

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
William B. Tischler :
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 1972-1974. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 4th day of February, 1983, he served the within notice of Decision by certified mail upon William B. Tischler, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William B. Tischler
3401 N.W. 47th Ave.
Lauderdale Lake, FL 33319

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
4th day of February, 1983.

David Parchuck

Connie A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

February 4, 1983

William B. Tischler
3401 N.W. 47th Ave.
Lauderdale Lake, FL 33319

Dear Mr. Tischler:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION	:	
	:	
OF	:	
	:	
WILLIAM TISCHLER	:	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 1972, 1973 and 1974.	:	

Petitioner, William B. Tischler, 3401 N.W. 47th Avenue, Lauderdale Lakes, Florida 33319, 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 1972, 1973 and 1974 (File Nos. 23914 and 23915).

On March 3, 1982, petitioner advised the State Tax Commission, in writing, that he desired to waive a small claims hearing and submit the case to the State Tax Commission, based on the entire record contained in the file. After due consideration, the State Tax Commission renders the following decision.

ISSUES

I. Whether petitioner's activities as a sales representative constituted the carrying on of an unincorporated business or whether petitioner was an employee and thus exempt from tax.

II. Whether petitioner properly computed his business income and business deductions for 1974.

FINDINGS OF FACT

1. Petitioner, William B. Tischler, and his wife Judith B. Tischler, timely filed New York State Combined Income Tax Returns for the years 1972,

1973 and 1974. Petitioner and his wife indicated on their return for 1974 that they changed residence from New York to Florida on September 8, 1974 and attached to said return Form CR-60.1, Schedule for Change of Resident Status, showing an allocation of income, deductions, and exemptions.

2. On January 31, 1978, the Audit Division issued two statements of audit changes; one statement was issued on the grounds that petitioner failed to submit information requested by the Audit Division and, as a result, his net income derived from his activities as a sales representative for the years 1972, 1973 and 1974 was held subject to unincorporated business tax. The statement proposed tax of \$4,019.30, penalties, pursuant to section 685(a)(1) and (a)(2) of the Tax Law, of \$1,778.85, plus interest of \$1,170.65, for a total of \$6,968.80. A second statement was issued for the year 1974 on the grounds that petitioner failed to submit information requested by the Audit Division and, as a result, an addition modification and business expenses were disallowed. The statement proposed additional personal income tax of \$1,867.95, plus interest of \$444.14, for a total sum of \$2,312.09. Accordingly, on March 24, 1978 two notices of deficiency were issued, one to cover the unincorporated business tax liability with updated penalties and interest and the other to cover the personal income tax liability with updated interest.

3. On October 26, 1976, the Audit Division requested certain information regarding petitioner's activities as a sales representative for the years in issue and as to their change of resident status for 1974. Petitioner did not reply to said letter.

4. On April 21, 1978, petitioner submitted a protest in reference to his Notice of Deficiency for 1974 stating that business income and expenses were allocated seventy-five percent to the resident period and twenty-five percent

to the nonresident period. He also indicated that the additional modification of \$100.00 represented a deduction for life insurance. Petitioner attached a schedule to his letter wherein he showed commissions earned of \$51,793.00 and expenses paid of \$19,676.00. Petitioner submitted a second letter under the same date of April 21, 1978 in which he stated that his business income for the period January 1, 1974 to September 8, 1974 was \$36,799.00 and that his expenses were \$14,522.00.

5. Petitioner and his wife purchased a condominium in Florida on July 19, 1974. They moved from New York to Florida on September 8, 1974, at which time they gave up their apartment in New York and moved all their belongings to Florida. They filed a Declaration of Domicile with and became registered voters in Florida, and have been living there since.

6. On June 29, 1978, the Audit Division issued a Notice and Demand for Payment of Income Tax Due for 1973 and 1974 Unincorporated Business tax. Petitioner submitted a letter in protest thereto in which he stated that no mention was ever made of an unincorporated business tax return, that he was not subject to said tax since he was a traveling salesman and did not sell to anyone in New York State, that all his orders were obtained outside of New York State, and that all goods and merchandise were shipped and used outside of New York State.

7. On September 25, 1979, the Tax Appeals Bureau in an attempt to resolve the matter without necessitating petitioner to appear at a pre-hearing conference, sent petitioner a letter stating it had accepted the figures for business income of \$36,799.00 and business expenses of \$14,522.00 as reported in his letter of April 21, 1978. The Bureau also mentioned that he had not submitted enough information to show that an employee-employer relationship existed

between him and his principal and, as a result, his activities were subject to unincorporated business tax for the years at issue. The Tax Appeals Bureau recomputed his tax liability for 1974 and sent petitioner a "Withdrawal of Petition and Discontinuance of Case," which he refused to sign claiming that the statute of limitations had expired. Petitioner was then advised by the Tax Appeals Bureau that pursuant to section 683(c)(1)(A) of the Tax Law, tax may be assessed at any time when a return is not filed.

8. Petitioner contended that it was a hardship for him to appear in Albany, New York and requested that the deficiencies be cancelled. He retained Andrea M. Leiter, an Attorney at Law, who addressed, in part, the Audit Division's letter of October 26, 1976 as follows:

1. Mr. Tischler's primary sources of income came from:

- a. Brunn & Bertheim, Inc., New York City, New York.
- b. Spaeth Displays, Inc., New York City, New York.

He acted as a salesman in the Mid-West, primarily selling display material for department stores and specialty stores. He was under a "draw" and paid for his own traveling expenses. The companies did not withhold taxes from his commissions because he was not on salary. He was instructed as to when to go "on the road" to sell; where to go; the lines to be offered for sale; and the amount of the draw. There were no employment agreements.

9. Petitioner was not free to represent principals other than Brunn & Bertheim and Spaeth Display, Inc., although on occasion he gave several customers the names of other companies which carried dissimilar products for which he received small amounts of compensation.

10. Petitioner was not reimbursed for expenses nor was he provided with his own desk, office space, secretary or telephone. However, he was allowed to

use someone else's secretary, and he could use, temporarily, any vacant desk or phone in the "general office of the company". Petitioner did not participate in any company benefit plans such as hospitalization or retirement. Prior approval was generally required for vacations.

11. Petitioner submitted Federal Form 1099-MISC with his letter of July 6, 1981 showing the amount of commissions paid to him by Spaeth Displays, Inc. for 1972, 1973 and 1974 and Brunn & Bertheim Inc. for the years 1972 and 1973. Brunn & Bertheim Inc. went out of business in 1974 and Form 1099-MISC was not available for that year. Said form described the payments as "commissions and fees to nonemployees". Petitioner also submitted a schedule showing the business expenses incurred during each year in issue.

CONCLUSIONS OF LAW

A. That Brunn & Bertheim, Inc. and Spaeth Displays, Inc. failed to exercise sufficient control over petitioner's activities; as a result, his activities as a sales representative constituted the carrying on of an unincorporated business within the meaning and intent of section 703 of the Tax Law. (see In the Matter of the Petition of Richard Mourry, State Tax Commission, December 31, 1970.)

B. That a sales representative cannot be deemed an "employee" where the principal does not exercise direction and control over the manner in which customers are approached and persuaded to purchase or where the principal does not control the sales routine. (Matter of Liberman v. Gallman, 41 N.Y. 2d 774, 396 N.Y.S.2d 159). Further, "petitioner has apparently been under the misconception that subdivision (f) of the section 703 is an exemption from the unincorporated business tax when in fact this portion of Article 23 merely limits the factors which may be relied upon to conclude that the individual is

self-employed as opposed to being a mere employee of his principals" (Frishman v. New York State Tax Commission, 32 A.D.2d 1071, mot. for lv. to app. den. 27 N.Y.2d 483).

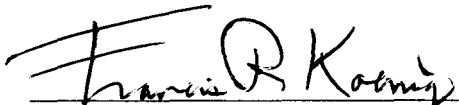
C. That the petition of William B. Tischler is granted to the extent that the amounts for business income and expenses, as shown in Finding of Fact "7" supra, are correct for both personal income and unincorporated business taxes; and that, except as so granted, the petition is denied and the notices of deficiency are sustained.

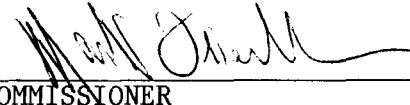
DATED: Albany, New York

FEB 04 1983

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER