

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

UNITED STATES BLIND STITCH MACHINE CORP.

DECISION

for Redetermination of a Deficiency or for
Refund of Franchise Tax on Business Corporations :
under Article 9-A of the Tax Law for the Years
1974 through 1977.

Petitioner, United States Blind Stitch Machine Corp., Express Street and Skyline Drive, Plainview, New York 11803, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the years 1974 through 1977 (File No. 30516).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 10, 1984 at 11:30 A.M., with all briefs to be submitted by January 30, 1985. Petitioner appeared by Allen Michelson, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined that petitioner's business allocation percentage was one hundred percent, on the basis that petitioner did not maintain a regular place of business outside of New York for the years 1974 through 1977.

FINDINGS OF FACT

1. Petitioner, United States Blind Stitch Machine Corp. ("U.S. Blind Stitch"), filed its franchise tax reports for the years 1974 through 1977.

calculating and paying its tax as a percentage of entire net income. Petitioner thereafter filed timely claims for refund of franchise tax for these years, based upon a claimed regular place of business outside this state and correspondingly, an allocation of its entire net income within and without New York. Petitioner computed its business allocation percentage for 1974 and 1975 as 71.82360 and 72.48427, respectively.

On May 15, 1978, the Audit Division granted petitioner's claims in their entirety, refunding \$11,589.00 for 1974 and \$19,338.00 for 1975. Subsequently, on May 9, 1980, the Audit Division issued to petitioner two notices of deficiency for the same years and in identical amounts (plus interest) to recover the allegedly erroneous refunds, pursuant to Tax Law section 1083(c)(5).

U.S. Blind Stitch filed its franchise tax reports for the taxable years 1976 and 1977, allocating its entire net income according to a business allocation percentage of 58.9904 and 58.6314, respectively. On May 9, 1980, the Audit Division issued to petitioner two notices of deficiency, disallowing the allocations and asserting franchise tax due for 1976 and 1977 in the respective amounts of \$35,005.00 and \$49,104.03, plus interest. (With regard to 1977, petitioner also claimed, and the Audit Division allowed, a refund in the sum of \$773.00, plus interest, based upon the federal jobs tax credit. This refund is not in dispute and will not hereafter be addressed.)

2. Petitioner, a manufacturer of industrial sewing machines, was organized under the laws of New York and began doing business in this state on January 1, 1937. Petitioner's assembly plant and administrative offices are situated in Plainview, New York; petitioner has sales and factory representatives stationed throughout the United States, Canada and Puerto Rico. For New York franchise tax purposes, the locations which petitioner claims constituted a "regular place

of business outside New York were: in 1974, an office in the apartment of its factory representative, Mr. Richard Faccioli, at 962 Hamilton Street, Allentown, Pennsylvania; and in 1975, 1976 and 1977, an office and a showroom in the one-family residence of Mr. Faccioli, at 77 Orchid Road, Macungie, Pennsylvania.

3. As petitioner's factory representative in Pennsylvania, Mr. Faccioli was responsible for unpacking and installing the industrial sewing machines at customers' premises, instructing customers' plant mechanics regarding routine maintenance of the machines and the machine operators regarding proper threading and use, and providing warranty and other repair and maintenance services.

4. One room on the main floor of Mr. Faccioli's residence was an office with desks, a filing cabinet, a parts cabinet and a telephone extension. Mr. Faccioli maintained in this office all sales and service records, an inventory of parts commonly required in servicing the sewing machines, and catalogs. The total inventory of spare parts and tools stored at his residence and incorporated in a kit which he carried with him on service visits was valued somewhere between \$5,000.00 and \$7,000.00. The telephone in the office was an extension of Mr. Faccioli's residential telephone; the number was listed in the telephone directory to Mr. Faccioli, and not to U.S. Blind Stitch. (During 1974, the office in Mr. Faccioli's apartment was similarly furnished and equipped.) During 1976 and 1977, petitioner contracted with a telephone answering service to record messages for **Mr.** Faccioli while he was visiting customers.

On the lower floor of the house was a showroom where petitioner had installed four blind stitch machines in order that Mr. Faccioli could demonstrate their operation to customers. This arrangement enabled Mr. Faccioli to convey

to a customer an accurate picture of the machine's operation, e.g., by sewing a bundle of the customer's fabric.

5. Mr. Faccioli's business card showed the principal corporate address in Plainview, New York and also his address and telephone number in Pennsylvania. The directory of the American Apparel Manufacturers Association, Inc. for each of the years at issue contained a listing for U.S. Blind Stitch in Plainview and showed beneath the heading "Regional and Area Representatives" Mr. Faccioli's name and his residential address in Pennsylvania; these directories are typically consulted by customers, potential customers and other machinery manufacturers.

6. At the hearing, counsel for the Audit Division conceded that Mr. Faccioli was an employee, as opposed to an independent contractor, of U.S. Blind Stitch. For each of the years under consideration, U.S. Blind Stitch issued to Mr. Faccioli wage and tax statements (Form W-2), reflecting wages, tips and other compensation and Pennsylvania income tax withheld therefrom as follows:

<u>YEAR</u>	<u>WAGES, TIPS AND OTHER COMPENSATION</u>	<u>STATE TAX WITHHELD</u>
1974	\$18,899.46	\$237.01
1975	22,804.24	455.40
1976	23,557.61	471.13
1977	25,236.81	504.72

Mr. Faccioli was a member of petitioner's health insurance plan and commencing in January, 1975, of the profit-sharing plan. Petitioner provided him use of an automobile registered in the Commonwealth of Pennsylvania. Petitioner also reimbursed Mr. Faccioli for expenses he incurred while travelling.

7. Mr. Faccioli did not execute with U.S. Blind Stitch an employment contract or any contract respecting the corporation's use of a portion of his residence. To compensate him for such use, petitioner offered him a flat fee to be paid periodically on a high rate, for his use of the residence.

Mr. Faccioli elected the increased commission rate, and received pursuant to this arrangement approximately \$3,000.00 annually. He also deducted a small, undisclosed amount for home-office use on his income tax returns.

8. Approximately 500 of petitioner's customers are located in Pennsylvania, particularly in the vicinity of Allentown. In 1974, in an effort to improve customer service and to enhance its image, petitioner established a Pennsylvania office, which at that time consisted of one room in Mr. Faccioli's apartment. Later, as above-described, petitioner set up an office and showroom in Mr. Faccioli's home. Finally, sometime in 1978, when Mr. Faccioli advised petitioner of his plans to retire, U.S. Blind Stitch established an office and showroom in a commercial building.

9. For each of the years 1974 through 1977, U.S. Blind Stitch filed with the Commonwealth of Pennsylvania franchise/corporate net income reports. The percentages, and the factors comprising the percentages, by which petitioner allocated its income to Pennsylvania are shown below.

	<u>PROPERTY FACTOR*</u>	<u>PAYROLL FACTOR*</u>	<u>SALES FACTOR*</u>	<u>APPORTIONMENT PERCENTAGE</u>
74	3,101/4,196,564	36,138/1,230,770	627,216/5,932,327	4.5276
75	9,880/4,451,744	34,196/976,372	660,465/5,660,238	5.1309
76	153/3,511,360	23,558/1,122,739	759,752/7,476,067	4.0884
77	3,820/5,151,025	25,237/1,459,716	1,044,030/8,032,844	4.9333

* In dollars

Petitioner's outside accounting firm was unaware, until after 1977, that inventory and sewing machines were located in Mr. Faccioli's home; as a result the value of such equipment was consistently omitted from the numerator of the property factor.

CONCLUSIONS OF LAW

A. That during the years at issue, Tax Law section 210.3(a)(4) required that any corporation, which did not maintain a regular place of business outside New York, allocate all its business income and capital to this state; the regulations promulgated under said provision and effective for the period under consideration defined a regular place of business, in relevant part, as "any ~~bona fide~~ office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business." (Ruling of State Tax Comm., March 14, 1962, section 4.11[b]; 20 NYCRR 4-2.2[b].) In determining whether a corporation has a regular place of business outside New York, the factors usually considered are whether the corporation has full time employees, maintains an office and is licensed to do business in the other state and whether the corporation pays taxes to the other state. (Matter of Psychological Corp. v. Tax Comm., 99 A.D.2d 905 [3d Dept. 1984].)

B. That petitioner satisfied each of the factors above set forth. Its office in Pennsylvania consequently constituted a regular place of business outside this state, entitling it to allocate its business income and capital within and without New York.

C. That the petition of United States Blind Stitch Machine Corp. is granted, and the notices of deficiency issued against it on May 9, 1980 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMPTROLLER