

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Metropolitan Art Associates :  
for Redetermination of a Deficiency or for Refund :  
of Unincorporated Business Tax under Article 23 of :  
the Tax Law for the Years 1977 and 1978. :

---

In the Matter of the Petition :  
of :  
Ben J. Seger : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Years 1977 and 1978. :

---

In the Matter of the Petition :  
of :  
Richard Greenberg :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Years 1977 and 1978. :

---

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1985, he served the within notice of Decision by certified mail upon Metropolitan Art Associates, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Metropolitan Art Associates  
346 New York Ave.  
Huntington, NY 11743

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Affidavit of Mailing

Page 2

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  
18th day of January, 1985.

David Paschuck

Quinn A. Haglund

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of  
Metropolitan Art Associates :

for Redetermination of a Deficiency or for Refund :  
of Unincorporated Business Tax under Article 23 of  
the Tax Law for the Years 1977 and 1978. :

---

In the Matter of the Petition :  
of  
Ben J. Seger : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax  
Law for the Years 1977 and 1978. :

---

In the Matter of the Petition :  
of  
Richard Greenberg :

for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax  
Law for the Years 1977 and 1978. :

---

State of New York :  
ss.:  
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1985, he served the within notice of Decision by certified mail upon Daniel H. Link, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Daniel H. Link  
12 Talbot Dr.  
Lake Success, NY 11020

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Affidavit of Mailing

Page 2

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  
18th day of January, 1985.

David Paschuck

Quinn Arthur  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 18, 1985

Metropolitan Art Associates  
346 New York Ave.  
Huntington, NY 11743

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) 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  
Daniel H. Link  
12 Talbot Dr.  
Lake Success, NY 11020  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of  
Metropolitan Art Associates :

for Redetermination of a Deficiency or for Refund :  
of Unincorporated Business Tax under Article 23 of  
the Tax Law for the Years 1977 and 1978. :

---

In the Matter of the Petition :  
of  
Ben J. Seger : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax  
Law for the Years 1977 and 1978. :

---

In the Matter of the Petition :  
of  
Richard Greenberg :

for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax  
Law for the Years 1977 and 1978. :

---

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1985, he served the within notice of Decision by certified mail upon Richard Greenberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard Greenberg  
5 Briar Court  
Westhill, NY 11747

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Affidavit of Mailing  
Page 2

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  
18th day of January, 1985.

David Parchuck

Ann W. R. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 18, 1985

Richard Greenberg  
5 Briar Court  
Westhill, NY 11747

Dear Mr. Greenberg:

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 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  
Daniel H. Link  
12 Talbot Dr.  
Lake Success, NY 11020  
Taxing Bureau's Representative



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Metropolitan Art Associates	:	
for Redetermination of a Deficiency or for Refund	:	
of Unincorporated Business Tax under Article 23 of	:	
the Tax Law for the Years 1977 and 1978.	:	
<hr/>		
In the Matter of the Petition	:	
of	:	
Ben J. Seger	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund	:	
of Personal Income Tax under Article 22 of the Tax	:	
Law for the Years 1977 and 1978.	:	
<hr/>		
In the Matter of the Petition	:	
of	:	
Richard Greenberg	:	
for Redetermination of a Deficiency or for Refund	:	
of Personal Income Tax under Article 22 of the Tax	:	
Law for the Years 1977 and 1978.	:	

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1985, he served the within notice of Decision by certified mail upon Ben J. Seger, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ben J. Seger  
4845 Cherry Laurel Lane  
Delray Beach, FL 33445

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Affidavit of Mailing

Page 2

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  
18th day of January, 1985.

David Partridge

James A. Hargrave

Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 18, 1985

Ben J. Seger  
4845 Cherry Laurel Lane  
Delray Beach, FL 33445

Dear Mr. Seger:

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 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  
Daniel H. Link  
12 Talbot Dr.  
Lake Success, NY 11020  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition  
of  
METROPOLITAN ART ASSOCIATES  
for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Years 1977  
and 1978.

---

In the Matter of the Petition  
of  
BEN J. SEGER  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article  
22 of the Tax Law for the Years 1977 and 1978.

---

In the Matter of the Petition  
of  
RICHARD GREENBERG  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article  
22 of the Tax Law for the Years 1977 and 1978.

---

DECISION

Petitioner, Metropolitan Art Associates, 346 New York Avenue, Huntington,  
New York 11743 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 1977 and 1978 (File No. 37825).

Petitioners, Ben J. Seger, 4845 Cherry Laurel Lane, Delray Beach, Florida  
33445 and Richard Greenberg, 5 Briar Court, Westhill, New York 11747 filed  
petitions for redetermination of a deficiency or for refund of personal income

tax under Article 22 of the Tax Law for the years 1977 and 1978 (File Nos. 37826 and 37827).

A formal hearing was commenced before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 26, 1984 at 1:15 P.M. and continued to conclusion before Daniel J. Ranalli, Hearing Officer, on July 25, 1984 at 1:00 P.M., with additional information to be submitted by September 25, 1984. Petitioners appeared by Daniel H. Link, C.P.A. The Audit Division appeared by John P. Dugan, Esq. James Della Porta, Esq., of counsel on January 26, 1984 and Thomas Sacca, Esq., of counsel on July 25, 1984).

#### ISSUES

I. Whether petitioner Metropolitan Art Associates had a regular place of business outside New York State.

II. If so, whether petitioner Metropolitan Art Associates accurately computed its allocation according to the formula provided for in section 707(c) of the Tax Law.

III. Whether petitioners Ben J. Seger and Richard Greenberg were entitled to deductions on their personal income tax returns for wages paid to their wives.

IV. Whether petitioners Ben J. Seger and Richard Greenberg were entitled to deductions on their personal income tax returns for offices maintained in their homes.

V. Whether the Audit Division properly disallowed a portion of the sales taxes claimed as deductions by Ben J. Seger and Richard Greenberg on their personal income tax returns.

FINDINGS OF FACT

1. Petitioner Metropolitan Art Associates ("the partnership") is a partnership equally owned by petitioners Richard Greenberg and Ben J. Seger. The partnership filed New York State partnership returns for 1977 and 1978. On each return, income was allocated between New York and Florida. Petitioner Ben J. Seger and his wife, Dorothy, filed New York State income tax resident returns for 1977 and 1978. Petitioner Richard Greenberg and his wife, Karen, also filed New York State income tax resident returns for 1977 and 1978.

2. On October 30, 1981, the Audit Division issued a Notice of Deficiency against the partnership in the amount of \$1,650.27 plus penalty of \$211.84 and interest of \$444.26 for a total due of \$2,306.37 for the years 1977 and 1978. A Statement of Unincorporated Business Tax Audit Changes issued by the Audit Division explained that the deficiency was based on a determination that the partnership had no regular place of business outside the State of New York and, therefore, 100 percent of net income was to be allocated to New York State.

3. On January 5, 1980, the partnership, by Ben J. Seger, had executed a consent fixing the period of limitation upon assessment of personal income and unincorporated business taxes for the year 1977 at any time on or before April 15, 1982.

4. On October 30, 1981, the Audit Division issued a Notice of Deficiency against petitioner Ben J. Seger in the amount of \$1,417.08 plus interest of \$366.26 for a total due of \$1,783.34 for the years 1977 and 1978. On the same date, the Audit Division issued a Notice of Deficiency against petitioner Richard Greenberg in the amount of \$2,173.74 plus interest of \$577.74 for a total due of \$2,751.48 for the years 1977 and 1978. Statements of personal income tax audit changes issued by the Audit Division explained that each

deficiency was based on disallowances of salary expenses paid by each petitioner to his wife, expenses of offices in each petitioner's home, and sales taxes as claimed.

5. The partnership sold graphic art to retail art galleries, wholesalers, interior decorators and designers. The partnership had an office located in Lake Success, New York. Ben J. Seger owned a three bedroom condominium in Lake Worth, Florida. Mr. Seger had converted one of the bedrooms into an office which he rented to the partnership for \$3,000.00 per year. During the peak selling season in Florida, which lasted from September through April of each year, Mr. Seger and his wife would spend approximately two weeks per month working out of the office in Florida. Mr. Greenberg would also occasionally work in Florida. The converted bedroom in Florida contained a large closet in which petitioners would store their inventory. Petitioners did business with customers over the phone and customers would visit the premises. The customers would purchase the items of inventory on hand or, if they asked for something not available, petitioners would have it shipped from New York. The partnership dealt with approximately 160 Florida art galleries out of its Florida office.

6. The partnership's Florida address did not appear on partnership invoices, stationery or printed business cards or in any Florida telephone directories. Petitioners, however, either typed in the Florida address on their printed business cards or attached printed stickers with the Florida address to the business cards for use while in Florida. A certificate of doing business was not required for a partnership in Florida and the partnership was not subject to tax in Florida.

7. The partnership employed Richard Greenberg's father Benjamin Greenberg as a commissioned salesman in Florida to handle the Florida accounts when one

of the partners was not available. In 1978, the partnership paid Benjamin Greenberg \$1,325.00 in commissions. The partnership also engaged the services of commissioned sales personnel in New England and the Midwest. These salespersons operated out of offices in their homes.

8. The Audit Division argued alternatively that, even if the partnership was allowed to allocate within and without New York, the allocation percentages were calculated erroneously on the partnership return. An examination of the New York State partnership returns indicated that petitioners failed to multiply the real property rental factor by eight for both 1977 and 1978. For 1978, petitioners included commissions paid to independent sales representatives in the wages paid to employees factor. There is no indication in the record that petitioner erroneously included in gross sales without New York State, sales negotiated or consummated and sent from petitioner's office situated within this State.

9. During the years in issue, petitioners Ben J. Seger and Richard Greenberg employed their wives to work for the partnership. Ben J. Seger paid his wife \$100.00 per week plus expenses and Richard Greenberg paid his wife \$150.00 per week. The written partnership agreement entered into by petitioners on January 1, 1977 stated, in part, that:

"It is anticipated that during the course of promoting the partnership business each of the partners will incur expenses in connection with the use of his personal Long Island residence, payments to his spouse for related services, home and other entertainment, travel and similar activities.

Each partner is expected to bear these expenses without reimbursement from the partnership."



10. Dorothy Seger handled paperwork and did typing for the partnership. She also accompanied her husband, Ben J. Seger, on all sales trips. On such trips, she helped transport the artwork and set up the exhibits for art shows. During the height of the Florida season she often worked eight to ten hours, seven days a week setting up art exhibits in the various towns where the partnership showed its artwork. Karen Greenberg, petitioner Richard Greenberg's wife, worked primarily at the Lake Success, New York office. She set up the office filing system, wrote letters to customers and trade magazines, made telephone calls to art galleries and performed various other office duties. She worked eight hours a day at the office and occasionally helped entertain customers at home during the evening. Mrs. Seger was paid once a week, usually by check. Mrs. Greenberg was paid biweekly, usually in cash. Neither Mr. Seger nor Mr. Greenberg withheld any taxes from their wives' salaries because they were apparently under the misimpression that wages paid to a spouse required no withholding.

11. Ben J. Seger and Richard Greenberg each deducted the salaries paid to their wives as business expenses. Dorothy Seger and Karen Greenberg included their salaries in their respective reported incomes for the years in issue. The Audit Division disallowed the deduction for petitioners and eliminated the amount as an item of income for their wives.

12. Both Mr. Seger and Mr. Greenberg maintained offices in their homes which they used for storing inventory, phoning customers and occasionally meeting customers. Mr. Greenberg also utilized approximately 75 percent of his basement for storage of inventory. Mr. Seger took a \$600.00 deduction for his home office for each year in issue. Mr. Greenberg took a \$600.00 deduction in 1977 and a \$1,200.00 deduction in 1978 for his home office. Petitioners did

not show the proper allocation of expenses incurred based on the size of the office space to the total floor area, nor was there any showing of an accurate dollar amount of the expenses incurred for the offices. Mr. Seger explained that the \$600.00 deduction was "an arbitrary amount that we felt was fair." Mr. Greenberg did not explain how he determined the \$1,200.00 amount deducted for 1978.

13. Petitioner Ben J. Seger took a deduction for sales taxes paid of \$1,895.00 in 1977 and \$1,837.00 in 1978. The Audit Division reduced these deductions to \$438.00 and \$599.00 respectively for lack of substantiation. Mr. Seger submitted checks and invoices substantiating \$692.60 in sales taxes paid in 1978. For 1977, he was unable to substantiate any sales taxes paid in excess of the Audit Division allowance.

14. Petitioner Richard Greenberg took a deduction for sales taxes paid of \$1,235.00 in 1978. The Audit Division reduced this amount to \$751.16 for lack of substantiation. Mr. Greenberg was unable to substantiate any sales taxes paid in excess of the Audit Division allowance.

#### CONCLUSIONS OF LAW

A. That section 707(a) of the Tax Law provides:

"If an unincorporated business is carried on both within and without this state, as determined under regulations of the tax commission, there shall be allocated to this state a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions. If the unincorporated business has no regular place of business outside this state, all of such excess shall be allocated to this state."

B. That 20 NYCRR 207.2(a) provides, in part, that:

"In general, an unincorporated business is carried on at any place either within or without New York State where the unincorporated business entity has a regular place of business. The occasional consummation of an isolated transaction in or at a place where no regular place of

business is maintained does not constitute the carrying on of business at such place. A regular place of business is any bona fide office, factory warehouse or other place which is systematically and regularly used by the unincorporated business entity in carrying on its business."

Subdivision (c) of the aforesaid regulation provides that:

"The foregoing provisions of this section are not exclusive in determining whether an unincorporated business has a regular place of business outside New York State or in determining whether the business is carried on both within and without New York. Where any question on these points exists, consideration should be given to all of the facts pertaining to the conduct and operation of the business including

- (1) the nature of the business,
- (2) the type of and location of each place of business used in the activity,
- (3) the nature of the activity engaged in at each place of business and
- (4) The regularity, continuity and permanency of the activity at each location."

C. That inasmuch as the partnership maintained office space in Florida devoted exclusively to the business, conducted extensive sales activities out of said office on a regular basis for eight months out of the year, met with customers at the office and stored inventory at that location, it had a regular place of business without New York State within the meaning and intent of section 707(a) of the Tax Law and 20 NYCRR 207.2.

D. That section 707(c) of the Tax Law provides that if unincorporated business income is not allocated in accordance with the taxpayer's books, the portion allocable to this State is allocated by a three-factor formula comprised of a property factor, a payroll factor and a gross income factor. The property factor includes real property rented to the unincorporated business and 20 NYCRR 207.6(b)(1) provides, in part, that:

"In order to avoid unnecessary hardship on taxpayers and for ease of administration, the fair market value of real property both within and without New York which is rented

to the taxpayer is determined by multiplying the gross rents payable during the taxable year by eight."

The payroll factor is computed by dividing total wages paid to employees in connection with the business carried on within this State by the total of all wages paid to employees in connection with the business carried on both within and without this State.

The gross income percentage is computed:

"by dividing (i) the gross sales or charges for services performed by or through an agency located within this State, by (ii) the total of all gross sales or charges for services performed within and without this State. The sales or charges to be allocated to this State shall include all sales negotiated or consummated, and charges for services performed, by an employee, agent, agency or independent contractor chiefly situated at, connected by contract or otherwise with, or sent out from offices of the unincorporated business, or other agencies situated within this State." [20 NYCRR 207.4(a)(3)]

E. That the partnership failed to properly compute its allocation formula according to the formula provided for in section 707(c) of the Tax Law. The partnership did not multiply its gross rents payable by eight as required by 20 NYCRR 207.6(b)(1). Moreover, there was no showing that the commissions paid to out-of-state salespersons were other than payments to independent contractors rather than wages to employees. Therefore, the allocation formula is to be recomputed for each year by multiplying the rental amounts by eight and excluding the payroll factors. Inasmuch as the partnership had a regular place of business outside New York, it was entitled to allocate the sales made out of its Florida office; therefore, the gross income percentage was properly computed.

F. That "the general rule is that a partner may not deduct partnership expenses on his individual return (citations omitted). There is, however, an exception to this rule to the effect that where, under a partnership agreement, a partner has been required to pay certain partnership expenses out of his own

directed to modify the Notice of Deficiency issued October 30, 1981 accordingly; and that, except as so modified the petition is in all other respects denied.

J. That the petition of Ben J. Seger is granted to the extent indicated in Conclusions of Law "F" and "H"; that the Audit Division is directed to modify the Notice of Deficiency issued October 30, 1981 accordingly; and that, except as so granted the petition is in all other respects denied.

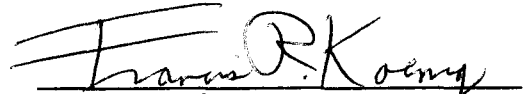
K. That the petition of Richard Greenberg is granted to the extent indicated in Conclusion of Law "F"; that the Audit Division is directed to modify the Notice of Deficiency issued October 30, 1981 accordingly; and that, except as so granted the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

CLAIM CHECK

TV

S

St

TA

AL

943921

RK

on

AU

☐ HOLD

DATE

27

1ST NOTICE

**FINAL NOTICE**

2ND NOTICE

RETURN

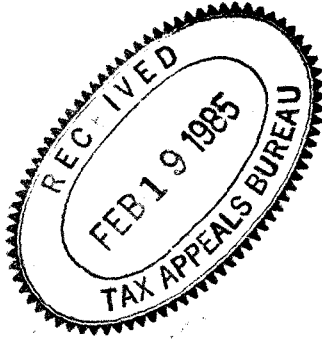
Detached from  
PS Form 3849-A  
Oct. 1980

**CERTIFIED**

**P 470 316 450**

**MAIL**

Richard Greenberg  
5 Briar Court  
Westhill, NY ~~1447~~



Under ☒ X

After

Examination

for such

No such office in state

Do not return to this address

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

January 18, 1985

Richard Greenberg  
5 Briar Court  
Westhill, NY 11747

Dear Mr. Greenberg:

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 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  
Daniel H. Link  
12 Talbot Dr.  
Lake Success, NY 11020  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition  
of  
METROPOLITAN ART ASSOCIATES  
for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Years 1977  
and 1978.

---

In the Matter of the Petition  
of  
BEN J. SEGER  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article  
22 of the Tax Law for the Years 1977 and 1978.

---

In the Matter of the Petition  
of  
RICHARD GREENBERG  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article  
22 of the Tax Law for the Years 1977 and 1978.

---

Petitioner, Metropolitan Art Associates, 346 New York Avenue, Huntington,  
New York 11743 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 1977 and 1978 (File No. 37825).

Petitioners, Ben J. Seger, 4845 Cherry Laurel Lane, Delray Beach, Florida  
33445 and Richard Greenberg, 5 Briar Court, Westhill, New York 11747 filed  
petitions for redetermination of a deficiency or for refund of personal income

DECISION



tax under Article 22 of the Tax Law for the years 1977 and 1978 (File Nos. 37826 and 37827).

A formal hearing was commenced before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 26, 1984 at 1:15 P.M. and continued to conclusion before Daniel J. Ranalli, Hearing Officer, on July 25, 1984 at 1:00 P.M., with additional information to be submitted by September 25, 1984. Petitioners appeared by Daniel H. Link, C.P.A. The Audit Division appeared by John P. Dugan, Esq. James Della Porta, Esq., of counsel on January 26, 1984 and Thomas Sacca, Esq., of counsel on July 25, 1984).

#### ISSUES

I. Whether petitioner Metropolitan Art Associates had a regular place of business outside New York State.

II. If so, whether petitioner Metropolitan Art Associates accurately computed its allocation according to the formula provided for in section 707(c) of the Tax Law.

III. Whether petitioners Ben J. Seger and Richard Greenberg were entitled to deductions on their personal income tax returns for wages paid to their wives.

IV. Whether petitioners Ben J. Seger and Richard Greenberg were entitled to deductions on their personal income tax returns for offices maintained in their homes.

V. Whether the Audit Division properly disallowed a portion of the sales taxes claimed as deductions by Ben J. Seger and Richard Greenberg on their personal income tax returns.

FINDINGS OF FACT

1. Petitioner Metropolitan Art Associates ("the partnership") is a partnership equally owned by petitioners Richard Greenberg and Ben J. Seger. The partnership filed New York State partnership returns for 1977 and 1978. On each return, income was allocated between New York and Florida. Petitioner Ben J. Seger and his wife, Dorothy, filed New York State income tax resident returns for 1977 and 1978. Petitioner Richard Greenberg and his wife, Karen, also filed New York State income tax resident returns for 1977 and 1978.

2. On October 30, 1981, the Audit Division issued a Notice of Deficiency against the partnership in the amount of \$1,650.27 plus penalty of \$211.84 and interest of \$444.26 for a total due of \$2,306.37 for the years 1977 and 1978. A Statement of Unincorporated Business Tax Audit Changes issued by the Audit Division explained that the deficiency was based on a determination that the partnership had no regular place of business outside the State of New York and, therefore, 100 percent of net income was to be allocated to New York State.

3. On January 5, 1980, the partnership, by Ben J. Seger, had executed a consent fixing the period of limitation upon assessment of personal income and unincorporated business taxes for the year 1977 at any time on or before April 15, 1982.

4. On October 30, 1981, the Audit Division issued a Notice of Deficiency against petitioner Ben J. Seger in the amount of \$1,417.08 plus interest of \$366.26 for a total due of \$1,783.34 for the years 1977 and 1978. On the same date, the Audit Division issued a Notice of Deficiency against petitioner Richard Greenberg in the amount of \$2,173.74 plus interest of \$577.74 for a total due of \$2,751.48 for the years 1977 and 1978. Statements of personal income tax audit changes issued by the Audit Division explained that each

deficiency was based on disallowances of salary expenses paid by each petitioner to his wife, expenses of offices in each petitioner's home, and sales taxes as claimed.

5. The partnership sold graphic art to retail art galleries, wholesalers, interior decorators and designers. The partnership had an office located in Lake Success, New York. Ben J. Seger owned a three bedroom condominium in Lake Worth, Florida. Mr. Seger had converted one of the bedrooms into an office which he rented to the partnership for \$3,000.00 per year. During the peak selling season in Florida, which lasted from September through April of each year, Mr. Seger and his wife would spend approximately two weeks per month working out of the office in Florida. Mr. Greenberg would also occasionally work in Florida. The converted bedroom in Florida contained a large closet in which petitioners would store their inventory. Petitioners did business with customers over the phone and customers would visit the premises. The customers would purchase the items of inventory on hand or, if they asked for something not available, petitioners would have it shipped from New York. The partnership dealt with approximately 160 Florida art galleries out of its Florida office.

6. The partnership's Florida address did not appear on partnership invoices, stationery or printed business cards or in any Florida telephone directories. Petitioners, however, either typed in the Florida address on their printed business cards or attached printed stickers with the Florida address to the business cards for use while in Florida. A certificate of doing business was not required for a partnership in Florida and the partnership was not subject to tax in Florida.

7. The partnership employed Richard Greenberg's father Benjamin Greenberg as a commissioned salesman in Florida to handle the Florida accounts when one

of the partners was not available. In 1978, the partnership paid Benjamin Greenberg \$1,325.00 in commissions. The partnership also engaged the services of commissioned sales personnel in New England and the Midwest. These salespersons operated out of offices in their homes.

8. The Audit Division argued alternatively that, even if the partnership was allowed to allocate within and without New York, the allocation percentages were calculated erroneously on the partnership return. An examination of the New York State partnership returns indicated that petitioners failed to multiply the real property rental factor by eight for both 1977 and 1978. For 1978, petitioners included commissions paid to independent sales representatives in the wages paid to employees factor. There is no indication in the record that petitioner erroneously included in gross sales without New York State, sales negotiated or consummated and sent from petitioner's office situated within this State.

9. During the years in issue, petitioners Ben J. Seger and Richard Greenberg employed their wives to work for the partnership. Ben J. Seger paid his wife \$100.00 per week plus expenses and Richard Greenberg paid his wife \$150.00 per week. The written partnership agreement entered into by petitioners on January 1, 1977 stated, in part, that:

"It is anticipated that during the course of promoting the partnership business each of the partners will incur expenses in connection with the use of his personal Long Island residence, payments to his spouse for related services, home and other entertainment, travel and similar activities.

Each partner is expected to bear these expenses without reimbursement from the partnership."

10. Dorothy Seger handled paperwork and did typing for the partnership. She also accompanied her husband, Ben J. Seger, on all sales trips. On such trips, she helped transport the artwork and set up the exhibits for art shows. During the height of the Florida season she often worked eight to ten hours, seven days a week setting up art exhibits in the various towns where the partnership showed its artwork. Karen Greenberg, petitioner Richard Greenberg's wife, worked primarily at the Lake Success, New York office. She set up the office filing system, wrote letters to customers and trade magazines, made telephone calls to art galleries and performed various other office duties. She worked eight hours a day at the office and occasionally helped entertain customers at home during the evening. Mrs. Seger was paid once a week, usually by check. Mrs. Greenberg was paid biweekly, usually in cash. Neither Mr. Seger nor Mr. Greenberg withheld any taxes from their wives' salaries because they were apparently under the misimpression that wages paid to a spouse required no withholding.

11. Ben J. Seger and Richard Greenberg each deducted the salaries paid to their wives as business expenses. Dorothy Seger and Karen Greenberg included their salaries in their respective reported incomes for the years in issue. The Audit Division disallowed the deduction for petitioners and eliminated the amount as an item of income for their wives.

12. Both Mr. Seger and Mr. Greenberg maintained offices in their homes which they used for storing inventory, phoning customers and occasionally meeting customers. Mr. Greenberg also utilized approximately 75 percent of his basement for storage of inventory. Mr. Seger took a \$600.00 deduction for his home office for each year in issue. Mr. Greenberg took a \$600.00 deduction in 1977 and a \$1,200.00 deduction in 1978 for his home office. Petitioners did

not show the proper allocation of expenses incurred based on the size of the office space to the total floor area, nor was there any showing of an accurate dollar amount of the expenses incurred for the offices. Mr. Seger explained that the \$600.00 deduction was "an arbitrary amount that we felt was fair." Mr. Greenberg did not explain how he determined the \$1,200.00 amount deducted for 1978.

13. Petitioner Ben J. Seger took a deduction for sales taxes paid of \$1,895.00 in 1977 and \$1,837.00 in 1978. The Audit Division reduced these deductions to \$438.00 and \$599.00 respectively for lack of substantiation. Mr. Seger submitted checks and invoices substantiating \$692.60 in sales taxes paid in 1978. For 1977, he was unable to substantiate any sales taxes paid in excess of the Audit Division allowance.

14. Petitioner Richard Greenberg took a deduction for sales taxes paid of \$1,235.00 in 1978. The Audit Division reduced this amount to \$751.16 for lack of substantiation. Mr. Greenberg was unable to substantiate any sales taxes paid in excess of the Audit Division allowance.

#### CONCLUSIONS OF LAW

A. That section 707(a) of the Tax Law provides:

"If an unincorporated business is carried on both within and without this state, as determined under regulations of the tax commission, there shall be allocated to this state a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions. If the unincorporated business has no regular place of business outside this state, all of such excess shall be allocated to this state."

B. That 20 NYCRR 207.2(a) provides, in part, that:

"In general, an unincorporated business is carried on at any place either within or without New York State where the unincorporated business entity has a regular place of business. The occasional consummation of an isolated transaction in or at a place where no regular place of

business is maintained does not constitute the carrying on of business at such place. A regular place of business is any bona fide office, factory warehouse or other place which is systematically and regularly used by the unincorporated business entity in carrying on its business."

Subdivision (c) of the aforesaid regulation provides that:

"The foregoing provisions of this section are not exclusive in determining whether an unincorporated business has a regular place of business outside New York State or in determining whether the business is carried on both within and without New York. Where any question on these points exists, consideration should be given to all of the facts pertaining to the conduct and operation of the business including

- (1) the nature of the business,
- (2) the type of and location of each place of business used in the activity,
- (3) the nature of the activity engaged in at each place of business and
- (4) The regularity, continuity and permanency of the activity at each location."

C. That inasmuch as the partnership maintained office space in Florida devoted exclusively to the business, conducted extensive sales activities out of said office on a regular basis for eight months out of the year, met with customers at the office and stored inventory at that location, it had a regular place of business without New York State within the meaning and intent of section 707(a) of the Tax Law and 20 NYCRR 207.2.

D. That section 707(c) of the Tax Law provides that if unincorporated business income is not allocated in accordance with the taxpayer's books, the portion allocable to this State is allocated by a three-factor formula comprised of a property factor, a payroll factor and a gross income factor. The property factor includes real property rented to the unincorporated business and 20 NYCRR 207.6(b)(1) provides, in part, that:

"In order to avoid unnecessary hardship on taxpayers and for ease of administration, the fair market value of real property both within and without New York which is rented

to the taxpayer is determined by multiplying the gross rents payable during the taxable year by eight."

The payroll factor is computed by dividing total wages paid to employees in connection with the business carried on within this State by the total of all wages paid to employees in connection with the business carried on both within and without this State.

The gross income percentage is computed:

"by dividing (i) the gross sales or charges for services performed by or through an agency located within this State, by (ii) the total of all gross sales or charges for services performed within and without this State. The sales or charges to be allocated to this State shall include all sales negotiated or consummated, and charges for services performed, by an employee, agent, agency or independent contractor chiefly situated at, connected by contract or otherwise with, or sent out from offices of the unincorporated business, or other agencies situated within this State." [20 NYCRR 207.4(a)(3)]

E. That the partnership failed to properly compute its allocation formula according to the formula provided for in section 707(c) of the Tax Law. The partnership did not multiply its gross rents payable by eight as required by 20 NYCRR 207.6(b)(1). Moreover, there was no showing that the commissions paid to out-of-state salespersons were other than payments to independent contractors rather than wages to employees. Therefore, the allocation formula is to be recomputed for each year by multiplying the rental amounts by eight and excluding the payroll factors. Inasmuch as the partnership had a regular place of business outside New York, it was entitled to allocate the sales made out of its Florida office; therefore, the gross income percentage was properly computed.

F. That "the general rule is that a partner may not deduct partnership expenses on his individual return (citations omitted). There is, however, an exception to this rule to the effect that where, under a partnership agreement, a partner has been required to pay certain partnership expenses out of his own



funds, he is entitled to deduct the amount thereof from his individual gross income "(Klein v. Commissioner, 25 T.C. 1045). The written partnership agreement discussed in Finding of Fact "9" required the partners to pay, inter alia, the salaries of their wives and the expenses incurred in maintaining offices in their homes. Therefore, the salaries paid to the partners' wives were properly taken as a deduction by Mr. Seger and Mr. Greenberg and properly included in the income of their wives.

G. That with respect to the deduction for the offices maintained in their homes, the burden is on petitioners "not only to show that [the Audit Division] is wrong, but also to produce evidence from which another and proper determination can be made" (Sarzen v. Commissioner, 37 T.C.M. 1853-4). Although petitioners showed that customers occasionally met with them at their homes, they failed to show a proper allocation of the expenses incurred based on the size of the office to total floor area and, moreover, there was a total absence of proof as to the dollar amount of the expenses incurred (see Barnes v. Commissioner, 44 T.C.M. 656). Mr. Seger admitted that the amount arrived at was "arbitrary". The deduction for the offices maintained in the homes of petitioners Ben J. Seger and Richard Greenberg must, therefore, be disallowed.

H. That with respect to the deduction for sales taxes paid during the years in issue, petitioner Ben J. Seger has proven that he paid \$692.60 in such taxes during 1978. Other than such amount neither petitioner was able to substantiate any sales taxes paid in excess of the amount allowed by the Audit Division on audit.

I. That the petition of Metropolitan Art Associates is granted to the extent indicated in Conclusions of Law "C" and "E"; that the Audit Division is

directed to modify the Notice of Deficiency issued October 30, 1981 accordingly; and that, except as so modified the petition is in all other respects denied.

J. That the petition of Ben J. Seger is granted to the extent indicated in Conclusions of Law "F" and "H"; that the Audit Division is directed to modify the Notice of Deficiency issued October 30, 1981 accordingly; and that, except as so granted the petition is in all other respects denied.

K. That the petition of Richard Greenberg is granted to the extent indicated in Conclusion of Law "F"; that the Audit Division is directed to modify the Notice of Deficiency issued October 30, 1981 accordingly; and that, except as so granted the petition is in all other respects denied.

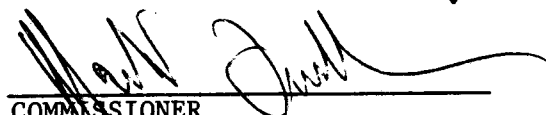
DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER