

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Morton M. Prensky
and Leona A. Prensky

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 Years 1976 - 1978.

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 6th day of October, 1982, he served the within notice of Decision by certified mail upon Morton M. Prensky and Leona A. Prensky, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morton M. Prensky
and Leona A. Prensky
12 Evelyn Dr.
Bethpage, NY 11714

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
6th day of October, 1982.

Annie A. Hayekund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

J. Vredenburg

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

October 6, 1982

Morton M. Prensky
and Leona A. Prensky
12 Evelyn Dr.
Bethpage, NY 11714

Dear Mr. & Mrs. Prenksy:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions
of
MORTON M. PRENSKY and LEONA A. PRENSKY
for Redetermination of Deficiencies or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1976,
1977 and 1978.

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DECISION

Petitioner, Morton M. Prenskey and Leona A. Prenskey, 12 Evelyn Drive, Bethpage, New York 11714, filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1976, 1977 and 1978 (File Nos. 27781 and 33990).

A small claims hearing for 1976 was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 29, 1981 at 2:45 P.M. Petitioners appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel). On February 15, 1982, petitioners informed the State Tax Commission, in writing, that they desired to waive a hearing for the tax years 1977 and 1978 and to submit the case to the State Tax Commission, based on the evidence contained in the file and on the testimony offered at the hearing for the tax year 1976.

ISSUES

I. Whether petitioner Morton M. Prenskey's activity as a manufacturer's representative constitutes the carrying on of an unincorporated business, the income from which is subject to unincorporated business tax.

company's items to retailers located in Brooklyn, Queens, Nassau and Suffolk, and, was compensated on a commission basis.

5. Petitioner generally determined his work hours and scheduled appointments with his customers. On occasion appointments with customers were made for him by the company.

6. In some instances, if sales generated by the petitioner were lagging or he encountered customer problems, the company's sales manager would accompany him and attempt to resolve the difficulties.

7. The company required that petitioner periodically take inventory of its products at the retail stores which he serviced. To accomplish this, petitioner hired personnel to physically count the inventory and report the results to him. The costs incurred in connection therewith were borne one third by the petitioner, and two thirds by the company. Petitioner also had the authority to terminate the personnel who took inventory.

8. The company periodically required petitioner to attend conventions.

9. Petitioner required the company's approval to take his unpaid vacations.

10. Petitioner also earned commissions, separate and apart from those generated from the company.

11. Petitioner's business card and letterhead listed his occupation as a manufacturer's representative. The card and letterhead indicated that the business was conducted from his home and included petitioner's home telephone number.

12. Petitioner for 1976 filed with the Internal Revenue Service a Schedule C, Form 1040, which listed his occupation as a manufacturer's representative, and, on which he claimed various business expenses incurred in connection with his occupation.

II. If petitioner Morton M. Prensky is found subject to unincorporated business tax, then, was there reasonable cause for his failure to file unincorporated business tax returns for subject years.

FINDINGS OF FACT

1. Petitioner Morton M. Prensky did not file unincorporated business tax returns for 1976, 1977 and 1978.

2. On November 1, 1978, the Audit Division issued a Statement of Audit Changes against petitioners for 1976, on the basis that petitioners failed to report changes made to their income by the Internal Revenue Service, and, that, petitioner Morton M. Prensky's activity, as a sales representative, was subject to unincorporated business tax. Accordingly, under date of July 18, 1979, it issued a Notice of Deficiency against the petitioners, for 1976, asserting personal income tax of \$78.19, unincorporated business tax of \$1,174.42 and interest of \$235.99 for a total of \$1,410.41. On September 4, 1980, the Audit Division issued a Statement of Audit Changes, for 1977 and 1978, again, on the basis that petitioner Morton M. Prensky's activity constituted the carrying on of an unincorporated business. Accordingly, under date of January 6, 1981, it issued a Notice of Deficiency against the petitioners for 1977 and 1978, asserting unincorporated business tax of \$1,952.44, plus penalties under section 685, subsections (a)(1) and (a)(2) of the Tax Law and interest of \$1,096.96, for a total of \$3,049.40.

3. Petitioners did not contest the deficiency for personal income tax for 1976, and, therefore, it is not at issue.

4. For the years at issue, petitioner Morton M. Prensky (hereinafter "petitioner"), was a sub-representative for H.I.S. Sales Company (hereinafter "company"), a distributor of stationery and gift items. Petitioner sold the

13. The company did not withhold social security, State or Federal income taxes from the petitioner's compensation.

CONCLUSIONS OF LAW

A. That the income received by petitioner Morton M. Prensky, from H.I.S. Sales Company during 1976, 1977 and 1978 constituted income from his regular business of selling. It did not constitute compensation as an employee within the meaning of section 703(b) of the Tax Law. That the company for whom petitioner sold goods did not exercise a sufficient degree of control and direction requisite to warrant his being considered an employee.

B. That petitioner's failure to file unincorporated business tax returns for 1977 and 1978 was not due to reasonable cause, and, was due to willful neglect, and, accordingly, penalties asserted pursuant to section 685, subsections (a)(1) and (a)(2) were properly asserted by the Audit Division.

C. That the petitions of Morton M. Prensky and Leona A. Prensky are denied, and the notice of deficiencies issued under dates of July 18, 1979 and January 6, 1981 are sustained, together with such interest and penalties as may be legally due.

DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER