

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Milton Shapiro

:

: 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 1971 - 1973.

State of New York  
County of Albany

David Parchuck, 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 May, 1983, he served the within notice of Decision by certified mail upon Milton Shapiro, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Milton Shapiro  
5 Glenn Dr.  
Woodbury, NY 11797

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 May, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :  
Milton Shapiro :

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for Redetermination of a Deficiency or a Revision :  
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Business Tax under Article 23 of the Tax Law :  
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State of New York  
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David Parchuck, 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 May, 1983, he served the within notice of Decision by certified mail upon Alan Winters the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alan Winters  
767 Fifth Avenue - 16th Floor  
New York, NY 10153

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  
6th day of May, 1983.

David Parchuck

Annice P. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 6, 1983

Milton Shapiro  
5 Glenn Dr.  
Woodbury, NY 11797

Dear Mr. Shapiro:

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  
Alan Winters  
767 Fifth Avenue - 16th Floor  
New York, NY 10153  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
MILTON SHAPIRO	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1971,	:	
1972 and 1973.	:	

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Petitioner, Milton Shapiro, 5 Glenn Drive, Woodbury, New York 11797, 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 1971, 1972 and 1973 (File No. 30328).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 26, 1982 at 9:15 A.M. Petitioner appeared with Alan Winters, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner's insurance sales activities constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Milton Shapiro (hereinafter petitioner) timely filed joint New York State income tax resident returns with his wife for the years 1971, 1972 and 1973 whereon he reported business income derived from his activities engaged in as an "insurance broker". He did not file an unincorporated business tax return for any of said years at issue.

2. On January 4, 1977 the Audit Division issued a Statement of Audit Changes to petitioner wherein it held that "the income from your business activities as an insurance broker is subject to the unincorporated business tax". Accordingly, a Notice of Deficiency was issued against petitioner on March 3, 1980 asserting unincorporated business tax of \$2,483.36, plus penalties and interest of \$2,258.01, for a total due of \$4,741.37. Said penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to file unincorporated business tax returns and failure to pay the tax determined to be due respectively.

3. During the years at issue petitioner derived income from the sale of general insurance exclusively for Horowitz & Babbit, Inc., (hereinafter H&B) a New York insurance brokerage firm. Additionally, he derived income from his activities engaged in as an independent insurance agent selling life insurance.

4. Petitioner contended that he was an employee of H&B and as such, his income derived therefrom is exempt from the imposition of unincorporated business tax.

5. Prior to May, 1965, petitioner was engaged in the general brokerage insurance business individually and as Milton Shapiro Ltd.

6. On May 1, 1965, petitioner entered into a contractual agreement with H&B whereby he was engaged by H&B as its agent to assist in servicing its accounts and to solicit new general insurance business. Pursuant to the terms of said agreement and an amendment annexed thereto:

- (a) Petitioner's compensation for the years at issue herein was \$100.00 weekly, paid as a salary, plus 55 percent commission on new business produced by him.
- (b) Petitioner did not receive commission on the business he brought in as a result of his servicing the existing accounts of H&B.

- (c) All office expenses were borne by H&B.
- (d) Petitioner was entitled to a 10 percent share in the profits of H&B.
- (e) All personal accounts of petitioner remained his own.
- (f) A disability income policy was to be obtained covering petitioner for a monthly income of \$1,000.00. Premium costs were to be shared equally.
- (g) Petitioner was required to be fully accountable for his time by means of an appointment and time schedule.

7. Petitioner's assigned territory for H&B consisted of the metropolitan New York area.

8. When not visiting clients, petitioner was expected to be in the office of H&B from approximately 9:00 A.M. to 5:00 P.M.

9. H&B provided petitioner with secretarial service and a work area, consisting of a desk, chair and file cabinets.

10. H&B finalized all policies written by petitioner. Premiums were billed under H&B's name.

11. At H&B's recommendation, petitioner attended a training course in 1966 which was provided by Aetna Casualty Insurance Co. H&B further provided petitioner with on the job training.

12. Petitioner was required to attend agency meetings. His vacation schedule required approval of H&B.

13. If a general insurance policy was refused by H&B, petitioner was allowed to place it elsewhere. General insurance basically comprises all types of insurance exclusive of life and health.

14. H&B provided petitioner with group life, hospitalization and major medical coverage. The cost of such coverage was shared equally between petitioner and H&B. A second group life policy was provided to petitioner at no cost.

15. H&B withheld income taxes from petitioner's weekly salary of \$100.00. Such salary income was not held subject to the unincorporated business tax. Taxes were not withheld from petitioner's commission earnings.

16. H&B provided petitioner with unemployment insurance coverage.

17. Petitioner was fully reimbursed for entertainment expenses incurred on behalf of H&B. Gasoline and telephone expenses were reimbursed at 50 percent.

18. H&B held petitioner liable for bad debts of his clients to the extent of his commission rate.

19. H&B represented from 30 to 40 separate insurance companies.

20. In 1976 petitioner was terminated from H&B and was required to pay \$30,000.00 for the accounts which he serviced.

21. Petitioner reported both his income derived from H&B and his income derived as an independent life insurance agent on a Federal Schedule C for each of the years at issue herein.

22. In 1971 petitioner received commissions from his activities as an independent life insurance agent of \$15,066.42. These commissions were derived from five life insurance companies. In 1972 petitioner received commissions of \$17,938.30 from eight life insurance companies and in 1973 he received commissions of \$24,024.79 from eleven life insurance companies.

23. Commissions received from H&B for the sale of general insurance during 1971, 1972 and 1973 were \$16,317.24, \$16,598.08 and \$17,581.94 respectively.

24. Petitioner's business address reported on his Federal Schedules C was that of H&B. H&B's address was also listed for petitioner on most information returns reporting his commissions from the various life insurance companies.

25. Petitioner operated his life insurance business from the office of H&B. He testified that the "life insurance business required a lot of time" and that he was not prohibited from devoting time to his own business "as long as I devoted time to his (H&B's) activity".

26. Petitioner submitted a statement from his tax preparer, Leon Goldberg, CPA, indicating that unincorporated business tax returns were not filed for the years at issue based on his professional opinion and advice.

#### CONCLUSIONS OF LAW

A. That although petitioner may have maintained a relationship of employer-employee with Horowitz & Babbitt, Inc., his activities for Horowitz & Babbitt, Inc. were so interrelated and integrated with his activities engaged in as an independent life insurance salesman, without a clear division of time, so as to constitute part of a business regularly carried on by him. Accordingly, all petitioner's commissions derived from the sale of insurance are subject to the imposition of unincorporated business tax pursuant to section 701(a) of the Tax Law.

B. That petitioner has established reasonable cause for his failure to file unincorporated business tax returns for the years at issue herein. Accordingly, the penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are hereby abated.

C. That the petition of Milton Shapiro is granted to the extent provided in Conclusion of Law "B" supra, and except as so granted, said petition is, in all other respects, denied.




D. That the Audit Division is hereby directed to modify the Notice of Deficiency dated March 3, 1980 to be consistent with the decision rendered herein.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER