

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

STUART L. and DOLORES H. PHELPS

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Personal Income & Unincorporated :
Taxes under Article(s) 22 & 23 of the :
Tax Law for the Year(s) ~~XXXXXX~~ :
1967, 1968 and 1969.

State of New York
County of Albany

John Huhn

, being duly sworn, deposes and says that

~~XX~~ He is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 24th day of April , 19 78, ~~XX~~ he served the within

Notice of Decision by (certified) mail upon Stuart L. & Dolores H.
Phelps

~~XXXXXXXXXXXXXXXXXX~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Stuart L. & Dolores H. Phelps
444 East 57th Street
New York, New York 10022

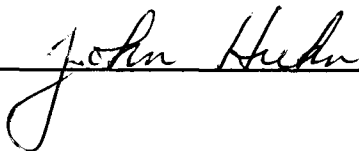
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the ~~XXXXXXXXXXXXXX~~
~~XXXXXX~~ petitioner herein and that the address set forth on said wrapper is the
last known address of the ~~XXXXXXXXXXXXXXXXXXXX~~ petitioner.

Sworn to before me this

24th day of April , 19 78





STATE OF NEW YORK
STATE TAX COMMISSION

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Tax Law for the Year(s) ~~XXXXXX~~ :
1967, 1968 and 1969.

State of New York
County of Albany

John Huhn, being duly sworn, deposes and says that

~~X~~He is an employee of the Department of Taxation and Finance, over 18 years of

age, and that on the 24th day of April, 1978, ~~X~~he served the within

Notice of Decision by (certified) mail upon Jack C. Bonderow, CPA

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed


as follows: Jack C. Bonderow, CPA
274 Madison Avenue
New York, New York 10016

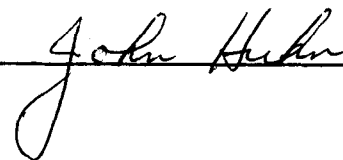
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

24th day of April, 1978.







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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

April 24, 1978

(518) 457-1723

Stuart L. & Dolores H. Phelps
444 East 57th Street
New York, New York 10022

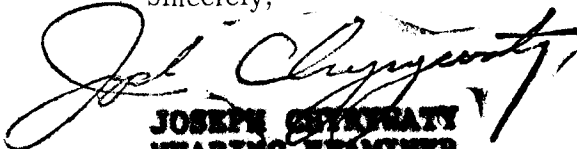
Dear Mr. & Mrs. Phelps:

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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


JOSEPH CYPRIATY
HEARING EXAMINER

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
STUART L. and DOLORES H. PHELPS	:	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 1967, 1968 and 1969.	:	

Petitioners, Stuart L. and Dolores H. Phelps, 444 East 57th Street, New York, New York 10022, 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 1967, 1968 and 1969 (File No. 11255).

A small claims hearing was held before Joseph Milack, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 20, 1977 at 9:15 A.M. Petitioners appeared by Jack Bonderow, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner Stuart L. Phelps' activities as a real estate broker for the years 1967, 1968 and 1969 constituted the carrying on of an unincorporated business.

II. Whether petitioners are entitled to a refund of personal income tax for the year 1969, based on an amended return for that year filed on February 5, 1976.

FINDINGS OF FACT

1. Petitioners, Stuart L. and Dolores H. Phelps, filed New York State combined income tax returns for the years 1967, 1968 and 1969. They did not file unincorporated business tax returns for said years.

2. On August 27, 1973, the Income Tax Bureau issued a Notice of Deficiency against petitioners for unincorporated business tax due for the years 1967, 1968 and 1969 in the amount of \$3,598.87. It was issued on the grounds that Stuart L. Phelps' activities as a real estate broker constituted the carrying on of an unincorporated business.

3. Petitioner Stuart L. Phelps, a licensed real estate broker, was employed by Fisher Brothers, 299 Park Avenue, New York, New York. Fisher Brothers own, build, operate and manage real estate. As a matter of practice, Fisher Brothers would set up separate partnerships for each office building which they had an interest in. Accordingly, Stuart L. Phelps was paid his salary for the years in question from "1345 Joint Account", a partnership formed to manage property located at 1345 Avenue of the Americas, New York, New York.

4. For the years in question, 1345 Joint Account withheld Federal and state income taxes, as well as social security taxes. Said partnership also paid unemployment and disability insurance. During this period, Stuart L. Phelps worked in a business office provided for him by Fisher Brothers. He had use of the phone which was listed under the Fisher Brothers name, but his name was printed in the telephone directory under Fisher Brothers (as were the names of other executives of the firm).

5. Fisher Brothers did not prevent Stuart L. Phelps from maintaining his own clients, as long as petitioner's independent activities did not interfere with his

duties during the working day at said firm. He usually worked Monday through Friday from 9:00 A.M. to 6:00 P.M. at the Fisher Brothers office; however, he was allowed, when necessary, to attend to his individual clients with the approval of his supervisors.

6. During the years in question, Stuart L. Phelps earned real estate commissions from sources unrelated to Fisher Brothers. For the three years in question, the taxpayer's gross income was as follows:

	<u>1967</u>	<u>1968</u>	<u>1969</u>
1345 Joint Account (per W-2)	\$20,000.24	\$30,000.04	\$25,000.04
Fisher-Park Lane Co.	3,000.00		
1345 Joint Account	2,000.00		10,000.00
Savoy 5th Avenue	2,621.02		10,484.00
General Cigar	15,000.00		
Phillip Brothers	<u> </u>	<u>4,991.92</u>	<u> </u>
	\$42,621.26	\$34,991.96	\$45,484.04

7. Fisher-Park Lane Co. and 1345 Joint Account were separate partnerships formed by Fisher Brothers for different office buildings that they had an interest in. The amounts reported therefrom (other than the amount shown on the W-2 from 1345 Joint Account) represented bonuses paid to Stuart L. Phelps for said years.

8. The amounts received from Savoy 5th Avenue, General Cigar and Phillip Brothers were commissions paid to Stuart L. Phelps for leasing activities which were unrelated to his work at Fisher Brothers. Stuart L. Phelps contended that his own independent activities (which resulted in the commissions reported above) were not activities that would constitute an unincorporated business. He contended that the commissions resulted from contacts made by him socially which occurred on a sporadic and nonrecurring basis. He also contended that amounts received by him were earned

solely on the basis of his introduction of the two parties and that the commissions he received were not really indicative of the time spent by him in earning them. In fact, petitioner contended that the commissions earned were based solely on a finder's fee, since no negotiations were conducted by him.

9. Stuart L. Phelps did not maintain a separate office from which he conducted his independent real estate activities, nor did he list himself as a real estate agent in the telephone directory.

10. Stuart L. Phelps contended that he should be allowed a refund of personal income tax in the amount of \$549.71, based on an amended New York State combined income tax return for 1969. The amended return was filed in order to report additional capital gains (which were determined by the Internal Revenue Service on audit) and to correct an error in his allocation of capital gains reported on the original New York return.

CONCLUSIONS OF LAW

A. That the salary and bonuses received by petitioner Stuart L. Phelps from 1345 Joint Account and Fisher-Park Lane Co. are deemed to be income earned as an employee of the Fisher Brothers partnership, within the meaning and intent of section 703(b) of the Tax Law; therefore, said salary and bonuses are exempt from the imposition of unincorporated business tax.

B. That the income received by petitioner Stuart L. Phelps in 1967, 1968 and 1969 from his own independent activities, constituted the carrying on of an unincorporated business; thus, the income derived therefrom was subject to unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law.

C. That petitioner Dolores H. Phelps was not involved in her husband's business activities. Consequently, the Notice of Deficiency issued against her is cancelled.

D. That petitioner Stuart L. Phelps' unincorporated business tax liabilities are reduced to \$254.49 for 1967, zero for 1968, and \$58.66 for 1969; that said liabilities are due, together with such penalties (pursuant to section 685(a) of the Tax Law for 1967 and sections 685(a)(1) and 685(a)(2) of the Tax Law for 1969) and interest as may be lawfully owing. The Income Tax Bureau is hereby directed to modify the Notice of Deficiency issued August 27, 1973 accordingly.

E. That the refund claimed on the 1969 amended return filed by petitioners on February 5, 1976 was generated by a correction of an error in their allocation of income on the original return, rather than by a report of Internal Revenue Service audit adjustments. Said amended return does not constitute a timely claim for refund within the meaning and intent of section 687(a) of the Tax Law and, therefore, the refund is denied.

F. That the petition of Stuart L. and Dolores H. Phelps is granted to the extent indicated in Conclusions of Law "C" and "D", but is in all other respect denied.

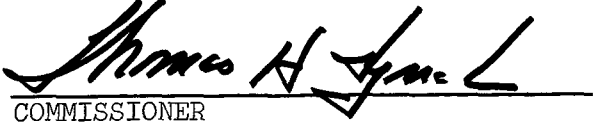
DATED: Albany, New York

April 24, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER