

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Jack & Joan Shinnick : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income Tax
under Article(s) 22 of the Tax Law :
for the Years 1975 - 1977.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 21st day of April, 1986, he/she served the within notice of decision by certified mail upon Jack & Joan Shinnick the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack & Joan Shinnick
4765 Makyes Rd.
Syracuse, NY 13215

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
21st day of April, 1986.

David Parchuck

Janet M. Snay

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of

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for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income Tax
under Article(s) 22 of the Tax Law :
for the Years 1975 - 1977.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 21st day of April, 1986, he served the within notice of decision by certified mail upon James Pastella, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James Pastella
Pastella & Heimerman
6310 Fly Road
East Syracuse, NY 13057

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
21st day of April, 1986.

David Parchuck

Janet M. Snay

Authorized to administer oaths
pursuant to Tax Law section 174

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

April 21, 1986

Jack & Joan Shinnick
4765 Makyes Rd.
Syracuse, NY 13215

Dear Mr. & Mrs. Shinnick:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
James Pastella
Pastella & Heimerman
6310 Fly Road
East Syracuse, NY 13057

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JACK SHINNICK and JOAN SHINNICK	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax and Unincorporated	:	
Business Tax under Articles 22 and 23 of the	:	
Tax Law for the Years 1975 through 1977.	:	

Petitioners, Jack Shinnick and Joan Shinnick, 4765 Makyes Road, Syracuse, New York 13215, filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1975 through 1977 (File No. 46661).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on December 5, 1985 at 9:15 A.M. Petitioners appeared by Pastella & Heimerman (Richard W. Heimerman, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioners were partners, for income tax purposes, during the years at issue.

FINDINGS OF FACT

1. Petitioners, Jack Shinnick and Joan Shinnick, filed separately, on one form, a New York State Combined Income Tax Return for the year 1975. They filed separately, on one form, a New York State Income Tax Resident Return for each of the years 1976 and 1977. On each of these returns, Joan Shinnick reported wage income from "Jack E. Shinnick, Jr. Mr. Fixit Shop." In addition

to the income tax returns, Jack Shinnick filed a New York State Unincorporated Business Tax Return for each of the years in issue. On each of said returns, Jack Shinnick was named as the taxpayer, the business was described as appliance sales and service and the business name was reported as "Mr. Fixit Shop."

2. On April 5, 1979, the Audit Division issued a Notice of Deficiency to petitioners, Jack and Joan Shinnick, asserting a deficiency of unincorporated business tax for the years 1975 through 1977 in the amount of \$3,230.03, plus interest of \$472.93, for a total amount due of \$3,702.96. On April 13, 1979, the Audit Division issued separate notices of deficiency to Jack Shinnick and Joan Shinnick for the year 1977. The Notice of Deficiency issued to Jack Shinnick asserted personal income tax due in the amount of \$687.45, plus interest of \$39.06, for a total amount due of \$726.51. The Notice of Deficiency issued to Joan Shinnick asserted a deficiency of personal income tax in the amount of \$10.54. To the extent at issue herein, the asserted deficiency of unincorporated business tax was premised upon the Audit Division's conclusion that Jack Shinnick and Joan Shinnick were partners and, therefore, the salary paid to Joan Shinnick was subject to unincorporated business tax. No issue has been raised herein with respect to the asserted deficiencies of personal income tax.

3. On July 9, 1979, petitioners filed a petition challenging the asserted deficiencies of unincorporated business tax. Subsequently, petitioners were advised that their petition was untimely. Thereafter, petitioners paid the amount of tax asserted to be due for the periods in issue and filed claims for credit or refund of personal income tax and/or unincorporated business income tax for said periods, seeking a refund of the unincorporated business tax which had been paid.

4. On December 3, 1981, the Audit Division denied petitioners' claim for a refund for the years 1975 through 1977 on the ground that Jack and Joan Shinnick were considered partners. This proceeding ensued.

5. In or about 1960, Mr. Shinnick started doing business under the name of Mr. Fixit Shop. The business activity consisted of repairing and selling small appliances such as lamps, irons and toasters.

6. Joan and Jack Shinnick were married in October, 1960.

7. In 1971, the business moved to its current location at 2227 South Salina Street in Syracuse, New York. This property is jointly owned by Joan and Jack Shinnick. However, the funds used to purchase this business were derived from Mr. Shinnick's savings. Joan Shinnick was listed as a joint owner because Jack Shinnick believed that this form of ownership would make it easier to settle his estate if something were to happen to him. Jack Shinnick did not pay Joan Shinnick rent for the use of the premises.

8. Prior to 1965, Joan Shinnick was employed by General Electric Company as a secretary. In January, 1965, Joan Shinnick began working in the unincorporated business. Her activities consisted of maintaining the books, drafting checks to creditors, typing purchase orders and assisting customers with over-the-counter sales. In this capacity, she worked from 8:30 A.M. to 5:00 P.M. six days a week.

9. During the years in issue, approximately fifty percent of the total business income was derived from over-the-counter sales and the balance of the business income was obtained by repairing appliances. Joan Shinnick did not have any knowledge of the repair portion of the business.

10. Petitioners maintained joint savings and checking accounts. The business did not maintain a separate bank account.

11. Joan Shinnick was paid by check at the end of the year. The amount of her compensation was determined by the net income of the business.

12. Joan Shinnick contributed neither money nor property to the business prior to or during the years at issue. In addition, Jack Shinnick neither held himself out as doing business as a partnership nor entered into a partnership agreement with Joan Shinnick.

CONCLUSIONS OF LAW

A. That in Matter of Wells, 36 A.D.2d 471, 475, aff'd. 29 N.Y.2d 931, it was stated that "(a)n indispensable requirement of a partnership is 'a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses'" (Citations omitted) (Emphasis in original).

B. That the determination of whether there is a partnership is to be based upon all of the facts (Matter of Edward Borkowsky and Claire Borkowsky, State Tax Commission, October 17, 1980). One factor is the "intention of the parties determined by their acts and the character in which they have regarded their relationship. "(Matter of Edward Borkowsky and Claire Borkowsky, supra).

C. That upon review of the all the facts and circumstances presented herein, it is concluded that Jack Shinnick did not engage in a partnership with Joan Shinnick. The petitioners did not enter into a partnership agreement with respect to the distribution of losses. Joan and Jack Shinnick did not hold themselves out as partners. The petitioners, for tax purposes, did not report that they were partners. Lastly, Joan Shinnick made no contribution of capital to the business.

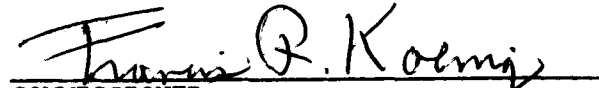
D. That the petition of Jack Shinnick and Joan Shinnick is granted.

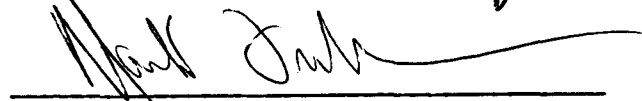
DATED: Albany, New York

STATE TAX COMMISSION

APR 21 1986


PRESIDENT


COMMISSIONER


COMMISSIONER