

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

FRANCIS C. GRANT, III

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DECISION

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 1973 and 1974.

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Petitioner, Francis C. Grant, III, 730 Fifth Avenue, Suite 2501, New York, New York 10019, 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 1973 and 1974 (File No. 48594).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 21, 1985 at 9:45 A.M. Petitioner appeared by Harvey Scheff, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

#### ISSUES

I. Whether petitioner's activities as a buyer of used automobiles constituted the conduct of an unincorporated business, thereby subjecting the income generated from said activities to unincorporated business tax.

11. Whether, for the year 1974, the Audit Division properly computed petitioner's personal income tax pursuant to the tax rate schedule then in effect.

111. Whether the Audit Division properly asserted penalties against petitioner for failure to timely file unincorporated business tax returns and for failure

FINDINGS OF FACT

1. Petitioner, Francis C. Grant, 111, timely filed New York State income tax resident returns for 1973<sup>1</sup> and 1974 wherein he reported business income of \$11,656.00 and \$18,119.00, respectively. Petitioner did not file unincorporated business tax returns for either of the years at issue.

2. On March 15, 1978, the Audit Division issued a Statement of Audit Changes to petitioner for 1973 and 1974 wherein it asserted, inter alia, that reported business income was subject to unincorporated business tax. Several technical adjustments were also made to the computation of petitioner's 1974 personal income tax liability. Petitioner agrees with said technical adjustments up to and including the computation of New York taxable income of \$32,031.75.

3. Based on the aforementioned Statement, the Audit Division, on April 4, 1978, issued a Notice of Deficiency to petitioner for 1973 and 1974. Said Notice asserted additional tax due of \$3,211.40, plus penalty<sup>2</sup> and interest of \$1,093.45, for a total allegedly due of \$4,304.85.

4. During the years at issue petitioner was a buyer of used automobiles. For the year 1974, petitioner purchased used automobiles on behalf of three separate firms: Park Avenue Motor Corp., Grand Prix Motors and Stateside Automotive Associates, Inc. Petitioner did not perform services simultaneously for the abovementioned firms. From January 1, 1974 through March 31, 1974,

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1 For 1973, petitioner filed a joint income tax return with his spouse, Charlotte Grant. For 1974, petitioner and his spouse filed separate income tax returns. Charlotte Grant is not a party to this proceeding.

2 Penalty was asserted pursuant to Tax Law §685(a)(1), for failure to file unincorporated business tax returns on time, and Tax Law §685(a)(2) for

petitioner performed services for Park Avenue Motor Corp, from April 1, 1974 through September 30, 1974 Mr. Grant represented Grand Prix Motors and for the remainder of the year he represented Stateside Automotive Associates, Inc. The record does not disclose how many firms petitioner represented in 1973; however, it is an industry standard that a buyer of used automobiles could represent only one firm at a given time.

5. As a buyer of used automobiles petitioner sought to purchase, on behalf of the firm he represented, quality used automobiles. When petitioner located a quality used automobile, he would negotiate a purchase price with the seller, contact the firm he represented with the details of the proposed transaction and seek permission to purchase the vehicle. If the firm petitioner represented gave its permission, petitioner would give the seller the firm's demand draft. Upon inspection of the purchased vehicle the firm, if not satisfied, could return said vehicle and cancel the transaction.

6. On various occasions the firms which petitioner represented would direct him not to purchase automobiles from certain dealers or would instruct him not to purchase a certain type of automobile.

7. Petitioner was compensated on a commission basis, receiving one-half of the profit generated from the sale of those automobiles which he had previously purchased on behalf of the firm he represented. Mr. Grant was not reimbursed for the expenses he incurred in his buying activities.

8. The income generated from petitioner's buying activities was reported on Federal Schedule "C", Profit or (Loss) From Business or Profession. The following table sets forth the income and expenses reported on Schedule "C" for the years at issue:

	<u>1973</u>	<u>1974</u>
Gross commission income	\$21,513.00	\$27,559.00
Total unreimbursed expenses	<u>9,857.00</u>	<u>9,440.00</u>
Net profit	<u>\$11,656.00</u>	<u>\$18,119.00</u>

9. The firms which petitioner represented did not deduct from his commission income such items as withholding taxes, social security taxes, disability insurance or workmen's compensation. Said firms did not provide petitioner with a health insurance plan or pension plan. Petitioner was not provided with an office by any of the firms he represented, although he was entitled to use their facilities any time he was present in said offices.

10. As indicated in Finding of Fact "2", supra, both parties concur that, for personal income tax purposes, petitioner's 1974 taxable income was correctly computed to be \$32,031.75. In its Statement of Audit Changes dated March 15, 1978, the Audit Division computed \$3,817.93 of tax due on taxable income of \$32,031.75. The correct tax due on said taxable income is \$3,114.76 and not \$3,817.93.

11. Petitioner's personal income tax returns have always been filed in a timely fashion. Mr. Grant relied on his certified public accountant to prepare all necessary returns and it was said accountant's opinion that petitioner was not subject to unincorporated business tax. It was for this reason that no unincorporated business tax returns were filed for the years at issue.

12. On his 1982 New York State income tax return, petitioner was entitled to a refund of \$810.00. Instead of issuing the refund to petitioner as requested, the Audit Division applied the \$810.00 to the amounts asserted due in the Notice of Deficiency dated April 4, 1978.

CONCLUSIONS OF LAW

A. That the firms which petitioner represented exercised a minimal amount of direction and control over his activities and it was insufficient to establish the existence of an employer-employee relationship. Tax Law §703(b) and 20 NYCCR 203.10(b). The firms which petitioner represented were primarily concerned with the result of his buying activities. Accordingly, petitioner's buying activities constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law and the income derived from said activities is therefore subject to unincorporated business tax.

B. That the Audit Division improperly computed petitioner's 1974 New York State personal income tax. The proper tax on a taxable income of \$32,031.75 is \$3,114.76 and not \$3,817.93. Due to the change in New York State personal income tax, petitioner's minimum income tax liability must be recomputed.

C. That petitioner has established that reasonable cause existed for his failure to timely file unincorporated business tax returns and for his failure to timely pay the unincorporated business tax. Accordingly, the penalties asserted pursuant to Tax Law §§685(a)(1) and 685(a)(2) are cancelled.

D. That pursuant to Finding of Fact "12", supra, petitioner is entitled to credit for a payment of \$810.00.

E. That the petition of Francis C. Grant, III is granted to the extent indicated in Conclusions of Law "B", "C" and "D", supra; that the Audit Division is directed to recompute the Notice of Deficiency dated April 4, 1978 consistent

with the conclusions reached herein; and that, except as so granted, the petition is in all other respects denied.

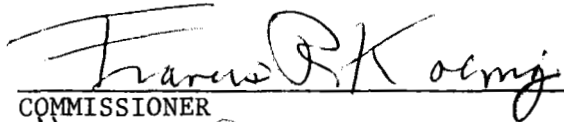
DATED: Albany, New York

STATE TAX COMMISSION

JAN 03 1986



PRESIDENT



COMMISSIONER



COMMISSIONER