

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harry J. & Pearl Shapolsky :
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 1968 - 1976. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

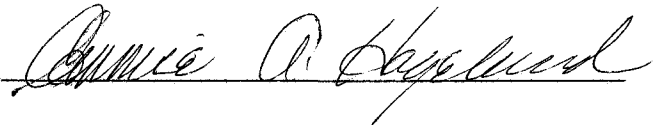
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Harry J. & Pearl Shapolsky, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry J. & Pearl Shapolsky
127 E. 36th St.
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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harry J. & Pearl Shapolsky :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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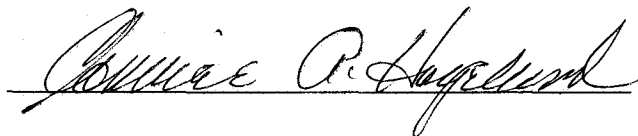
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Herbert J. Cohn the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert J. Cohn
Louis J. Cohn & Co.
100 E. Old Country Rd.
Mineola, NY 11501

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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

July 15, 1983

Harry J. & Pearl Shapolsky
127 E. 36th St.
New York, NY 10016

Dear Mr. & Mrs. Shapolsky:

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 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
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Herbert J. Cohn
Louis J. Cohn & Co.
100 E. Old Country Rd.
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
HARRY J. SHAPOLSKY and PEARL SHAPOLSKY : DECISION
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Years 1968 :
through 1976.

Petitioners, Harry J. Shapolsky and Pearl Shapolsky, 127 East 36th Street, New York, New York 10016, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1968 through 1976 (File Nos. 27660, 28707, 28708 and 28709).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 21, 1982 at 2:45 P.M., with all briefs to be submitted by December 12, 1982. Petitioner appeared by Louis J. Cohn & Co. (Herbert J. Cohn, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether petitioners' salary income was sufficiently interrelated and connected with petitioners' business of buying and selling mortgages as to be subject to unincorporated business tax.

FINDINGS OF FACT

1. On April 13, 1979, the Audit Division issued a Notice of Deficiency to Harry J. Shapolsky which asserted a deficiency of unincorporated business tax and New York State personal income tax for the year 1975 of \$3,177.45 plus interest of \$710.34 for a total amount due of \$3,887.79. On the same day, the

Audit Division issued a Notice of Deficiency to Harry J. Shapolsky which asserted a deficiency of unincorporated business tax and New York State and New York City personal income tax for the year 1976 of \$2,652.03 plus interest of \$367.46 for a total amount due of \$3,019.49. The Statement of Audit Changes stated that Mr. Shapolsky's wage and bonus income was so integrated with his activities involved with his unincorporated business that his wage income was subject to unincorporated business tax. The Statement also stated that since Mr. Shapolsky had not submitted certain information, the bonus income was held to be sufficiently integrated and interrelated with Mr. Shapolsky's unincorporated business as to be subject to unincorporated business tax. Lastly, the Statement said that an adjustment was made based upon an audit of Mr. Shapolsky's federal income tax return.

2. On October 4, 1979, the Audit Division issued a Notice of Deficiency to petitioners, Harry J. and Pearl Shapolsky, asserting a deficiency of unincorporated business tax for the years 1968 through 1971 of \$10,029.27 plus penalty and interest of \$6,629.70 for a total amount due of \$16,658.97. The Statement of Audit Changes, which was previously issued, stated that petitioners income from wages, business, sale or exchange of property, and management fees was subject to unincorporated business tax. The penalties were asserted for failure to file unincorporated business tax returns and failure to pay unincorporated business tax when due for 1968 and 1970. A penalty was also asserted pursuant to section 685(c) of the Tax Law for underpayment of estimated tax.

3. On October 4, 1979, the Audit Division issued a Notice of Deficiency to petitioners which asserted a deficiency of unincorporated business tax for the years 1972, 1973 and 1974 in the amount of \$19,452.21 plus interest of \$8,407.31

for a total amount due of \$27,859.52. The Statement of Audit Changes, which was previously issued, stated that petitioners income from wages, business, sale or exchange of property and management fees was subject to unincorporated business tax. The Statement also said that an adjustment was being made to conform the New York State audit with the result of a federal audit.

4. On October 4, 1979, the Audit Division issued a Notice of Deficiency to Harry J. Shapolsky for the year 1974 which asserted a deficiency of personal income tax in the amount of \$2,260.85 plus interest of \$859.26 for a total amount due of \$3,120.11. The asserted deficiency was premised upon adjustments made to Harry J. Shapolsky's United States personal income tax return by the Internal Revenue Service.

5. On April 10, 1979, the Audit Division issued a Notice of Deficiency in the amount of \$878.65 to petitioners, Harry J. and Pearl Shapolsky, for the years 1975 and 1976. The Notice asserted a penalty pursuant to section 685(c) of the Tax Law for failure to file a declaration or underpayment of estimated tax.

6. Petitioners filed separately on a New York State Combined Income Tax Return for 1968. Each petitioner reported wage income as well as income from the sale or exchange of property. Only Mr. Shapolsky reported business income. Petitioners did not state their occupations on this return. An unincorporated business tax return was not filed for 1968.

7. Petitioners filed separately on a New York State Combined Income Tax Return for 1969. Mr. Shapolsky listed his occupation as real estate and Mrs. Shapolsky listed her occupation as secretary. Only Mr. Shapolsky reported business income. Two New York State unincorporated business tax returns were

attached to petitioners' income tax return. One of the unincorporated business tax returns reported a business of mortgages. Both petitioners signed this unincorporated business tax return.

8. Petitioners filed separately on a New York State Combined Income Tax Return for 1970. Petitioners did not list their occupations on this return. Only business income of Mr. Shapolsky was reported on this return. An unincorporated business tax return was not filed for 1970.

9. Petitioners filed separately on a New York State Combined Income Tax Return for 1971. Each petitioner listed his or her occupation as real estate and reported business income. Only Mr. Shapolsky reported income from the sale or exchange of property other than capital assets. Two unincorporated business tax returns were attached to petitioners' income tax return. One of the unincorporated business tax returns named each petitioner and reported a business of real estate.

10. Petitioners filed separately on a New York State Combined Income Tax Return for 1972. Business income was reported only by Mr. Shapolsky. Both petitioners reported other income listed on their Federal income tax return as income from management. Two New York State unincorporated business tax returns were attached to petitioners income tax returns. One of the unincorporated business tax returns listed a business of mortgage investment. This return was signed by both petitioners. Petitioners also filed with their return two schedules encaptioned Profit (or Loss) From Business or Profession. One of these schedules listed a principal business activity of mortgages.

11. Petitioners filed separately on a New York State Income Tax Resident Return for the year 1973. On this return, only Mr. Shapolsky reported business income. Both petitioners reported other income. However, no explanation was

listed for this income. A New York State Unincorporated Business Tax Return for 1973 was attached to petitioners' income tax return. Only Mr. Shapolsky signed this return which did not list a business activity. Petitioners also filed two schedules of Profit (or Loss) From Business or Profession. One of these schedules listed each petitioner and reported a principal business activity of mortgages. The net profit reported on this schedule was the same as the net profit reported on the unincorporated business tax return filed.

12. Petitioners filed separately on a New York State Income Tax Resident Return for the year 1974. Each petitioner listed an occupation of real estate. Only Mr. Shapolsky reported business income on this return and only Mrs. Shapolsky reported other income. However, no explanation was listed for this income. A New York State Unincorporated Business Tax Return was attached to petitioners income tax return. This return only listed Mr. Shapolsky's name and did not report a type of business activity.

13. Petitioners filed separately on a New York State Income Tax Resident Return for 1975. Each petitioner reported an occupation of real estate on this return. However, only Mr. Shapolsky reported business income during this year. Both petitioners reported other income without any further explanation. Attached to petitioners return were two schedules reporting Profit or (Loss) From Business or Profession. One of these schedules named each petitioner and described the principal business activity as mortgages. A New York State Unincorporated Business Tax Return was also attached to petitioners income tax return. This return listed just Mr. Shapolsky and did not list a type of business activity. The net profit reported was the difference between the net profit and net loss reported on the two schedules of Profit or (Loss) from Business or Profession.

14. Petitioners filed separately on a New York State Income Tax Resident Return for 1976. Each petitioner listed his or her occupation as real estate. Only Mr. Shapolsky reported business income. Both petitioners reported other income without an explanation. Two schedules of Profit or (Loss) From Business or Profession were attached to petitioners' return. One of these schedules listed each petitioner and reported a principal business activity of mortgages. A New York State Unincorporated Business Tax Return was filed along with petitioners' personal income tax return. This return only listed Mr. Shapolsky and did not report a kind of business activity. The net profit reported was the difference between the net profit and net loss reported on the two schedules of Profit or (Loss) from Business or Profession.

15. Throughout the periods in issue each petitioner received a substantial number of wage and tax statements from numerous corporations.

16. On May 19, 1972 petitioner Harry J. Shapolsky consented to an extension of the period of limitation upon assessment of personal income and unincorporated business taxes for the year ended December 31, 1969 to one year following the close of proceedings for the year 1965. On May 29, 1974 Harry J. and Pearl Shapolsky consented to an extension of the period of limitation upon assessment of personal income tax and unincorporated business tax for the years ended December 31, 1971 and December 31, 1972 to one year following the close of proceedings for the year 1965. On May 17, 1976 Harry J. and Pearl Shapolsky consented to an extension of the period of limitation upon assessment of personal income tax and unincorporated business tax for the years ended December 31, 1973 and December 31, 1974 to one year following the close of proceedings for the year 1965.

17. On May 9, 1979, petitioners' representative sent a letter and a check to the Audit Division. The cover letter stated that petitioner Harry J. Shapolsky would pay the New York State personal income tax due for the years 1975 and 1976 and the New York City personal income tax due for 1976. Petitioner also paid that portion of the asserted deficiency of unincorporated business tax for the years 1975 and 1976 premised upon the Federal audit adjustment. The total amount paid by Mr. Shapolsky was \$2,079.55. The letter from petitioners' representative concluded that Mr. Shapolsky continued to object to the salary income and bonus income included in petitioners' unincorporated business income.

18. Mr. Shapolsky has been engaged in the electrical contracting business since 1933. Over a period of time, Mr. Shapolsky met individuals who were interested in investing in real estate. Thereafter, petitioners established real estate corporations with other individuals who owned rental property. Petitioners owned between one-third and one-half of the stock of each corporation.

19. Mr. Shapolsky was not an employee of any of the real estate corporations. Petitioners' representative was unable to state at the hearing whether Mr. Shapolsky was an officer of any of the real estate corporations.

20. Mr. Shapolsky's electrical contracting business did work for some but not all of the real estate corporations.

21. At the hearing, petitioners' representative testified that Mr. Shapolsky spent little or no time working for the real estate corporations and that Mrs. Shapolsky's time was spent largely as a housewife. Petitioners' representative stated that Mr. Shapolsky had made interest free loans to the corporations as well as equity investments and that the salary income reported on the wage

and tax statements actually represented a return on the debt and equity investments that petitioners had made in the real estate corporations.

22. At the hearing, petitioners' representative conceded that the commission and bonus income was subject to unincorporated business tax.

23. The Audit Division did not explain why Mrs. Shapolsky's salary and other income were not held subject to unincorporated business tax for 1975 and 1976, but were held subject to unincorporated business tax in prior years.

CONCLUSIONS OF LAW

A. That a proceeding before the State Tax Commission is commenced by the filing of a petition within ninety days of the issuing of the Notice of Deficiency (Tax Law sections 689(a); 689(b)). Since no petition was filed pertaining to the asserted deficiencies of personal income tax or estimated tax penalty, no determination is rendered by the State Tax Commission with respect to the Notices of Deficiency or portions of the Notices of Deficiency which asserted deficiencies of personal income tax and estimated tax penalty respectively. However, petitioners are to be given credit for the sum of \$2,079.55 paid in 1979 (Finding of Fact "17").

B. That in accordance with Finding of Fact "22", petitioners' commission and bonus income is subject to unincorporated business tax.

C. That in view of the questionable explanation that the amounts reported on the wage and tax statements represented income from investment, the lack of documentary evidence to substantiate this explanation, and the failure of petitioners' to appear and testify in person, petitioners have failed to sustain their burden of proof of establishing that the salary income was not derived from the unincorporated mortgage business (Tax Law §§ 689(e); 722; Matter of Phillip P. Zipes, State Tax Commission, February 22, 1980).

D. That the petitions of Harry J. Shapolsky and Pearl Shapolsky are denied; however, the notice of deficiency which asserted personal income tax deficiencies for 1975 and 1976 (Finding of Fact "17"), is to be adjusted based on payment made; and that, except as so granted, the notices of deficiency are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983


PRESIDENT


COMMISSIONER


COMMISSIONER