

STATE OF NEW YORK
STATE TAX COMMISSION

_____ :
In the Matter of the Petition :
of :
James A. & Shirley Petersen :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax :
under Article 22 & 23 of the Tax Law :
for the Years 1967 - 1970. :
_____ :

AFFIDAVIT OF MAILING

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 22nd day of February, 1980, he served the within notice of Decision by certified mail upon James A. & Shirley Petersen, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

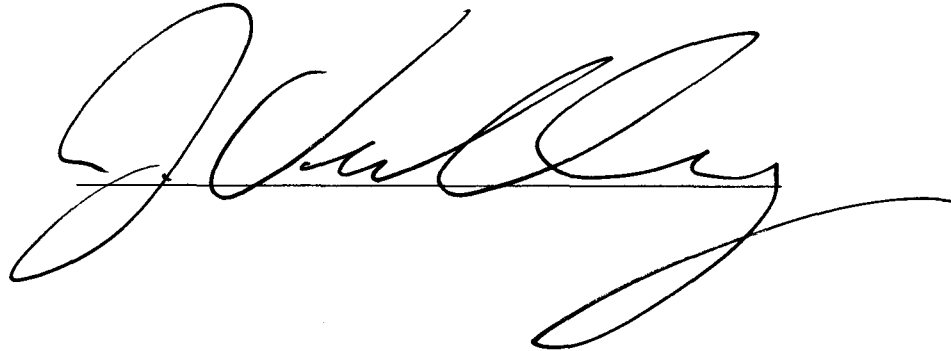
James A. & Shirley Petersen
304 S. Euclid Ave.
Westfield, NJ 07090

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
22nd day of February, 1980.

Janne Knapp



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

February 22, 1980

James A. & Shirley Petersen
304 S. Euclid Ave.
Westfield, NJ 07090

Dear Mr. & Mrs. Petersen:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JAMES A. PETERSEN and SHIRLEY PETERSEN : 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 Ending November 30, 1967, 1968, :
1969 and 1970. :

Petitioners, James A. Petersen and Shirley Petersen, residing at 304 South Euclid Avenue, Westfield, New Jersey 07090, filed petitions 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 ending November 30, 1967, 1968, 1969 and 1970 (File No. 01363).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 17, 1976 at 9:15 A.M. Petitioner appeared pro se and for his wife, Shirley Petersen. The Income Tax Bureau appeared by Peter Crotty, Esq. (Arthur R. Rosen, Esq., of counsel).

ISSUES

I. Whether petitioner James A. Petersen had a regular place of business out of New York State within the meaning of the Tax Law, so as to permit him to properly allocate unincorporated business income.

II. Whether petitioners, James A. Petersen and Shirley Petersen, were properly subjected to penalties under section 685(a) (1) and (2) and section 685(c) of the Tax Law.

FINDINGS OF FACT

1. Petitioners, James A. Petersen and Shirley Petersen, filed New York State income tax nonresident and unincorporated business tax returns for the years 1967, 1968, 1969 and 1970. On September 25, 1972, as a result of a field audit, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against James A. Petersen and Shirley Petersen for additional personal income tax due in the amount of \$20,251.07, plus penalties and interest of \$3,460.67, for a total of \$23,711.74. On September 25, 1972, also as the result of a field audit, the Income Tax Bureau issued a further Statement of Audit Changes and Notice of Deficiency against James A. Petersen for additional unincorporated business tax due in the amount of \$8,812.88, plus interest of \$1,386.62, for a total sum of \$10,199.50.

The Notice of Deficiency dated September 25, 1972 delineated the personal income tax due as follows:

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1967	\$ 2,410.32	\$ 56.18	\$ 642.69	\$ 3,109.15
1968	4,791.77	104.61	990.17	5,886.55
1969	4,940.50	78.33	724.47	5,743.30
1970	<u>8,108.48</u>	<u>161.74</u>	<u>702.52</u>	<u>8,972.74</u>
	<u>\$20,251.07</u>	<u>\$400.82</u>	<u>\$3,059.85</u>	<u>\$23,711.74</u>

*Section 685(a) 1 & 2 penalty = \$285.06;
Underestimation of tax, section 685(c) = \$115.76

A Statement of Audit Changes as to unincorporated business tax due was itemized:

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
1967	\$1,081.68	\$ 293.83	\$ 1,375.51
1968	2,085.21	441.31	2,526.52
1969	2,234.70	338.87	2,573.57
1970	<u>3,411.29</u>	<u>312.61</u>	<u>3,723.90</u>
	<u>\$8,812.88</u>	<u>\$1,386.62</u>	<u>\$10,199.50</u>

2. On January 14, 1972, petitioners, James A. Petersen and Shirley Petersen, his wife, executed a Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business taxes, extending the time for making an assessment to and including April 15, 1973, for the tax years 1967 and 1968. The consent was validated by the Department of Taxation and Finance on January 20, 1972.

