

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harold (dec'd) & Pearl Carlin :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income & UBT :
under Article 22 & 23 of the Tax Law :
for the Years 1965 - 1970. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, 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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Harold (dec'd) & Pearl Carlin, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

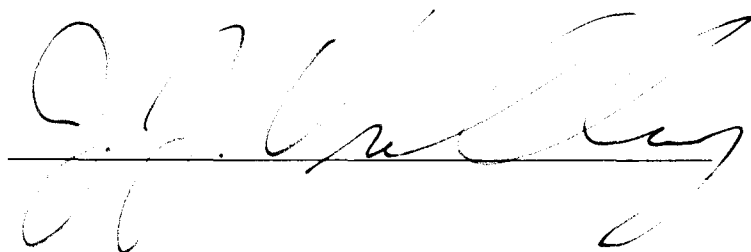
Harold (dec'd) & Pearl Carlin
142 McGlynn Pl.
Cedarhurst, NY 11516

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
7th day of July, 1980.

Rebecca A. Brink



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harold (dec'd) & Pearl Carlin :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income & UBT :
under Article 22 & 23 of the Tax Law :
for the Years 1965 - 1970. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, 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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Alvin I. Goidel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Alvin I. Goidel
Goidel, Goidel & Helfenstein, P.C.
127 John St.
New York, NY 10038

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
7th day of July, 1980.

Esther A. Bank

J. J. Vredenburg

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

July 7, 1980

Harold (dec'd) & Pearl Carlin
142 McGlynn Pl.
Cedarhurst, NY 11516

Dear Mrs. Carlin:

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, 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Alvin I. Goidel
Goidel, Goidel & Helfenstein, P.C.
127 John St.
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
HAROLD CARLIN
(Deceased)
and PEARL CARLIN
for Redetermination of a Deficiency or
for Refund of Personal Income and
Unincorporated Business Taxes under
Articles 22 and 23 of the Tax Law for
the Years 1965 through 1970.

DECISION

Petitioners, Harold Carlin (now deceased) and Pearl Carlin, his wife, 142 McGlynn Place, Cedarhurst, New York 11516, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1965 through 1970 (File No. 13105).

A formal hearing was held before Harvey Baum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 19, 1977 at 2:45 P.M. Petitioners appeared by Goidel, Goidel & Helfenstein, P.C. (Alvin S. Goidel, Esq., of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq. (Laurence Stevens, Esq., of counsel).

The parties agreed to have this matter submitted to the State Tax Commission for a decision, without the necessity of calling witnesses to testify with respect thereto. The representative for the Audit Division prepared questions and the attorney for petitioners submitted answers thereto, sworn to by petitioner Pearl Carlin.

After considering the entire record contained herein, the Commission renders the following decision.

ISSUE

Whether petitioners were subject to unincorporated business tax during the years at issue.

FINDINGS OF FACT

1. Harold and Pearl Carlin filed New York State income tax resident returns for the years 1965 through 1970. Harold Carlin did not file unincorporated business tax returns for said years.

2. The Internal Revenue Service audited the Federal income tax returns of Harold and Pearl Carlin for 1965, 1967 and 1968, and made adjustments increasing the amount of taxes due for said years. Mr. and Mrs. Carlin did not file a report of changes in Federal taxable income for the aforementioned years.

3. On January 25, 1972, the Income Tax Bureau issued a Statement of Audit Changes against Harold and Pearl Carlin. Said Statement imposed additional personal income tax for 1965, 1967 and 1968, based on adjustments which were made to conform with the audit of their Federal income tax returns, in the respective amounts of \$1,333.29, \$1,753.72 and \$1,902.71. In addition, unincorporated business income tax was imposed for 1965 through 1970 in the amount of \$16,470.88, exclusive of penalty and interest. Accordingly, the Income Tax Bureau issued a Notice of Deficiency against Harold and Pearl Carlin for the years 1965 through 1970 in the amount of \$33,575.41, including penalty and interest. Mr. and Mrs. Carlin timely filed a petition with respect thereto. Petitioners raised no objection with respect to the deficiency of additional personal income tax.

4. During the years at issue, Harold Carlin was a sales representative for Rand Products, Vici's, Inc. and Knight Slipper Co., selling ladies' shoes and slippers on a commission basis only. He received a weekly draw against

commissions, which draw never exceeded said commissions. Mr. Carlin's territory included the south and southwest portions of the United States. Mr. Carlin also sold to various chain stores which had their buying offices in New York City.

5. Mr. Carlin was not compensated for any expenses which he incurred in connection with his sales activities on behalf of his principals.

6. None of his principals withheld Federal or New York State income taxes on the commission payments to Mr. Carlin, nor did they deduct social security taxes on these payments.

7. There was no agreement between the principals as to the division of Mr. Carlin's time.

8. During the years at issue, the principals did not exercise any supervision and control over Harold Carlin's sales routine.

9. Pearl Carlin was not engaged in any business during the years at issue.

10. Petitioner Pearl Carlin contends that the Tax Law as applied by the Department of Taxation and Finance is unconstitutional.

CONCLUSIONS OF LAW

A. That Pearl Carlin was not subject to unincorporated business tax during the years in issue.

B. That during the years 1965 through 1970, Harold Carlin was an independent contractor and not an employee, within the meaning and intent of section 703 of the Tax Law. (Matter of Liberman v. Gallman, 41 N.Y.2d 775; Matter of Frishman v. New York State Tax Commission, mot. for lv. to app. den. 27 N.Y.2d 483.)

C. That income received by petitioner Harold Carlin from his principals during the years 1965 through 1970, constituted income from his regular business activities and was not compensation received as an employee in accordance with

the meaning and intent of section 703(b) of the Tax Law. (Matter of Feld v. Gallman, 41 A.D.2d 882; Matter of Naroff v. Tully, 55 A.D.2d 755.)

D. That commission income which Harold Carlin received from the principals represented by him, in the sale of ladies' shoes and slippers during the years 1965 through 1970, constituted income subject to unincorporated business tax, within the meaning and intent of sections 701 and 703(a) of the Tax Law. (Matter of Britton v. State Tax Commission, 22 A.D.2d 987, affd. 19 N.Y.2d 613; Matter of Hardy v. Murphy, 29 A.D.2d 1038.)

E. That Pearl Carlin is liable for the additional personal income tax for 1965, 1967 and 1968, and is not personally liable for any unincorporated business tax for the years 1965 through 1970.

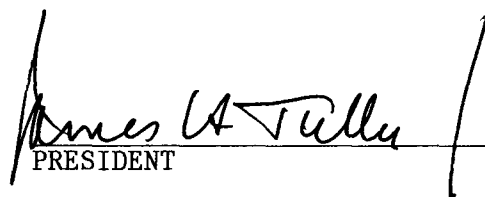
F. That the constitutionality of the laws of the State of New York is presumed by the New York State Tax Commission. There is no jurisdiction at the administrative level to declare such laws unconstitutional.

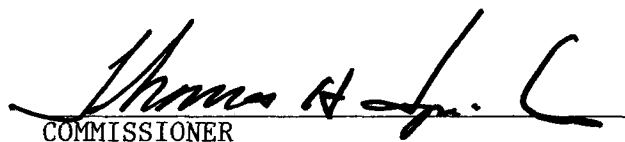
G. That the petition of Harold Carlin (now deceased) and Pearl Carlin is granted to the extent indicated in Conclusions of Law "A" and "E"; and that, except as so granted, the petition is in all other respects denied.

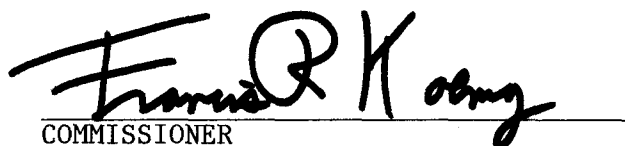
DATED: Albany, New York

JUL 07 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER