

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Harry & Rae Sotsky :

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 1970 & 1971. :

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 23rd day of May, 1980, he served the within notice of Decision by certified mail upon Harry & Rae Sotsky, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry & Rae Sotsky

108-48 70th Rd.

Forest Hills, NY 11375

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
23rd day of May, 1980.

Joanne Krapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Harry & Rae Sotsky

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision
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Personal Income & UBT
under Article 22 & 23 of the Tax Law
for the Years 1970 & 1971.

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 23rd day of May, 1980, he served the within notice of Decision by certified mail upon Bruce Leffler 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. Bruce Leffler
Goidel, Goidel & Helfenstein
127 John St.
New York, NY 10038

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
23rd day of May, 1980.

Joanne Knapp

J. Vredenburg

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

May 23, 1980

Harry & Rae Sotsky
108-48 70th Rd.
Forest Hills, NY 11375

Dear Mr. & Mrs. Sotsky:

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
Bruce Leffler
Goidel, Goidel & Helfenstein
127 John St.
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HARRY SOTSKY and RAE SOTSKY	:	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 1970 and 1971.	:	

Petitioners, Harry Sotsky and Rae Sotsky, 108-48 70th Road, Forest Hills, New York 11375, 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 1970 and 1971 (File No. 16118).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 23, 1979 at 10:45 A.M. Petitioners appeared by Bruce S. Leffler, Esq. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether the income from petitioner's activities as a salesman during the years 1970 and 1971 was subject to the unincorporated business tax.

II. Whether the Income Tax Bureau properly disallowed business expenses of \$5,000.00 for 1971.

III. Whether petitioners are subject to a penalty pursuant to Sections 685(a) (1) and 685(a) (2) of the Tax Law.

FINDINGS OF FACT

1. Petitioners, Harry A. Sotsky and Rae Sotsky, timely filed New York State income tax resident returns for the years 1970 and 1971. Petitioner Harry A. Sotsky reported salary income and employee business expenses as follows:

	<u>1970</u>	<u>1971</u>
Salary Income	\$36,083.00	\$25,087.00
Employee Business Expenses	13,970.00	8,913.00

The salary income and employee business expenses reported were attributed to his activities as a salesman. Unincorporated business tax returns for 1970 and 1971 were not filed by petitioner Harry A. Sotsky on the advice of his tax preparer and attorney.

2. On February 25, 1974, the Income Tax Bureau issued a Notice of Deficiency for the year 1970 against petitioners, Harry A. Sotsky and Rae Sotsky, along with an explanatory Statement of Audit Changes, on which business expenses of \$13,970.00 were reduced to \$10,553.36, and medical expenses claimed of \$1,496.04 were reduced to \$869.73. These adjustments resulted in additional personal income tax due of \$449.00, plus interest, which were conceded and are not at issue.

3. On February 25, 1974, the Income Tax Bureau issued another Notice of Deficiency for 1970 against petitioner Harry A. Sotsky, along with an explanatory Statement of Audit Changes on which income from his activities as a salesman was held subject to the unincorporated business tax. In addition, penalties were imposed in accordance with Sections 685(a)(1) and 685(a)(2) of the Tax Law.

4. On December 23, 1974, the Income Tax Bureau issued a Notice of Deficiency for 1971 against petitioner Harry A. Sotsky, along with an explanatory Statement of Audit Changes, which stated;

"Business expenses are reduced by \$5,000.00 based on experience of prior audit."

and

"Income earned as an outside salesman is considered as income from an unincorporated business."

This deficiency resulted in additional personal income and unincorporated business taxes in the sum of \$1,003.35, plus interest of \$161.85.

5. Petitioner Harry A. Sotsky has been a furniture salesman for Atlantic Sleep Products Company (Atlantic) since June, 1948. He was assigned a specific territory and to specific accounts, which were subject to change at the sole discretion of Atlantic. All sales were subject to the approval of Atlantic and commissions became payable only when goods were shipped to a customer.

6. Petitioner was required to report by telephone his sales and appointments to Atlantic at its New York City office on a daily basis. On reporting, he was frequently instructed to visit clients or to service specific accounts.

7. Petitioner was required to attend sales meetings every other Friday at a showroom maintained by Atlantic. He was required to attend and participate at Atlantic's annual furniture show. At this show, petitioner was required to sell and service customers within and without his assigned territory but was entitled to commissions only from those customers located within his assigned territory.

8. Petitioner was required to assist key customers in setting up their displays or in developing merchandising programs.

9. Petitioner was provided, by Atlantic, with price lists, order forms, photographs and swatches.

10. Payroll taxes were not withheld from petitioner's commission income. Petitioner paid self-employment taxes and maintained a self-employed retirement plan (Keogh Plan).

11. Petitioner was required to pay, without reimbursement, all selling expenses which included, in part, travel, lodging, telephone and entertainment expenses.

12. Petitioner sold solely for Atlantic during 1970 and 1971. He was forbidden to sell for other firms, which included Atlantic's own subsidiaries, Silray Furniture Manufacturing Corp. and Bedding Industry of America.

13. Prior to the Notice of Deficiency issued December 23, 1974, petitioner Harry A. Sotsky was not informed by the Income Tax Bureau that the employee business expenses of \$8,913.00, claimed for 1971, were under examination. He was not requested to submit evidence supporting these expenses. Petitioner challenged the Income Tax Bureau's basis for such a disallowance, since in 1970, when an actual audit was performed, the Income Tax Bureau disallowed approximately 24 percent of the business expenses claimed; whereas in 1971, based on the aforementioned audit, the Bureau disallowed approximately 56 percent of the business expenses claimed.

CONCLUSIONS OF LAW

A. That sufficient direction and control was imposed by the Atlantic Sleep Products Company during 1970 and 1971 so as to cause petitioner Harry A. Sotsky to become Atlantic's employee. Accordingly, the income derived therefrom is exempt from the unincorporated business tax in accordance with the meaning and intent of Section 703(b) of the Tax Law and 20 NYCRR 203.10.

B. That the disallowance of an expense item "based on experience of prior audit" was arbitrary and contrary to established audit procedures developed by the Income Tax Bureau.

C. That the issue of whether petitioner Harry Sotsky is liable to penalties under sections 685(a) (1) and 685(a) (2) of the Tax Law is rendered moot by virtue of Conclusion of Law "A", supra, and said penalties are cancelled accordingly.

D. That the petition of Harry Sotsky and Rae Sotsky is granted to the extent that the Notice of Deficiency issued February 25, 1974 for unincorporated business tax for the year 1970 and the Notice of Deficiency issued December 23, 1974 for personal income and unincorporated business taxes for 1971 are both cancelled.

E. That the Notice of Deficiency issued February 25, 1974 for the year 1970 for personal income tax is sustained along with such additional interest as may be lawfully owing; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAY 23 1980

STATE TAX COMMISSION

James G. Sullivan
PRESIDENT

Thomas H. Jr.
COMMISSIONER

Francis R. K. Long
COMMISSIONER