincorporated business tax. Subsequently, petitioners were advised that their petition was untimely. Thereafter, petitioners paid the amount of tax asserted to be due for the periods in issue and filed claims for credit or refund of personal income tax and/or unincorporated business income tax for said periods, seeking a refund of the unincorporated business tax which had been paid.

4. On December 3, 1981, the Audit Division denied petitioners' claim for a refund for the years 1975 through 1977 on the ground that Jack and Joan Shinnick were considered partners. This proceeding ensued.

5. In or about 1960, Mr. Shinnick started doing business under the name of Mr. Fixit Shop. The business activity consisted of repairing and selling small appliances such as lamps, irons and toasters.

6. Joan and Jack Shinnick were married in October, 1960.

7. In 1971, the business moved to its current location at 2227 South Salina Street in Syracuse, New York. This property is jointly owned by Joan and Jack Shinnick. However, the funds used to purchase this business were derived from Mr. Shinnick's savings. Joan Shinnick was listed as a joint owner because Jack Shinnick believed that this form of ownership would make it easier to settle his estate if something were to happen to him. Jack Shinnick did not pay Joan Shinnick rent for the use of the premises.

8. Prior to 1965, Joan Shinnick was employed by General Electric Company as a secretary. In January, 1965, Joan Shinnick began working in the unincorporated business. Her activities consisted of maintaining the books, drafting checks to creditors, typing purchase orders and assisting customers with over-the-counter sales. In this capacity, she worked from 8:30 A.M. to 5:00 P.M. six days a week.

9. During the years in issue, approximately fifty percent of the total business income was derived from over-the-counter sales and the balance of the business income was obtained by repairing appliances. Joan Shinnick did not have any knowledge of the repair portion of the business.

10. Petitioners maintained joint savings and checking accounts. The business did not maintain a separate bank account

11. Joan Shinnick was paid by check at the end of the year. The amount of her compensation was determined by the net income of the business.

12. Joan Shinnick contributed neither money nor property to the business prior to or during the years at issue. In addition, Jack Shinnick neither held himself out as doing business as a partnership nor entered into a partnership agreement with Joan Shinnick.

CONCLUSIONS OF LAW

A. That in Matter of Wells, 36 A.D.2d 471, 475, aff'd. 29 N.Y.2d 931, it was stated that "(a)n indispensable requirement of a partnership **is** 'a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses'" (Citations omitted) (Emphasis in original).

B. That the determination of whether there is a partnership is to be based upon all of the facts (Matter of Edward Borkowsky and Claire Borkowsky, State Tax Commission, October 17, 1980). One factor is the "intention of the parties determined by their acts and the character in which they have regarded their relationship. "(Matter of Edward Borkowsky and Claire Borkowsky, supra)).

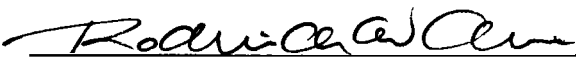
C. That upon review of the all the facts and circumstances presented herein, it is concluded that Jack Shinnick did not engage in a partnership with Joan Shinnick. The petitioners did not enter into a partnership agreement with respect to the distribution of losses. Joan and Jack Shinnick did not hold themselves out as partners. The petitioners, for tax purposes, did not report that they were partners. Lastly, Joan Shinnick made no contribution of capital to the business.

D. That the petition of Jack Shinnick and Joan Shinnick is granted.

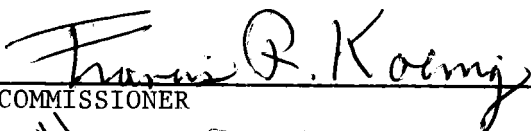
DATED: Albany, New York

STATE TAX COMMISSION

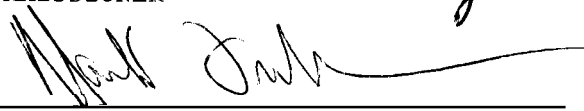
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PRESIDENT



COMMISSIONER



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