3. On December 21, 1972, petitioner James A. Petersen d/b/a Petersen Linen Co., filed a petition for redetermination of a deficiency of \$8,812.88, or for refund of personal income tax or unincorporated business tax for 1967 through 1970. On December 21, 1972, petitioners, James A. Petersen and Shirley Petersen, filed a petition for redetermination of the deficiency of \$20,251.07, or for refund of personal income tax or unincorporated business tax for 1967, through 1970.

4. During the years in issue, 1967, 1968, 1969 and 1970, petitioner James A. Petersen d/b/a Petersen Linen Co. (hereinafter Petersen) was a wholesome dealer in linens. Under the company name he imported and sold large quantities of sheets, pillow cases, and the like, manufactured in the Orient. In 1967 and 1968, the offices were at 298 Fifth Avenue, New York, New York. In 1969 and 1970, the offices were located at 13 West 31st Street, New York, New York. The offices also served as a showroom for samples of the merchandise offered for sale by petitioner James A. Petersen.

5. Imports arriving on the East Coast were largely handled, warehoused and shipped through the facilities of the Port of New York Express Co. of Jersey City, New Jersey. The greater portion of the imported merchandise was unloaded at West Coast ports, placed in public warehouses in California, and then shipped to customers all over the United States in accordance with written directions from petitioner James A. Petersen. Petitioner James A. Petersen, regularly stored his purchased goods in public warehouses in Long Beach, California, San Francisco, California, Los Angeles, California, as well as in warehouses in Chicago, Illinois

and San Juan, Puerto Rico. Most of the goods sold by petitioner James A. Petersen was stored in out-of-state warehouses, shipped from them to customers, and was never in the State of New York.

The customers included Community Discount Stores, Aldens, Mangel Brothers, Sears, Roebuck & Co., Spiegel's of Chicago, Jordan Marsh, Signet Club Plan, Ames Co., Arlen's Department Store of Boston, Ballengers, Progress D. C. Santa Fe Co. and Valley Distributors of Los Angeles. Total sales of Petersen Linen Co. in 1970 amounted to over \$3,500,000.00.

6. Annual unqualified financial reports of the operations of Petersen Linen Co. rendered by certified public accountants for the fiscal years 1967 through 1970 certified that title to merchandise in transit, merchandise held in public warehouses outside New York State and merchandise held in the company premises in New York State rested with petitioner James A. Petersen, on the respective year-end dates. All goods sold were owned by Petersen Linen Co.

7. Petitioner James A. Petersen had a business relationship for some thirty years with one Peter M. Brown. A similar relationship existed in prior years between Mr. Brown's father and petitioner's grandfather. For the past ten years, Mr. Brown leased an office at 300 West Adam Street, Chicago, Illinois. The name, Petersen Linen Company, was on the door and on the lobby directory as well. The furniture in the office, which consisted of two desks, two cabinets, a display table, a typewriter and four or five chairs was supplied and owned by Mr. Brown. Here he represented the Petersen Linen Company to prospective customers. Orders and payments were directed to the Petersen Linen Company at this Chicago office. Petersen Linen Company stationery showed locations at 13 West 31st Street, New York, New York, 38 Chauncey Street, Boston, Massachusetts, 300 West Adam Street, Chicago, Illinois, as well as Puerto Rico and Los Angeles. Mr. Brown was reimbursed by Mr. Peterson for rent, telephone, travel and entertainment incurred in the pursuit of business. His compensation was a commission on company sales.

Mr. Brown worked exclusively for the Petersen Linen Company. There was no withholding of taxes or social security from his income.

8. Petitioner James A. Petersen used his home at 304 South Euclid Avenue, Westfield, New Jersey, partly for business purposes. His travel was restricted as the result of a heart condition. Because of the time differential, it was necessary for him to place calls to suppliers in the Orient in the very early morning hours. Petitioner's telephone expenses for six months of 1970 totaled \$1,504.44.

9. From 1967 through 1970, petitioners, James A. Petersen and Shirley Petersen, filed New York State nonresident income tax returns in April of the succeeding year. During this same period, James Petersen concluded his business year on November 30th of each year in issue.

10. Petitioners, James A. Petersen and Shirley Petersen, were nonresidents. They resided at 304 South Euclid Avenue, Westfield, New Jersey.

11. Petitioner James A. Petersen filed unincorporated business tax returns for each of the years 1967 through 1970. Attached to each New York State Unincorporated Business Tax Return, petitioner James A. Petersen attached a copy of the Federal income tax return Schedule "C" (Profit or Loss From Business or Profession) which had been prepared by certified public accountants from the company books. However, petitioner James A. Petersen personally prepared the balance of his Federal and New York State income tax returns. Petitioner James A. Petersen did not report on the New York State Business Allocation Schedule (IT-202-A) the personal property owned by the business as shown on the Federal Schedule "C". The portion of petitioner James A. Petersen's business allocable to New York State was calculated by him ostensibly under the provisions of section 707(c) of the Tax Law.

These business allocation percentages were reported by petitioner James A. Petersen as follows: 1967 - 35 percent; 1968 - 33 percent; 1969 - 35 percent; 1970 - 33 percent. In his amended returns filed after the hearing, petitioner James A. Petersen calculated the business allocation percentages at: 1967 - 16 percent; 1968 - 14.98 percent; 1969 - 20.63 percent; 1970 - 19.78 percent. The amended allocations (Form 202-A) were allegedly prepared by Byrnes & Baker, CPAs, from the books and records of Petersen Linen Co.

12. The Income Tax Bureau disallowed \$6,529.00 of the travel and entertainment expenses deducted by petitioner James A. Petersen in his income tax return for 1970 on the ground that petitioner had not produced substantiation. Reasonable proof of the expenditures for business travel and entertainment were subsequently produced. An Internal Revenue Service audit of the 1970 Federal income tax return accepted the item as filed. While the New York State Income Tax Bureau is not bound by the IRS audit findings, it is some evidence that the substantiation offered by the taxpayer was reasonably sufficient.

13. Also questioned by the Income Tax Bureau auditor was an alleged repayment of a \$2,000.00 loan by petitioner's son, and of a \$2,100.00 loan by an unnamed borrower in 1970. Petitioner James A. Petersen produced photostatic copies of the note and the check for its repayment. No verification was provided of the \$2,100.00 alleged repayment.

14. The 1967 State income tax returns were filed April 12, 1968.

CONCLUSIONS OF LAW

A. That the execution of a Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Taxes on January 14, 1972, and its validation by the Income Tax Bureau on January 20, 1972, were ineffective in extending to April 15, 1973, the time for making of an assessment for the tax year ended December 31, 1967. Section 683(a) of the Tax Law requires any assessment to be made within three years after the return was filed. Section 683(c) (2) of the

Tax Law provides for extension of the limitation on assessment only before the expiration of the period prescribed in section 683. The 1967 income tax return was filed April 12, 1968. No consideration can be given herein to the deficiency or request for refund for the tax year of 1967.

B. That Petersen Linen Co. maintained out of New York State business locations within the meaning and intent of section 707 of the Tax Law during the tax years 1968, 1969 and 1970. Under section 707(a), if a business is carried on both within and without this State, as determined under regulations of the Tax Commission, allocation is permitted. Regular place of business is now defined in 20 NYCRR 207.2(a) (effective February 1, 1974),

"...Where, as a regular course of business, property of an unincorporated business is stored by it in a public warehouse until it is shipped to customers, such warehouse is considered a regular place of business..."

Petitioner James A. Petersen's Chicago office was also an out-of-state office systemtically and regularly used by the unincorporated business entity in carrying on its business. Giordano v. State Tax Commission, 52 AD 2d 691 (2nd Dept. 1976) citing McMahan v. State Tax Commission (1974) 45 AD 2d 624, 627, 360 NYS 2d, 495, 498 motion for leave to appeal denied 36 NY 2d 646.

C. That an additional amount of \$2,100.00 shall be added to the New York State taxable gross income of petitioners, James A. Petersen and Shirley Petersen, for the year 1970, since the source of the \$2,100.00 was not satisfactorily explained.

D. That the Notice of Deficiency dated September 25, 1972, shall be annulled insofar as it denies allocation of unincorporated business income to petitioner James A. Petersen for the tax years 1968, 1969 and 1970.

E. That the alleged "Amended" income and unincorporated business tax returns filed by petitioner James A. Petersen, in conjunction with his petition for redetermination of alleged deficiencies are not timely as filing of amended tax returns, but have been regarded as petitioner's statement of what he now believes

the correct allocation should have been.

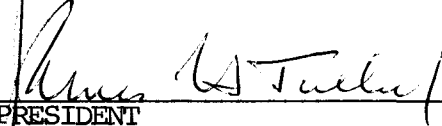
F. That the Notice of Deficiency dated September 25, 1972, as it relates to New York State income tax due from James A. Petersen and Shirley Petersen shall be modified by the Income Tax Bureau in accordance with this decision, and as so modified, is sustained.

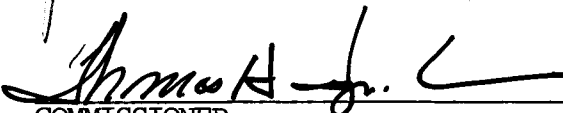
G. The penalty for late filing of the 1968, 1969 and 1970 income tax returns is annulled [Rev. Rul. 57-389, IRB 1957, 35, 15]. The petition is granted to the extent of annulling the Notice of Deficiency of September 25, 1972, insofar as it refers to unincorporated business taxes; the penalty for late filing of an income tax return for 1967 is cancelled. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 22 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER