

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Estate of Stanley Schoen :  
& Ramona Schoen, Indiv. & as Executrix : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
under Article 22 of the Tax Law for the Year 1972 :  
and Unincorporated Business Tax under Article 23 of :  
the Tax Law for the Years 1972, 1974, 1975 and 1976.

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State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of January, 1984, he served the within notice of Decision by certified mail upon Estate of Stanley Schoen, & Ramona Schoen, Indiv. & as Executrix the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

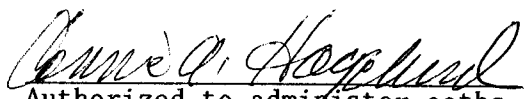
Estate of Stanley Schoen  
& Ramona Schoen, Indiv. & as Executrix  
4 Gates Ave.  
Plainview, NY 11803

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
31st day of January, 1984.



  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Estate of Stanley Schoen :  
& Ramona Schoen, Indiv. & as Executrix :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Year :  
1972 and Unincorporated Business Tax under Article :  
23 of the Tax Law for the Years 1972, 1974, 1975 :  
and 1976.

State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of January, 1984, he served the within notice of Decision by certified mail upon Leon Shaw, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leon Shaw  
15 Roslyn Rd.  
Mineola, NY 11501

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
31st day of January, 1984.

David Parchuck

Connie P. Hagedorn  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 31, 1984

Estate of Stanley Schoen  
& Ramona Schoen, Indiv. & as Executrix  
4 Gates Ave.  
Plainview, NY 11803

Dear Mrs. Schoen:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Leon Shaw  
15 Roslyn Rd.  
Mineola, NY 11501  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions	:	
of	:	
STANLEY SCHOEN and RAMONA SCHOEN	:	DECISION
	:	
for Redetermination of Deficiencies or for		
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1972 and		
Unincorporated Business Tax under Article 23 of	:	
the Tax Law for the Years 1972, 1974, 1975 and		
1976.	:	

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Petitioners, Stanley Schoen and Ramona Schoen, 4 Gates Avenue, Plainview, New York 11803, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the year 1972 and unincorporated business tax under Article 23 of the Tax Law for the years 1972, 1974, 1975 and 1976 (File Nos. 13663 and 27789).

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 October 28, 1981 at 10:45 A.M. and continued to conclusion before James Hoefer, Hearing Officer on December 8, 1982 at 2:45 P.M., with all briefs to be submitted by February 22, 1983. Petitioner Ramona Schoen appeared by Leon Shaw, Esq. and Nathan Shields, C.P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq. of counsel) and Paul Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioner Stanley Schoen's activities as a sales representative constituted services rendered as an employee exempt from unincorporated business tax or that of an independent contractor subject to said tax.

II. Whether the Audit Division's disallowance of certain business expenses for 1972 was proper.

III. Whether the Audit Division's disallowance of a resident tax credit for 1972 was proper.

FINDINGS OF FACT

1. Petitioners, Stanley Schoen (now deceased) and Ramona Schoen, filed joint New York State income tax resident returns for the years at issue wherein Stanley Schoen listed his occupation as sales representative.

2. On August 13, 1974, the Audit Division issued to petitioners a Statement of Audit Changes for 1972 wherein business expenses were disallowed in the amount of \$1,162.93 and petitioner Stanley Schoen's activities as a sales representative were held subject to unincorporated business tax. The recomputation of personal income tax allegedly due did not give petitioners credit for the resident tax credit originally claimed on their return in the amount of \$1,619.47. On January 26, 1976 two notices of deficiency were issued for the year 1972. One to petitioners for personal income tax due plus interest for a total sum of \$2,173.68 and the other to Stanley Schoen for unincorporated business tax due plus interest for a total sum of \$2,467.27.

On December 12, 1978, the Audit Division issued to petitioner Stanley Schoen a Statement of Audit Changes for 1974, 1975 and 1976 wherein his activities as a sales representative were held subject to unincorporated business tax. Accordingly, on April 10, 1979 a Notice of Deficiency was issued to petitioner Stanley Schoen for the years 1974, 1975 and 1976 imposing unincorporated business tax due plus interest for a total sum of \$6,247.74.

3. Stanley Schoen (hereinafter petitioner) was employed on a part time basis by several dyeing and/or finishing plants and trucking companies to

service their businesses in the garment center of New York City. Petitioner was well known in the textile and trucking fields and, therefore, he was able to assist both types of businesses in their efforts to increase sales. Petitioner's knowledge of the textile industry made his services highly desirable to both dyeing and/or finishing plants and the trucking companies servicing those plants. The trucking companies that petitioner was associated with were limited to certain routes, so that a company handling traffic from New York to Pennsylvania was not competitive with one handling traffic between New York and New Jersey. Petitioner represented the dyeing and/or finishing plants by selling their services to the textile industry. Petitioner's services for both the trucking companies and the dyeing and/or finishing plants were interrelated in that he would:

- a) arrange with a trucking company to have unfinished fabric transported to a dyeing plant,
- b) arrange with a dyeing plant to have the fabric dyed,
- c) arrange to have the dyed fabric transported a second time to a manufacturer,
- d) arrange with a manufacturer to have the dyed fabric knitted, and
- e) lastly, arrange to have the manufactured item transported to a wholesaler.

4. Petitioner received income from the following sources during the years in issue:

	<u>1972</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>
Friedmans Express	\$ 6,500.00	\$ 7,580.97	\$10,590.35	\$ 9,603.11
Textile Motor Express	18,806.74	18,811.11	20,205.78	20,120.57
Richlee Dyeing & Finishing	5,600.00			
Hartex, Inc.	27,600.00			
Oxford Textile Finishing Co. (old)		15,300.00	9,650.00	18,550.00
Oxford Textile Finishing Co. (new)			4,200.00	
Bruce Johnson Trucking Co.				4,500.00
TOTAL	<u>\$58,506.74</u>	<u>\$41,692.08</u>	<u>\$44,646.13</u>	<u>\$52,773.68</u>

The amounts received for each year were reported as wages and salaries on withholding statements and reported as such on both the Federal and New York

State tax returns. All of the above firms withheld federal income taxes and social security taxes from the compensation paid to petitioner.

5. Petitioner was employed by Friedman's Express ("Friedman's") as a freight solicitor. Friedman's furnished petitioner with sales leads of potential shippers of merchandise and he also developed his own leads. Petitioner was also required to contact customers regarding shortages, damage claims and collection. He was paid a salary of \$125.00 per week plus ten percent of the gross billings attributable to his efforts. Mr. Schoen worked approximately fifteen to twenty hours per week and was provided with a desk at Friedman's office located in New York City, a telephone, postage and company stationery. He received a paid vacation and was covered under disability insurance, workmen's compensation, blue cross and blue shield, and company life insurance. Petitioner had to account for expenses incurred and was reimbursed only after submitting a voucher for payment. Petitioner's territory included the New York City metropolitan area (encompassing all five boroughs), Suffolk County, Westchester County, Nassau County, and northeast Pennsylvania. Petitioner, on occasion, sold outside these areas and obtained several large accounts for Friedman's.

Petitioner was also employed by Textile Motor Express ("TMX") as a sales representative. His functions included solicitation of new business either through his own endeavors or leads furnished by TMX. His other duties included damage inspections, follow up collection on past due accounts and other functions associated with the trucking business. TMX did not have an office in New York State and did not provide petitioner with office space. Petitioner was provided with a company pension plan, health and hospitalization, life insurance, was covered under disability insurance and workmen's compensation, and was a participant in the company's profit sharing plan. He was also paid

for holidays and vacation. Petitioner submitted oral and written reports to TMX of customers he was calling upon and any new business he generated. He was compensated at a rate of 10% of the gross revenues generated from his sales activities. He had no stated working hours with TMX and was reimbursed for entertainment and other expenses after submitting a voucher. Petitioner's territory included the New York metropolitan area and northern New Jersey. He contacted TMX three or four times daily when he was traveling on business.

Petitioner was paid a salary of \$300.00 per week by Oxford Textile Finishing Co., Inc. ("Oxford") to solicit dyeing and finishing work by following up leads furnished by Oxford. He was not paid on a commission basis for any of the years in issue. Petitioner was covered under a health insurance plan and was included in other company benefit plans.

The record herein contains no information as to Bruce Johnson Trucking Company other than the withholding statement mentioned in Finding of Fact "4", supra.

6. Petitioner Ramona Schoen testified that Stanley Schoen did not maintain an office in their home or anywhere else and that following his death she received a small death benefit from Friedman's Express and a substantial death benefit of \$35,000.00 from Textile Motor Express, Inc. Petitioner Ramona Schoen could not furnish any information as to Stanley Schoen's relationship with Richlee Dyeing and Finishing Co., Inc. or Hartex, Inc. in 1972.

7. All of the firms which petitioner represented were aware of the fact that he was performing services for other firms. The firms in question were primarily concerned with the results achieved by petitioner and not the methods utilized. There existed no clear division of time among the firms which petitioner represented. Petitioner was not required to submit his itinerary



for review or approval nor was he bound by a set work schedule. Petitioner was not required to attend any regular sales meetings, did not employ sales aids or sales tracks furnished by the firms and had no written contract with any of the firms he represented.

8. For the years 1972, 1974, 1975 and 1976 petitioner claimed a deduction for unreimbursed employee business expenses of \$12,072.67, \$7,361.21, \$5,339.00 and \$4,877.26, respectively. The record herein contains no evidence as to which of the firms said unreimbursed expenses were attributable to; nor is it known what percentage of total expenses incurred by petitioner on behalf of said firms were reimbursed, as opposed to unreimbursed.

9. Petitioner's accountant, Nathan Shields, testified that his client's business records, including a diary, were given to an auditor in the Audit Division for examination, and that sometime later a Statement of Audit Changes was received by petitioner showing that an adjustment was made disallowing a portion of their deduction claimed for gifts in the amount of \$1,162.93 on the ground that said gifts were unsubstantiated by documentary evidence. In some cases the gifts were made in cash and in other cases small non-cash gifts were made to various shipping room employees and persons who were employed by the companies that he solicited. Petitioner Ramona Schoen stated that all business receipts were stapled to the pages in the diary kept by her husband who, at the end of the year, prepared a list from said diary showing the unreimbursed expenses that he had incurred in connection with his sales activities. At the hearing held herein, petitioner's representative submitted a schedule showing the companies and the individual to whom gifts were made. An officer of TMX testified that ICC Regulations limited the gift to any one company to \$25.00, and if Stanley Schoen exceeded this amount, he could not be reimbursed by TMX.

The amounts shown in the schedule represent payments made to individuals of various companies including payments to more than one employee of one company.

10. Petitioner filed a New Jersey Emergency Transportation Tax Nonresident Return for the year 1972 wherein he reported wage income of \$33,200.00 and employee business expenses of \$6,850.70, for a total New Jersey income of \$26,349.30. The wage income reported on petitioner's 1972 New Jersey return represented the compensation received by petitioner from Hartex, Inc. (\$27,600.00) and Richlee Dyeing and Finishing Co., Inc. (\$5,600.00). New Jersey tax was withheld from the compensation paid to petitioner by Hartex, Inc. and Richlee Dyeing and Finishing Co., Inc. Petitioner, for 1972, paid to the State of New Jersey an income tax of \$1,619.47.

11. Petitioner's 1972 New York State income tax return claimed a credit of \$1,619.47 against New York tax due for taxes paid to New Jersey. In support of his claim for a resident tax credit and in accordance with the 1972 instruction booklet, petitioner attached to his 1972 New York return Form IT-112R, Claim For Resident Credit, and a copy of his 1972 New Jersey tax return. The Statement of Audit Changes issued to petitioner for the year 1972 assessing personal income tax due contained no statement or explanation as to the ground or grounds upon which the Audit Division based its disallowance of petitioner's claimed resident credit. The record in this matter likewise contains no statements or assertions by the Audit Division setting forth the basis for the disallowance of the claimed resident credit.

#### CONCLUSIONS OF LAW

A. That although the record in this matter contains some facts to support that petitioner may have been an employee, we nonetheless conclude that the firms for which petitioner rendered services exercised insufficient direction

and control over his activities to be considered an employee exempt from unincorporated business tax. [See Tax Law section 703(a),(b) and (f) and 20 NYCRR 203.1, 203.10 and 203.14.]

The fact that petitioner simultaneously performed services for four (4) separate entities, without a clear division of time among them, when considered together with the fact that none of the entities exercised any substantial control over petitioner's daily activities, being concerned primarily with the results achieved and not the methods utilized, leads to the conclusion that petitioner's activities were that of an independent sales representative subject to unincorporated business tax. It is also noted that only one of the firms in question provided petitioner with an office, that he had no set work schedule, that petitioner incurred substantial unreimbursed expenses and that two (2) of the firms either fully or partially compensated petitioner based on the percentage of sales consumated. The aforementioned facts, when considered collectively, outweigh those facts which would support petitioner's status as an employee.

B. That although Stanley Schoen was limited to one gift per company by ICC Regulations, additional payments made to other individuals did not exceed \$25.00 to any one individual during the taxable year (see Treasury Regulation §1.274-3). Therefore, since he did not exceed the \$25.00 limitation, as mentioned in Finding of Fact "9" supra, the deduction for business gifts is allowed.

C. That absent any evidence in the record setting forth the ground or grounds upon which the Audit Division disallowed petitioner's claimed resident tax credit, it cannot be held that said disallowance has a reasonable and


factual basis. Accordingly, petitioner, for the year 1972, is entitled to a resident tax credit of \$1,619.47.

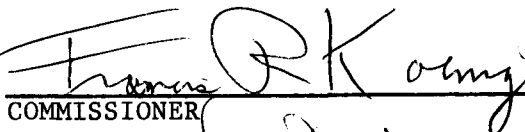
D. That the petition of Stanley Schoen (now deceased) and Ramona Schoen is granted to the extent indicated in Conclusions of Law "B" and "C", supra; that the Audit Division is directed to recompute the notices of deficiency in issue consistent with the conclusions rendered herein; and that, except as so granted, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 31 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER