

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Allen B. Schwartz

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax & UBT :
under Article 22 & 23 of the Tax Law
for the Years 1970 - 1972. :

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 20th day of June, 1980, he served the within notice of Decision by certified mail upon Allen B. Schwartz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Allen B. Schwartz
27 Greenwood Loop Rd.
Bricktown, NJ

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
20th day of June, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Allen B. Schwartz

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for Redetermination of a Deficiency or a Revision :
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Personal Income Tax & UBT :
under Article 22 & 23 of the Tax Law
for the Years 1970 - 1972. :

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 20th day of June, 1980, he served the within notice of Decision by certified mail upon Jerome Raifman 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. Jerome Raifman
16 Breexe Hill Rd.
Fort Salonga, NY 11768

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
20th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

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

June 20, 1980

Allen B. Schwartz
27 Greenwood Loop Rd.
Bricktown, NJ

Dear Mr. Schwartz:

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
Jerome Raifman
16 Breexe Hill Rd.
Fort Salonga, NY 11768
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ALLEN B. SCHWARTZ : DECISION
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 1970, 1971 and 1972.

Petitioner, Allen B. Schwartz, 27 Greenwood Loop Road, Bricktown, New Jersey, 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 1970, 1971 and 1972 (File No. 12779).

A formal hearing was held before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 23, 1977 at 2:45 P.M. Petitioner appeared by Jerome Raifman, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq. of counsel).

ISSUE

Whether the business activities of petitioner, Allen B. Schwartz, as a sales representative in the years 1970, 1971 and 1972 constituted the carrying on of an unincorporated business, thereby subjecting said petitioner to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Allen B. Schwartz, timely filed New York State income tax resident returns for the years 1970, 1971 and 1972, listing his address at that time as 449 East Hudson Street, Long Beach, New York. Said petitioner did not file unincorporated business tax returns for those years.

2. On February 24, 1975, the Income Tax Bureau issued a Statement of Audit Changes against petitioner imposing additional income tax for the years 1970, 1971 and 1972 of \$8,756.79, plus penalty, pursuant to section 685(c) of the Tax Law in the sum of \$851.93 and interest of \$1,578.81, making a total of \$11,187.53, on the ground that income received in said years as an independent agent was subject to unincorporated business tax. Accordingly, a Notice of Deficiency dated February 24, 1975 was issued for \$11,187.53, together with the aforesaid Statement of Audit Changes.

3. Petitioner timely filed a petition for redetermination or for refund of personal income tax or unincorporated business tax.

4. During the years in question, petitioner, Allen B. Schwartz, resided at 449 East Hudson Street, Long Beach, New York, and listed his occupation on his Federal and New York State income tax returns as an "outside salesman".

5. Petitioner's New York State income tax return for 1970 discloses gross income of \$34,519.00 but said petitioner offered Form IT-2102 from The Market Is Most, Ltd. showing his wages to be \$4,000.00. While petitioner's Federal income tax return for 1970 reflects wages and income in the amount of \$34,519.00 from two employers, The Market Is Most, Ltd. and Lenard Leopold's Living Room, no W-2 forms or other credible evidence were offered in support of said petitioner's claim that he was a salaried employee during that year.

6. Petitioner's New York State income tax return for 1971 discloses gross income of \$16,613.00 earned from one employer, Aquarius Rags, Inc.; however, the form IT-2102 from that employer which was attached to the 1971 return shows said petitioner's wages to be \$4,350.00. Petitioner did not offer any W-2 forms or other credible evidence to substantiate his claim that he was a salaried employee during that year.

7. Petitioner's New York State income tax return for 1972 discloses gross income of \$96,167.00 but the two wage statements attached to that return show wages and other compensation paid by Aquarius Rags, Inc. and Esprit De Corp., in the respective amounts of \$51,750.00 and \$2,000.00.

8. In or about July, 1971, petitioner was the exclusive sales representative of Esprit De Corp., a California corporation and, in such capacity, was responsible for the sale of certain lines of ladies ready-to-wear apparel throughout the United States. In or about June, 1972, Esprit De Corp. and petitioner executed an Amended Representative Agreement whereby, inter alia, consent was given to petitioner to assign his exclusive sales agency to Aquarius Rags, Inc., a New York corporation formed by petitioner, on the condition that he remain its chief executive officer and majority shareholder (Pet. Exh. 1, p. 1).

Petitioner offered no credible evidence to sustain his contention that the exclusive sales agency with Esprit De Corp. was assigned to Aquarius Rags, Inc. or that the compensation received by petitioner from that company was for his services as an officer rather than as an independent sales representative for 1972.

9. The Amended Representative Agreement also provided that (i) in consideration of past services, Esprit De Corp. would transfer 200 shares of its capital stock to petitioner (Id. at p.2 par. A-1); (ii) petitioner was to receive a commission based on net sales price (Id. at p.4, par. B-3); (iii) petitioner was required to pay all the expenses related to or arising out of the exclusive sales agency, including that of hiring other salesmen (Id. at p. 5, par. B-4 and B-8); (iv) in the event that petitioner employed other salesmen or subagents, petitioner would be deemed the employer and he could not bind Esprit De Corp. in connection therewith (Id. at p. 5, par B-8); and (v) petitioner would be deemed to be an independent contractor and nothing contained in the agreement should be construed as conferring any rights of an employee on him (Id. at p. 5, par B-10).

10. Petitioner offered no credible or probative evidence to sustain his claim that, for the years in question, he was merely a "salaried employee earning only W-2 income". Rather, the credible evidence supports the finding that petitioner was an independent agent subject to the unincorporated business tax. Petitioner was not subject to the will and control of any superior to whom he reported and was free to choose the means and methods of obtaining a particular result; petitioner traveled extensively but arranged his own itinerary and appointments; petitioner fixed his own daily work schedule; petitioner was not provided with health, vacation or pension benefits from any of his principals; petitioner bore the cost and expense of his duties as a sales representative or agent with respect to an office, assistants and the like without reimbursement from his principal.

11. By letter dated October 23, 1974, the Income Tax Bureau requested extensive information from petitioner in order to determine his activities and whether or not said activities subjected him to unincorporated business tax, but petitioner did not respond.

CONCLUSIONS OF LAW

A. That, pursuant to sections 722 and 689(e) of the Tax Law, petitioner, Allen B. Schwartz, bears the burden of proof to establish that the compensation received in 1970, 1971 and 1972 for his performance of services as a sales representative or agent was for services rendered as an employee rather than as an independent agent carrying on an unincorporated business. Matter of Naroff v. Tully, 55 A.D.2d 755, 389 N.Y.S.2d 453 (3rd Dept. 1976).

B. That although section 703(b) of the Tax Law provides that the performance of services by an individual as an employee shall not be deemed an unincorporated business unless such services constitute part of a business regularly carried on by such individual, petitioner has failed to sustain his burden of proving that he was an "employee" within the meaning of said section. Matter of Seifer v. State Tax Commission, 58 A.D.2d 726, 396 N.Y.S.2d 493 (3rd Dept. 1977).

C. That, even if petitioner had shown an assignment of his exclusive sales agency to Aquarius Rags, Inc. in or after June, 1972, the services rendered by said petitioner as an officer of said company were so integrated and interrelated with his activities as an independent sales representative as to constitute activities subject to unincorporated business tax within the meaning and intent of sections 703(b) and (f) of the Tax Law. Herson V. Tully et. al. 65 A.D.2d 638, Mot. for Lv. to app. den. 46 N.Y.2d 711.

D. That, within the meaning and intent of sections 703(b) and (f) of the Tax Law, petitioner demonstrated all of the indicia of an entrepreneur rather than an employee and, accordingly, the income received by petitioner for his services as an independent sales representative or agent for the years 1970, 1971 and 1972 are subject to unincorporated business tax. Matter of Seifer v. State Tax Commission, supra.

E. That the petition of Allen B. Schwartz is denied and the Notice of Deficiency issued against said petitioner on February 24, 1975 is sustained.

DATED: Albany, New York

JUN 20 1980

STATE TAX COMMISSION

James B. Tully
PRESIDENT

Thomas D. Jones
COMMISSIONER

Francis P. Koenig
COMMISSIONER