

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Arnold & Barbara Rothstein :  
: AFFIDAVIT OF MAILING  
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 Year 1973

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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 3rd day of April, 1981, he served the within notice of Decision by certified mail upon Arnold & Barbara Rothstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arnold & Barbara Rothstein  
628 A 3rd St.  
Brooklyn, NY 11215

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  
3rd day of April, 1981.

*Cornell G. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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of :  
Arnold & Barbara Rothstein :  
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Personal Income & UBT :  
under Article 22 & 23 of the Tax Law :  
for the Year 1973 :

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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 3rd day of April, 1981, he served the within notice of Decision by certified mail upon Alan H. Quinn the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

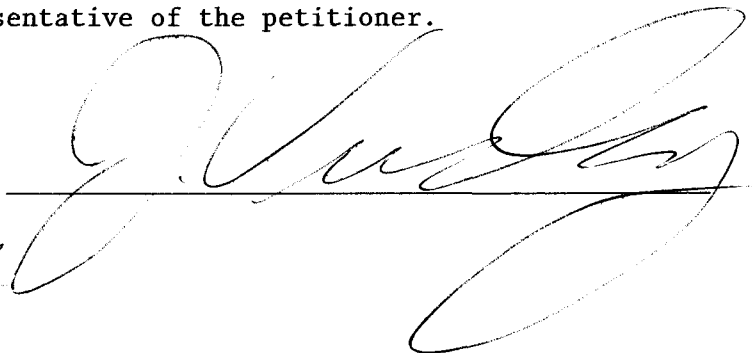
Mr. Alan H. Quinn  
1185 E. 9th St.  
Brooklyn, NY 11230

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  
3rd day of April, 1981.

Constance A. Hagelund



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

April 3, 1981

Arnold & Barbara Rothstein  
628 A 3rd St.  
Brooklyn, NY 11215

Dear Mr. & Mrs. Rothstein:

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  
Alan H. Quinn  
1185 E. 9th St.  
Brooklyn, NY 11230  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
ARNOLD ROTHSTEIN and BARBARA ROTHSTEIN	:	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 Year 1973.	:	

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Petitioners, Arnold Rothstein and Barbara Rothstein, 628A 3rd Street, Brooklyn, New York 11215, 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 year 1973 (File No. 18296).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 19, 1979 and February 19, 1980. Petitioners, Arnold Rothstein and Barbara Rothstein, appeared by Alan H. Quinn, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether income derived from petitioner's selling activities is subject to the unincorporated business tax.

II. Whether penalties pursuant to sections 685(a)(1), 685(a)(2) and 685(c) of the Tax Law were properly imposed.

FINDINGS OF FACT

1. Petitioners, Arnold Rothstein and Barbara Rothstein, timely filed a joint New York State Income Tax Resident Return for the year 1973, on which net business income of \$22,135.97 was reported. An unincorporated business tax return was not filed for the year 1973.

2. On April 11, 1977, the Audit Division issued a Notice of Deficiency in the sum of \$1,211.81 against petitioners, Arnold Rothstein and Barbara Rothstein, for the year 1973, along with an explanatory Statement of Audit Changes on which the net business income of \$22,135.97 was held subject to the unincorporated business tax. Penalties were imposed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law. In addition penalties were imposed for failure to file declarations of estimated tax for personal income tax and unincorporated business tax pursuant to section 685(c) of the Tax Law in the amounts of \$45.09 and \$27.96 respectively.

3. Petitioner Arnold Rothstein was a furniture salesman selling for Roger Rougier Ltee and Cimon Limitee (the "principals") during the year 1973. Both principals were affiliated, carry noncompeting furniture lines and were located in Montreal, Canada.

4. Petitioner Arnold Rothstein was compensated on a commission basis with no withholding of payroll taxes and no reimbursement of selling expenses, except for extraordinary expenses; such as, trips to Montreal, Canada and trade show expenses.

5. The principals forbade petitioner from representing other firms and restricted his selling territory to the Eastern seaboard. Petitioner was required to regularly report his activities and whereabouts, to attend all sales meetings in Canada and to render services at the principals' trade shows.

6. Petitioner Arnold Rothstein was provided with sales forms, leads and price lists. He was required to call upon accounts requested by his principals; however, on large accounts petitioner was required to be accompanied by his principal's sales manager. Most of petitioner's sales calls were generated by inquiries received by the principals, which were, in turn, referred to him. In addition to his selling activities, petitioner was assigned administrative

duties; such as, adjusting claims, collecting past due accounts, investigating complaints, servicing customers and performing design functions.

7. All orders and new accounts were approved by the principals. At trade shows, petitioner Arnold Rothstein was assisted by company personnel and set up exhibits as directed by the principals.

8. Both principals have provided written statements indicating that petitioner is their employee and that they encourage petitioner's dual status as an employee of both companies. They recognize that petitioner's duties are similar for both companies and that he usually sells their products to the same clients.

9. Petitioner Arnold Rothstein was generally required to perform his duties between 9:00 A.M. and 5:00 P.M. and was usually granted two weeks paid vacation per year.

10. Petitioner Arnold Rothstein did not maintain an office in the United States, but performed many of his functions from his home located in the City and State of New York.

11. Petitioner Arnold Rothstein paid self-employment taxes and reported his income and selling expenses as a sole proprietor. Petitioner Barbara Rothstein was a housewife during the year 1973 and did not participate in her husband's selling activities.

12. Although petitioners challenged the imposition of the penalty pursuant to section 685(c) of the Tax Law, no information or evidence was submitted regarding the aforementioned penalty. The joint New York State Income Tax Resident Return filed for the year 1973 indicated personal income tax due of \$1,127.34, without any prepayments through withholding taxes or through an estimated tax return.

CONCLUSIONS OF LAW

A. That sufficient direction and control was exercised by Roger Rougier Ltee and Cimon Limitee during the year 1973 so as to cause petitioner Arnold Rothstein to become their employee within the meaning and intent of section 703(b) of the Tax Law and, accordingly, the income derived therefrom is not subject to the unincorporated business tax.

B. That the penalty pursuant to section 685(c) of the Tax Law was properly imposed for personal income tax purposes.

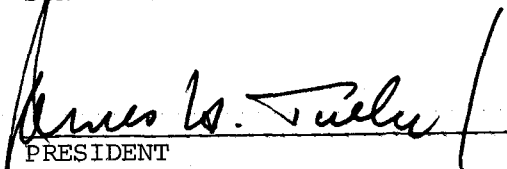
C. That the petition of Arnold Rothstein and Barbara Rothstein is granted to the extent that the unincorporated business tax imposed is cancelled, along with the related penalties imposed under sections 685(a)(1), 685(a)(2) and 685(c) of the Tax Law.

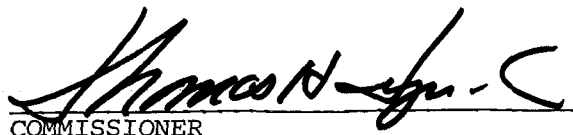
D. That the Audit Division is hereby directed to accordingly modify the Notice of Deficiency issued April 11, 1973; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

APR 03 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER