

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

February 29, 1984

Boris Shteinshleifer
60 E. 8th St.
New York, NY 10003

Dear Mr. Shteinshleifer:

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
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
Louis L. Mast
P.O. Box 126, Vanderveer Station
Brooklyn, NY 11210
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BORIS SHTEINSHLEIFER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1978.	:	

Petitioner, Boris Shteinshleifer, 60 East 8th Street, New York, New York 10003, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1978 (File No. 33362).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 15, 1983 at 2:40 P.M. Petitioner appeared by Louis L. Mast, Esq. The Audit Division appeared by John P. Dugan, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional unincorporated business tax to be due from petitioner based on the sale of leasehold improvements in connection with the liquidation of his business.

II. Whether petitioner is liable for a penalty due to negligence or intentional disregard of the Tax Law under section 685(b).

FINDINGS OF FACT

1. On January 22, 1981, as the result of a field audit, the Audit Division issued a Notice of Deficiency against petitioner, Boris Shteinshleifer, in the amount of \$6,659.00, plus penalty and interest of \$1,575.16, for a total due of

\$8,234.16 for the year 1978. A Statement of Audit Changes issued November 19, 1980 indicated that additional unincorporated business tax of \$7,690.00¹ was due based on inclusion in unincorporated business income of \$150,000.00 gain from the sale of personal business property and \$11,900.00 in consulting fees. The additional tax due as a result of the consulting fees is not at issue herein.

2. Petitioner was engaged in the operation of a gold and silver refining business known as N. L. Shteinshleifer Co. ("the Company") either in partnership with his father and brother or as a sole proprietor for over 30 years. The operation involves buying scrap metals such as gold, silver and platinum, crushing and melting the metals, and then refining the metals for use in industry. Such an operation required use of heavy machinery and equipment including incinerators, chimneys, and scrubbers. A scrubber is a machine which removes excess acid from fumes by a chemical process prior to discharging the fumes into the air. By their very nature, these items become permanent fixtures when installed and cannot be removed without damaging the premises or the machinery.

3. The Company did not have enough money, originally, to buy its own building to house the business, therefore, it entered into a lease arrangement. A separate corporation known as N. L. Shteinshleifer, Inc. ("the Corporation") was formed in 1950 for the sole purpose of holding the lease on the business premises. The Company paid rent to the Corporation which, in turn, passed it along to the landlord. Petitioner asserted that this arrangement was utilized to limit his liability in case of accidents on the premises due to the hazardous

¹ A credit of \$1,031.00 was allowed against additional unincorporated business tax due as a result of New York State and New York City adjustments to State and City minimum income tax.

nature of the chemicals and air pollutants which were an integral part of the operation.² The Corporation had no income and no losses and, in 1978 at least, paid only minimum New York corporation franchise tax. Petitioner presented no evidence indicating who purchased the machinery and equipment used in the business or whether the Company or the Corporation carried the machinery as assets on its books and records.

4. In 1978, petitioner sold his business to CLAL, a French refining company with branches throughout Europe which wanted to establish a branch in the United States. The selling price of \$150,000.00 was broken down on the bill of sale as follows: furniture, fixtures, equipment, supplies and chemicals, \$10,000.00; leasehold improvements to the premises, \$110,000.00; and goodwill and other intangible assets, \$30,000.00. The parties to the sale were listed as Boris Shteinshleifer d/b/a N. L. Shteinshleifer Co. and CAP Operating Corp., which was a transitional operating company for CLAL. Nowhere was any reference made to the Corporation. Petitioner described the furniture, fixtures and equipment as listed on the bill of sale as moveable objects which could be readily removed from the premises. The leasehold improvements were the heavy machinery and equipment which could not be removed without damage to the machinery or the premises.

5. On audit, the Audit Division determined that additional unincorporated business tax was due on the gain from the sale of the business. The entire gain of \$150,000.00 was allocated to the Company with no part of the sales price attributed to the Corporation. Petitioner, on his Federal and State

² It is noted, however, that petitioner would remain exposed to personal liability as either a partner in or sole proprietor of the company.

income tax returns, had characterized the entire \$150,000.00 as a capital gain from the sale of the stock of the Corporation. Petitioner now maintains that the \$110,000.00 of the selling price which was attributed to leasehold improvements was actually a sale by the Corporation, which petitioner asserts, owned all the leasehold improvements since the Corporation held the lease. Petitioner offered no explanation, however, as to why only the Company was a party to the sale of the business and not the Corporation, and there is nothing further in the record which would indicate that the Corporation had any assets beyond the leasehold.

6. The Audit Division also imposed a section 685(b) negligence penalty on petitioner. Petitioner argues that his actions were, at most, the result of a difference of opinion on the interpretation of the law and that he acted in good faith with no negligence involved and that, therefore, penalties should be waived.

CONCLUSIONS OF LAW

A. That section 705(a) of the Tax Law includes within the definition of unincorporated business income "income and gain from any property employed in the business, or from liquidation of the business...".

B. That where a person other than the lessee is shown to be in possession of the leasehold premises, the law presumes that the lease has been assigned to him, and that the assignment was sufficient to transfer the term and to satisfy the statute of frauds. Moreover, payment of rent by one other than the lessee, who has been let into possession of the demised premises by the lessee is prima facie evidence of the assignment of the whole term (Mann v. Munch Brewery, 225 N.Y. 189, 193). Petitioner paid all the rent and was in possession of the

leasehold for the entire term of the lease. The Corporation was never in possession of the property and, admittedly, only acted as a conduit for the Company to pay rent to the landlord. It is presumed, therefore, that petitioner was an assignee of the leasehold. Therefore, petitioner's argument that the Corporation owned all the leasehold improvements by virtue of its holding of the leasehold is without merit. Moreover, petitioner offered no other evidence which establishes a basis for attributing the leasehold improvements to the Corporation. The Company was the sole occupant of the premises and was the only party which utilized the machinery and equipment during the period of the lease. The Company was the only seller listed on the bill of sale covering the transaction with CLAL. It, therefore, must be concluded that petitioner purchased and owned all of the Company's equipment including the machinery categorized as leasehold improvements. Other than the fact that the Corporation signed the original lease and collected rent from the Company, petitioner failed to show any connection whatsoever between the Corporation and the leasehold improvements which would prove that the improvements were sold by the Corporation and not by the Company. Therefore, the Audit Division correctly attributed the entire gain from the sale to the Company.

C. That section 685(b) of the Tax Law provides for the imposition of a penalty if any part of a deficiency is due to negligence or intentional disregard of the law or rules and regulations without intent to defraud. Petitioner did not intentionally disregard the law or the regulations. The underpayment of the unincorporated business tax was based on an honest misunderstanding of the law of which an average reasonable man might be capable and the penalty for negligence should not be asserted and is hereby waived.

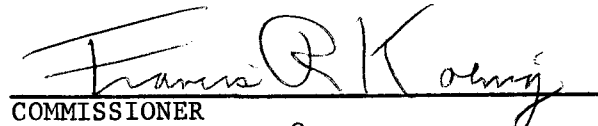
D. That the petition of Boris Shteinshleifer is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is directed to modify the Notice of Deficiency issued January 22, 1981 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 29 1984


PRESIDENT


COMMISSIONER


COMMISSIONER