

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
David & Rivka Taub :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Year :
1969.

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 30th day of October, 1981, he served the within notice of Decision by certified mail upon David & Rivka Taub, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

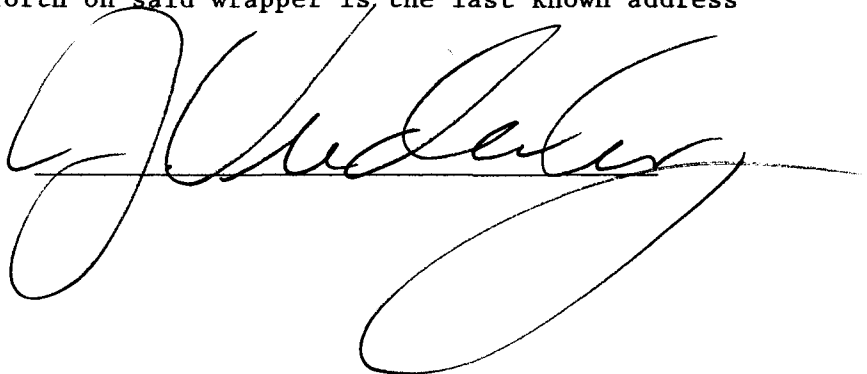
David & Rivka Taub
c/o Spilky & Spilky
150 Broadway
New York, NY 10038

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
30th day of October, 1981.





STATE OF NEW YORK
STATE TAX COMMISSION

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of :
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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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Abraham H. Spilky the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

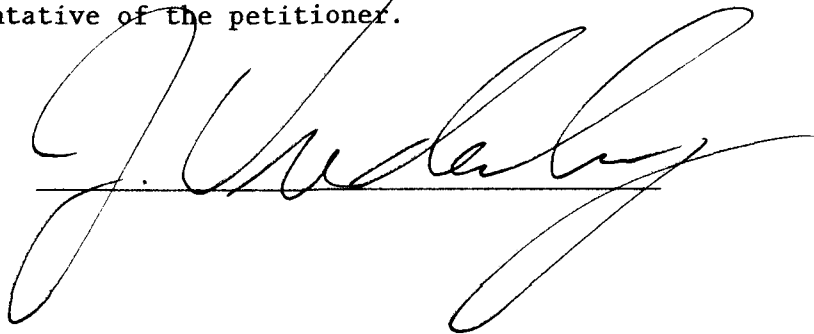
Abraham H. Spilky
Spilky & Spilky
150 Broadway
New York, NY 10038

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
30th day of October, 1981.





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

October 30, 1981

David & Rivka Taub
c/o Spilky & Spilky
150 Broadway
New York, NY 10038

Dear Mr. & Mrs. Taub:

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 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
Abraham H. Spilky
Spilky & Spilky
150 Broadway
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DAVID TAUB and RIVKA TAUB	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1969.	:	

Petitioners, David Taub and Rivka Taub, c/o Eaton, Van Winkle & Greenspoon, 600 Third Avenue, New York, New York, 10016, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1969 (File No. 13825).

A formal hearing was commenced before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 19, 1977 at 2:45 P.M., continued before Solomon Sies, Hearing Officer, at the same offices on January 17, 1978 at 9:15 A.M. and continued to conclusion before Edward L. Johnson, Hearing Officer, at the same offices on August 23, 1978 at 1:30 P.M. Petitioner appeared by Spilky & Spilky, Esqs. The Audit Division appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel at the hearings on April 19, 1977 and January 17, 1978; Bruce Zalaman, Esq., of counsel at the hearing on August 23, 1978).

ISSUE

Whether petitioners' loss may be deducted in accordance with section 165 of the Internal Revenue Code and, if so, in what amount.

FINDINGS OF FACT

1. Petitioners, David Taub and Rivka Taub, filed a New York State resident personal income tax return for 1969, in which they claimed a \$100,000.00 loss as a business bad debt and a \$30,000.00 loss as a non-business bad debt.

2. The Audit Division issued a Statement of Audit Changes in which it disallowed both losses on the ground that petitioners did not make an effort to collect the amount of the losses. Accordingly, it issued a Notice of Deficiency on July 29, 1974 for 1969 of \$17,315.44, plus \$4,455.26 in interest, for a total of \$21,770.70.

3. During 1968 and 1969 petitioner's brother, Israel Taub, was in the embroidery and flocking business. Approximately fifteen years prior to 1968, Israel Taub was engaged in the flocking business. Flocking is a completely different operation from the embroidery business. Flocking consists of applying an adhesive to a material and then applying a fabric powder which renders a velvet finish design on the material to which it is applied.

4. The flocking process as it had existed had limitations. There were difficulties associated with washing the material. In addition, the flocking process left an odor.

5. By 1968 Israel Taub developed an entirely new flocking process. Unlike the former flocking process which utilized a paint type of adhesive, Israel Taub utilized a water type of adhesive which did not leave an odor and which left the material more washable. Israel Taub also experimented with a method of applying the flock electrostatically and drying the flock in special ovens.

6. Initially, Israel Taub explored the market and determined that there could be acceptance of this new process by individuals involved in the manufac-

ture of towels. Thereafter, Israel Taub approached his brother, David Taub, to finance a portion of this new flocking enterprise.

7. When he was approached by his brother, David Taub expressed an interest in the business. Accordingly, David Taub agreed to finance this flocking enterprise. In exchange for financing the new business it was agreed that David Taub would receive fifty percent of the profits and Israel Taub would perform all of the work.

8. In 1969, petitioner David Taub was in the stationery business in the employ of Hi-Craft Envelope Co., Inc. pursuant to an employment contract dated August 31, 1965. This contract prohibited David Taub from participating "...in any business or occupation directly or indirectly as principal or agent or as an officer, director, stockholder or employee of any corporation or as a member of a joint venture or partnership..." with certain exceptions and qualifications. On August 29, 1969, petitioner David Taub entered into a consultation agreement with Williamhouse-Regency, Inc., the parent company of Hi-Craft Envelope Co., Inc., for the period from September 1, 1969 to August 31, 1974. This agreement contained a clause which prohibited David Taub from engaging "...in any business in competition with the business in which W-R (sic) and its subsidiaries are presently engaged in the United States and Canada."

9. David Taub was concerned about his prospective investment because of the limitations in his employment contract. Therefore, in order to prevent his employer from learning about his investment, David Taub made the checks payable to the order of Abraham Shenken, who thereafter forwarded the money to Dove Flocking & Screening Co.; David Taub invested a total of \$31,500 in this manner.

10. As the flocking operation progressed, David Taub and Israel Taub frequently conferred about the progress that Israel Taub was making in the business. Sometimes they would confer nightly on the phone and other times they would meet in person.

11. The flocking and embroidery operations were conducted under the name of Dove Flocking & Screening Co. David Taub's involvement with Dove Flocking & Screening Co. was not revealed to the public.

12. The same books were utilized for both the flocking and embroidery operations. However, said books contained a separate column for the expenditures of the flocking operation. Expenditures on behalf of the flocking operation were paid through a checking account utilized for both the flocking and embroidery operations. Although expenditures for minor expenses, material and equipment could be distinguished between the two operations, wage expenses for those servicing both the flocking and embroidery operations were arbitrarily allocated between the two operations. On approximately a monthly basis Israel Taub and David Taub would have an accounting of the flocking operation from information obtained from the books utilized for both the flocking and embroidery operations.

13. In 1969, David Taub executed an agreement guaranteeing loans from the Merchants Bank of New York to Dove Flocking & Screening Co. Israel Taub borrowed money from the Merchants Bank of New York in the amount of \$100,000.00. However, Israel Taub was not able to pay the notes as they became due. Accordingly, in a letter dated December 19, 1969 the Merchants Bank of New York requested that David Taub reduce or retire the loan. Thereafter, David Taub paid the full amount of this loan by a check dated December 23, 1969.

14. When the sample orders of the material prepared by the flocking process were distributed, the consumers discovered that the flock became hard

and the towels were unusable. Early in 1969 the companies that Dove Flocking & Screening Co. had been dealing with started cancelling their orders.

15. In September or October 1969, David and Israel Taub and Israel Taub's accountant, Arnold Schreier, prepared a series of worksheets summarizing the entire flocking operation. The worksheets were prepared in order to determine what the entire loss was; whether David Taub was going to invest more money; and whether Israel and David Taub were going to continue the flocking operation. Two of these worksheets were encaptioned, in part, "David Taub and Israel Taub Joint Venture". The worksheets disclosed that the total expenses and equipment purchases of the flocking operation for the year 1968 were \$97,806.21 and for the year 1969 were \$100,590.80. The worksheets also disclosed that the total sales of the flocking operation were \$56,538.01. Thus, the net loss of the flocking operation for the years 1968 and 1969 was \$141,859.00. David Taub absorbed \$131,500.00 of the loss and Israel Taub absorbed the balance of the loss. Thereafter, the flocking operation was discontinued.

16. David Taub sought professional advice as to how this loss should be shown on his tax return. However, he did not wish to disclose his investment in the flocking enterprise to his accountant, Mr. Memetski. David Taub was concerned that Mr. Memetski might inadvertently mention David Taub's investment to David Taub's ex-partner and that, as a result, David Taub's employer would learn of the investment. Therefore, David Taub sought advice from Israel Taub's accountant, Mr. Arnold Schreier. On Mr. Schreier's advice, David Taub asked Mr. Memetski to deduct the loss as a bad debt. Upon presentation of the checks and the guarantee agreement with the bank, Mr. Memetski claimed a loss on petitioners' United States Individual Income Tax Return for 1969 of \$100,000.00 as a business bad debt and a loss of \$30,000.00 as a non-business bad debt.

17. Neither state nor Federal partnership returns were presented to show that the claimed partnership held itself out to the government as a partnership; no evidence was presented as to whether there was an agreement regarding the splitting of the losses at the time David Taub initially advanced the \$31,500.00 for the flocking operation; no evidence was presented as to whether any of the equipment utilized for the flocking operation was depreciated; no evidence was presented as to whether Dove Flocking & Screening Co. accounted for its expenditures and receipts on a cash or accrual basis; and no evidence was presented as to whether the sales of the flocking operation were for the year 1969 alone.

18. Petitioners maintained in their petition: that the loss was improperly treated as a loan on their 1969 tax return; that David Taub entered into a joint venture with Israel Taub; and that the loss was deductible pursuant to section 165(c) of the Internal Revenue Code as a loss incurred in a trade or business or a loss incurred in a transaction entered into for profit.

CONCLUSIONS OF LAW

A. That the issue of whether David and Israel Taub were engaged in a joint venture for tax purposes presents a question of fact (Gurtman v. Commissioner, 34 TCM (CCH) 475, 480). That "[t]he resolution of this question is to be arrived at by considering the same principles which govern the question of whether a partnership is to be accorded recognition for tax purposes. Hubert M. Luna [December 26, 1967], 42 TC 1067, 1077 (1974); (citation omitted)" (Gurtman v. Commissioner, 34 TCM (CCH) 475, 480, supra).

B. That the primary consideration "...is whether the parties intended to, and did in fact, join together for the accomplishment or conduct of an undertaking or enterprise. Hubert M. Luna, supra at 1077. See Commissioner v. Culbertson [49-1 USTC ¶ 9323], 337 U.S. 733, 741-42 (1949)." (Gurtman v. Commissioner, 34

TCM (CCH) 475, 480, supra.) That the resolution of this consideration depends upon an analysis of all the facts and circumstances (Gurtman v. Commissioner, 34 TCM (CCH) 475, 480, supra; Luna v. Commissioner, 42 TC 1067, 1077, supra; see generally 6 Mertens, Law of Federal Income Taxation, §35.03).

C. That in Commissioner v. Culbertson (337 U.S. 733, 742) the Supreme Court stated:

"The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard..., but whether considering all the facts - the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purpose for which it is used, and any other facts throwing light on their true intent - the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise."

D. That considering the facts: that David Taub's involvement with Dove Flocking & Screening Co. was not revealed to the public and no evidence was presented that David and Israel Taub ever held themselves out to any governmental entity as a partnership; that the responsibility for the conduct of the flocking operation was vested in just Israel Taub; that the flocking operation and embroidery operations were conducted under the same name; that the expenditures of the flocking operation were recorded on the books of Dove Flocking & Screening Co.; and that no evidence was presented that David Taub and Israel Taub agreed to share losses in any particular manner when David Taub initially advanced funds to Dove Flocking & Screening Co.; petitioners have failed to sustain their burden of proof of establishing that David Taub and Israel Taub were engaged in a joint venture within the meaning of section 761 of the Internal Revenue Code (See generally 6 Mertens, Law of Federal Income Taxation §35.03).

E. That even if David Taub and Israel Taub are considered to have been engaged in a joint venture, petitioners have failed to establish the amount of the loss for the year 1969; it is impossible to determine from the record which portion of the loss was attributable to 1968 and which portion was attributable to 1969.


F. That the petition of David Taub and Rivka Taub is denied and the Notice of Deficiency issued for 1969 is sustained.

DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER