

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gans Brothers :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Year 1968.

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 14th day of August, 1981, he served the within notice of Decision by certified mail upon Gans Brothers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gans Brothers
200 Lexington Ave.
New York, NY 10016

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
14th day of August, 1981.

Ann R. Haglund

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gans Brothers :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Year 1968. :

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 14th day of August, 1981, he served the within notice of Decision by certified mail upon Edwin Shor the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edwin Shor
26 Court St.
Brooklyn, NY 11242

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
14th day of August, 1981.

Connie A. Haglund

J. Vredenburg

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

August 14, 1981

Gans Brothers
200 Lexington Ave.
New York, NY 10016

Gentlemen:

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) 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
Edwin Shor
26 Court St.
Brooklyn, NY 11242
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GANS BROTHERS	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Year 1968.	:	

Petitioner, Gans Brothers, 200 Lexington Avenue, New York, New York 10016, filed a petition for a redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1968 (File No. 14236).

A formal hearing was held before Melvin S. Barasch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 13, 1978 at 3:00 P.M. Petitioner appeared by Edwin Shor, CPA. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether petitioner's activities were subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Gans Brothers, timely filed a New York State partnership return for the year 1968, on which it reported income and deductions. However, the partnership did not complete the "Schedule U-D - Unincorporated Business Tax and Payments" portion of said schedule but did indicate that it was "not

subject" to said tax. The kind of business noted on the 1968 return was that of "sales managers".

2. On October 28, 1970, the Income Tax Bureau issued a Statement of Audit Changes against petitioner for the year 1968. The explanation given was that petitioner's activities as sales managers were subject to unincorporated business tax. Accordingly, the Income Tax Bureau issued a Notice of Deficiency for 1968 against petitioner on May 24, 1971, asserting unincorporated business tax of \$1,886.19, penalty, pursuant to section 685(a) of the Tax Law, of \$471.55, and interest of \$238.55, for a total due of \$2,596.29.

3. Petitioner timely filed a petition for redetermination of a deficiency or for refund of unincorporated business tax for the year 1968.

4. In 1950, Messrs. Lawrence Gans and Jerome Gans formed Gans Brothers, a partnership, for the purpose of designing furniture. In late 1967, the partners became directors of sales and marketing and vice-presidents for Unagusta Manufacturing Corporation ("Unagusta").

5. Petitioner inferred that it (the partnership) was an employee of Unagusta.

6. Unagusta is a \$30 million furniture business with its main office in Waynesville, North Carolina. It is comprised of several subsidiaries throughout the country.

7. Petitioner supervised about thirty salesmen who were employed by Unagusta. It was also totally responsible for the design of the furniture line, which included working with the designers, hardware people and lumber suppliers.

8. Petitioner received compensation in the form of commissions which were payable to Gans Brothers. The commissions were based on the overall sales

of Unagusta. One of the Forms 1099 submitted by the four subsidiaries of Unagusta listed the commissions as "consultant's fees".

9. Petitioner had an office at 200 Lexington Avenue, New York, New York in 1968 with the name of Unagusta and Gans Brothers, Incorporated on the door. Gans Brothers, Incorporated was sales representatives for Unagusta in the metropolitan area of New York. The office rent was paid by Unagusta, but the petitioner paid for one secretary.

10. Petitioner had the same telephone number as Unagusta in 1968.

11. Unagusta's letterhead carried the notation "Gans Brothers Directors of Sales and Marketing."

12. No income taxes or social security taxes were withheld from petitioner's commissions. Unagusta did not provide petitioner or its partners with a pension plan, medical insurance, vacation or sick day benefits.

13. Messrs. Lawrence Gans and Jerome Gans were not subject to any degree of control and direction from Unagusta. The partners set their own daily work schedule and arranged their own travel itinerary and appointments. The supervision of the thirty salesmen was solely within their control. The partners' expertise in discerning the various furniture trends throughout the country was the basis for the final word as to furniture design at Unagusta.

14. Interest income of \$2,278.00 reported on the partnership return was not partnership income but rather income of Lawrence Gans and Jerome Gans. A stipulation was reached that this investment income was not subject to unincorporated business tax.

CONCLUSIONS OF LAW

A. That section 703(a) of the Tax Law defines an unincorporated business as including "...any trade, business or occupation engaged in...by an individual

or unincorporated entity, including a partnership...".

B. That pursuant to section 703(b) of the Tax Law, "[t]he performance of services by an individual as an employee...of a corporation...shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual".

C. That "[T]he exemption of compensation received by an individual as an employee extends only to individuals and not to partnerships..." (People ex rel. Feinberg v. Chapman, 274 A.D. 715). Messrs. Lawrence Gans and Jerome Gans chose to have the money paid to the partnership rather than to them as individuals. Forms 1099 were made out to the partnership and not to individuals. Furthermore, the partnership has been in existence since 1950.

D. That Unagusta did not exercise supervision and control over the partners' activities as directors of sales and marketing and vice-presidents of Unagusta. The Court of Appeals defined independent contractor with the following test:

"The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used."

(Matter of Morton, 284 N.Y. 167, at p. 172; quoted in Lieberman v. Gallman, 41 N.Y.2d 774, at p. 778 (1977).)

E. That petitioner is an independent contractor "...whose services constitute their own 'business' though performed in the furtherance of the 'business' of another." (Irwin v. Klein, 271 N.Y. 477, 485).

F. That petitioner's failure to complete schedule U-D of it's timely filed partnership return was not due to willful neglect. Therefore, the

penalty asserted under section 685(a) of the Tax Law (then in effect) is cancelled.

G. That the Audit Division is hereby directed to modify the Notice of Deficiency issued May 24, 1971 in accordance with Finding of Fact "14", *supra*.

H. That the petition of Gans Brothers is granted to the extent provided for in Conclusions of Law "F" and "G", *supra*; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

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RECEIVED
TAX APPEALS BUREAU
AUG 26 1981

PERSON CHECKED

Undelivered _____ Refused _____
Addressed unknown _____
Insufficient Address _____
No such street _____ number _____
No such office in state _____
Do not remail in this envelope

Edwin Short
26 Court St.
Brooklyn, NY 11242

☐ Moved, left no address
☒ Moved, no such number
☐ Addressed unknown
☐ Moved, not forwarded

COPY
REF



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

August 14, 1981

Gans Brothers
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STATE OF NEW YORK

STATE TAX COMMISSION

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DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION


PRESIDENT


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