

STATE OF NEW YORK

STATE **TAX** COMMISSION

In the Matter of the Petition

of

WILLIAM W. KEHRLI **AND** DOROTHY KEHRLI

DECISION

for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article **23** of the Tax Law for the Years 1979
and 1980.

Petitioners, William W. Kehrli and Dorothy Kehrli, 617 Herkimer Road,
Utica, New York 13502, 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 1979 and 1980 (File No. 49771).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the
offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on
March **31**, 1986 at 1:15 P.M. Petitioners appeared by Robert J. Hahn, Esq. The
Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of
counsel).

ISSUES

I. Whether petitioners timely filed a petition for redetermination of **a**
deficiency of unincorporated business tax under Article 23 of the Tax Law for
the year 1980.

II. Whether petitioner William W. Kehrli's activities as a sales manager
for Suburban Foods Corporation constituted the carrying on of an unincorporated
business, thereby subjecting the income earned therefrom to unincorporated
business tax pursuant to Article **23** of the Tax Law.

111. Whether the Audit Division's determination that petitioner's income

violative of his rights under the Fourteenth Amendment of the Constitution of the United States.

FINDINGS OF FACT

1. For the year 1979, William W. Kehrli and Dorothy Kehrli filed a New York State Income Tax Resident Return under the filing status "married filing joint return" (Dorothy Kehrli is a party to this proceeding solely as a result of filing such joint return with her husband; therefore, the term "petitioner" shall hereinafter refer only to William W. Kehrli). Petitioner did not file a New York State unincorporated business tax return for 1979.

2. On May 13, 1983, the Audit Division issued to William W. Kehrli and Dorothy Kehrli a Statement of Audit Changes for the year 1979 which contained the following explanation:

"Under authorization of Federal Law (Section 6103(b) of the Internal Revenue Code), we have received notification of Federal audit changes and the following deficiency is based on failure to report such changes.

The income from your activities as a salesman is subject to the unincorporated business tax.

New York tax increase is based on Federal adjustment to business income.

PERSONAL INCOME TAX

New York State taxable income reported	\$13,452 .00	
Adjustment	<u>5,678 .00</u>	
Corrected amount	\$19,130.00	
Tax on above	\$ 1,295.60	
Personal income tax previously stated	<u>686.00</u>	
ADDITIONAL PERSONAL INCOME TAX DUE		\$ 609.60

UNINCORPORATED BUSINESS TAX

Net income before salary credit	\$18,542.00
Adjustment	<u>5,678 .00</u>
Corrected income	\$24,220.00
Less: Allowance for services	<u>4,844.00</u>
Balance	\$19,376.00
Less: Exemptions	5 000 00

Tax on above	\$	646.92	
Less: Credit		<u>-0-</u>	
Unincorporated business tax due	\$	646.92	
Unincorporated business tax previously stated		<u>-0-</u>	
ADDITIONAL UNINCORPORATED BUSINESS TAX DUE			<u>646.92</u>
TOTAL ADDITIONAL TAX DUE			<u>\$1,256.52</u>
	Interest	<u>430.83</u>	
	TOTAL DUE		<u>\$1,687.35"</u>

Petitioner does not contest the amount of the deficiency asserted by the Audit Division to be due as a result of his failure to report Federal audit changes, but contests only that portion of the deficiency which results from the Audit Division's determination that his income from his activities as a salesman is subject to the unincorporated business tax.

3. On November 18, 1983, the Audit Division issued to William W. Kehrli and Dorothy Kehrli a Notice of Deficiency asserting additional tax due in the amount of \$1,256.52, plus interest of \$487.69, less a credit of \$100.00, for a total amount due of \$1,644.21.

4. On January 17, 1984, the Audit Division issued to William W. Kehrli and Dorothy Kehrli a Statement of Audit Changes for the year 1980 which explained that his income from his activities as a self-employed person was subject to unincorporated business tax and, therefore, asserted additional tax due in the amount of \$149.00, plus interest of \$49.26, for a total amount due of \$198.26. By a petition dated February 3, 1984 and received by the Tax Appeals Bureau on February 6, 1984, petitioner timely sought redetermination of the tax asserted by the Audit Division to be due pursuant to the Notice of Deficiency issued November 18, 1983 for the year 1979. In said petition, petitioner also sought redetermination of the tax asserted to be due for the year 1980. As of the date of the filing of his petition, however, the Audit Division had not issued to petitioner a Notice of Deficiency for the year 1980. Said Notice of Deficiency

asserting tax due in the amount of \$149.00, plus interest of \$53.34, for a total amount due of \$202.34 for the year 1980, was subsequently issued to petitioner on April 5, 1984. Petitioner's representative was advised by a letter from the Tax Appeals Bureau, dated February 16, 1984, that his petition for the year 1980 was premature since a Notice of Deficiency for said year had not yet been issued. The letter further advised that, if a Notice of Deficiency for 1980 was subsequently issued, a petition for said year would have to be filed.

5. For the period at issue, petitioner was employed as a sales manager for Suburban Foods Corporation (hereinafter "Suburban") whose headquarters was located in Syracuse, New York. Suburban was in the business of selling food, food freezers and microwave ovens. Pursuant to a written agreement between petitioner and Suburban, petitioner was an independent contractor responsible for the payment of his own State and Federal income taxes and F.I.C.A. tax. Said agreement contained language to the effect that nothing contained therein would be construed to create an employer-employee relationship. For the year 1979, petitioner filed a Federal Schedule C (Profit or [Loss] from Business or Profession) on which he claimed business deductions of \$80,750.00. Said deductions included office expenses, rent on business property, telephone, utilities, auto expenses and commissions.

6. In his position as a sales manager for Suburban, petitioner traveled to offices in Schenectady, Latham, Amsterdam, Kingston and Rochester, New York. At each of the offices, petitioner would spend a couple of days hiring, supervising and training salesmen, running advertisements in local newspapers, making appointments with prospective customers and calling on customers to obtain contracts for the purchase of Suburban's products. Each month, petitioner

Syracuse headquarters at which time he would meet with his supervisor, Carl Pinto, who was Suburban's Regional Manager. While in Syracuse, petitioner would pick up checks for himself and for the salesmen who worked for him and, on occasion, would pick up and deliver food orders to customers when delivery orders from Suburban's headquarters were short.

7. Suburban provided petitioner with customer leads, food orders and brochures, but neither told him what work to do nor when such work had to be done. Petitioner kept a daily log of business, but was not required to keep set business hours. For each of the local offices within petitioner's territory, the rental agreements were in petitioner's name rather than in the name of Suburban, although Suburban provided furnishings therefor. Petitioner also obtained telephone service for each office in his own name. **No** clerical or secretarial staff was provided by Suburban for these local offices; petitioner and the salesmen whom he supervised performed said clerical and secretarial functions for themselves.

8. Petitioner received no salary from Suburban. He received a commission, a production bonus amounting to \$300.00 per week during the period at issue, plus an override commission from sales made by the salesmen whom he supervised. He received no minimum guarantee from Suburban. Petitioner was permitted by Suburban to take a vacation during which time he would receive his production bonus and commission override. During the period at issue, petitioner also sold pictures for a California company and was permitted by Suburban to use their local offices for such sales as long as it did not interfere with Suburban business. **In** addition to working out of the local offices, petitioner also did some of his work for Suburban from his home.

CONCLUSIONS OF LAW

A. That section 689(b) of the Tax Law, the provisions of which are specifically incorporated in Article 23 by section 722(a) of the Tax Law, provides, in pertinent part, as follows:

"Within ninety days...after the mailing of the notice of deficiency..., the taxpayer may file a petition with the tax commission for a redetermination of the deficiency."

B. That petitioner's representative was advised by letter from the Tax Appeals Bureau that his petition seeking a redetermination of the tax alleged to be due for the year 1980 was premature. Said letter further advised petitioner's representative that if, at a later date, a Notice of Deficiency was issued for 1980, a petition for such year must be refiled. Since no Notice of Deficiency had been issued to petitioner for 1980 as of the date of the filing of his petition, such petition was, therefore, premature and the State Tax Commission is without jurisdiction to address the issue of petitioner's tax deficiency for 1980.

C. That 20 NYCRR 203.10(c) provides, in pertinent part, as follows:

"Whether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case. The designation and description of the relationship by the parties, whether by contract or otherwise, is not necessarily determinative of the status of the individual for unincorporated business income tax purposes. Other factors to be considered in determining if there is sufficient exercise of direction and control resulting in an employer-employee relationship are whether the individual performing the services maintains his own office, engages his own assistants or hires his own employees, or incurs expenses without reimbursement.... Still other factors which may have some bearing are whether or not

- (1) personal income taxes or Federal insurance contributions are deducted from compensation to be paid to the individual,
- (2) whether or not the person or entity for whom the services are performed pays unemployment insurance,
- (3) whether or not the individual is a member of an employee pension plan or

D. That petitioner received no salary from Suburban, but, instead, received commissions and bonuses based upon sales production. Social security, Federal and State income taxes were not withheld from petitioner's weekly check. Petitioner paid his own F.I.C.A. tax. Petitioner had extensive unreimbursed business expenses and his supervisor exerted little or no control over his daily activities. Therefore, in view of all of the relevant facts and circumstances herein, petitioner was not subject to sufficient direction and control to be considered an employee of Suburban, but rather was an independent contractor. His activities for Suburban for the year 1979 constituted the carrying on of an unincorporated business in accordance with the meaning and intent of section 703(a) of the Tax Law and his income therefrom was thus subject to the imposition of the unincorporated business tax.

E. That the laws of New York State are presumed to be constitutionally valid at the administrative level of the State Tax Commission.

F. That the petition of William W. Kehrli and Dorothy Kehrli is denied and the notices of deficiency dated November 18, 1983 and April 5, 1984 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 13 1987


PRESIDENT


COMMISSIONER


COMMISSIONER