

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Tobias & Frances Greenspan :

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. :

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 9th day of January, 1981, he served the within notice of Decision by certified mail upon Tobias & Frances Greenspan, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Tobias & Frances Greenspan
17 Lower Byrdcliff Rd.
Woodstock, NY 12498

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
9th day of January, 1981.

Connie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
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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 9th day of January, 1981, he served the within notice of Decision by certified mail upon Irwin Weissman 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. Irwin Weissman
570 Seventh Ave.
New York, NY 10018

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
9th day of January, 1981.

Cornie A. Hagelund

[Signature]

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

January 9, 1981

Tobias & Frances Greenspan
17 Lower Byrdcliff Rd.
Woodstock, NY 12498

Dear Mr. & Mrs. Greenspan:

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
Irwin Weissman
570 Seventh Ave.
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
TOBIAS GREENSPAN and FRANCES GREENSPAN	:	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, Tobias Greenspan and Frances Greenspan, 17 Lower Byrdcliff Road, Woodstock, New York 12498, 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. 15705).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at 31 Chambers Street, Room 302, New York, New York, on June 27, 1980 at 10:15 A.M. Petitioner Tobias Greenspan appeared with Irwin Weissman, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUES

I. Whether the activities engaged in by petitioner Tobias Greenspan, as a furniture salesman, constituted the carrying on of an unincorporated business.

II. Whether the deficiency asserted for personal income tax had been previously paid by petitioners.

FINDINGS OF FACT

1. Petitioners, Tobias Greenspan and Frances Greenspan, timely filed New York State combined income tax returns for the years 1970 and 1971 whereon Tobias Greenspan (hereinafter petitioner) reported "business income" from his activities as a "sales rep". Petitioner did not file unincorporated business tax returns for said years at issue.

2. On October 30, 1974, the Audit Division issued a Statement of Audit Changes wherein petitioner's "business income" was held subject to the imposition of unincorporated business tax. Additionally, adjustments were made to personal income tax and unincorporated business tax based on unreported Federal audit changes to business expenses claimed. Accordingly, a Notice of Deficiency was issued against petitioners on June 28, 1976 asserting additional personal income tax of \$1,090.58, unincorporated business tax of \$1,107.26, penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law of \$420.03, for failure to file an unincorporated business tax return and failure to pay the tax determined to be due, respectively, and interest of \$622.00, for a total due of \$3,239.87.

3. Petitioner did not contest the portion of the deficiency relating to personal income tax. He contended that he had previously agreed to same and paid the additional tax due. The file contains no indication of alleged payment and although petitioner was allowed sufficient time to submit documentation evidencing same, he failed to do so.

4. During the years at issue, petitioner was a sales representative for Sheraton Manufacturing Company, (Sheraton) a Maryland company engaged in the manufacture of upholstered furniture. His territory consisted of a portion of New York State, from Albany to part of Manhattan, including Westchester and Bronx Counties

5. Petitioner spent each Monday through Thursday visiting retail furniture stores in his territory. Each Friday, which was the only day it was open, petitioner was required to work in Sheraton's Manhattan showroom.

6. In addition to selling, petitioner, who was compensated on a commission basis, was required to perform certain non income producing duties, such as servicing customers, operating the showroom and collecting delinquent accounts.

7. Sheraton did not withhold income or social security taxes from petitioner's compensation because as Sheraton stated it was "standard practice in the furniture industry".

8. Petitioner maintained a home office since office space was not provided for him by Sheraton. Said office was used for maintaining records and catalogues but was not used for selling.

9. A letter submitted by Stuart Resnick, President of Sheraton, dated April 1, 1974 states that :

- a. Petitioner is considered an employee, governed by restrictions, provisions and conditions as set forth by the sales director located at the factory in Maryland.
- b. Petitioner may not take on the sale of merchandise for another company without Sheraton's prior consent.
- c. Petitioner is told the conditions under which he must sell.
- d. In writing sample orders, petitioner is required to follow a specified package program determined by Sheraton's marketing head.
- e. Petitioner is required to screen all complaints and defective merchandise personally but is not authorized to make binding decisions for the company.
- f. The frequency of petitioners calls on specific retailers is carefully regulated by the sales director and oral or written reports are necessary from time to time.
- g. Petitioner is expected to take his vacation at a time when the plant is closed.
- h. Petitioner is required to be present at those markets in which the company participates with serious illness being the only valid excuse for not being present, and
- i. petitioner assumes the burden of his own expenses which may include motel, transportation, meal costs, customer entertainment, gifts and selling aids.

10. On many occasions petitioner was instructed which customers to see and which merchandise to push. Additionally, he was periodically required to attend meetings and visit the factory in Maryland.

11. Petitioner was required to sell at prices dictated by Sheraton.

12. Sheraton covered petitioner for business interruption insurance but did not cover him for unemployment, health or life insurance, nor did it provide him with a pension plan or workmens compensation coverage.

13. In addition to selling for Sheraton, petitioner sold lamps for Monitor Manufacturing Company Inc., from which he derived gross income for 1970 and 1971 of \$5,908.42 and \$5,549.11 respectively. In a letter from Sheraton dated July 14, 1975 it was stated that "We only permitted the merchandising of lamps as an asset to our sales. Mr. Greenspan will submit our photos showing the enhancing of our furniture by the lamps and the making of package deals".

14. On September 20, 1978 petitioner was fired from his position with Sheraton. Said action was taken since Sheraton became aware that petitioner was selling for another company (subsequent to the years at issue). Sheraton's letter to petitioner on the same date states "As has been the policy of our company during your 21 years tenure, no employee of our company is permitted to divide any of his working hours without express written permission from us. Said permission has never nor would be given. In light of this total disregard for our policy I find no alternative but to terminate your employment with our company."

CONCLUSIONS OF LAW

A. That Sheraton Manufacturing Company exercised a sufficient degree of direction and control over petitioner's activities so as to constitute a bona fide employer-employee relationship within the meaning and intent of section 703(b) of the Tax Law. Accordingly, petitioner's income derived from Sheraton was from services rendered as an employee.

B. That although petitioner's sales activities for Monitor Manufacturing Company Inc. constituted the carrying on of an unincorporated business, the income derived therefrom during the years at issue was too nominal to yield a tax liability.

C. That petitioner has not sustained his burden of proof required pursuant to section 689(e) of the Tax Law to show that the portion of the deficiency attributable to personal income tax had been previously paid.

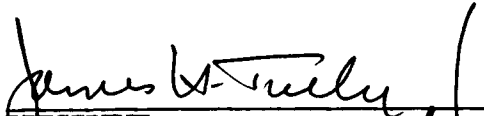
D. That the petition of Tobias Greenspan and Frances Greenspan is granted to the extent provided in Conclusions of Law "A" and "B" supra, but that said petition is, in all other respects, denied.

E. That the Audit Division is hereby directed to modify the Notice of Deficiency dated June 28, 1976 to be consistent with the decision rendered herein.

DATED: Albany, New York

JAN 09 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER