

Frishman, Leonard

Commissioner Murphy, MacDuff and Conlon

Solomon Sles, Hearing Officer

LEONARD FRISHMAN

FOR A REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW FOR
THE YEARS 1961 AND 1962

(File #2-3673576)

A hearing with reference to the above matter was held before me at the New York office on March 31, 1966 at 86 Centre Street, New York, N.Y. The appearances and evidence produced were as shown in the stenographic minutes and the exhibits submitted herewith.

The issue involved is whether the activities of the taxpayer as a sales representative for six manufacturers selling non-competitive lines to one customer (F.W. Woolworth Co.) constitute the carrying on of an unincorporated business in accordance with Section 703(f), Article 23 of the Tax Law.

The taxpayer represents six manufacturers, two of whom are located in New York City, the others in Connecticut, Illinois and Massachusetts selling plastic table covers, cloth curtains, center rug, shower curtains and draperies exclusively to F.W. Woolworth & Co. In connection with his activities, the taxpayer maintained a showroom in New York City where he would receive orders on occasion. However, he had no employees or assistants. He would call on various district offices of F.W. Woolworth & Co. and receive orders from the buyers attached to such offices. He was reimbursed on a straight commission basis and was not reimbursed for any of his expenses. None of the principals deducted withholding taxes or paid unemployment insurance or social security on his behalf. On his return for 1962 the taxpayer Leonard Frishman reported under occupation that he was "self employed" and indicated on his Federal return that he paid "self-employment" tax. The taxpayer endeavored to effect sales of all the products he handled on behalf of the various principals to the buyer of each regional office he contacted.

No arrangement existed whereby taxpayer was required to devote a specific portion of his time to the representation of any one principal, even though all such principals knew and permitted such multiple representations. The taxpayer was not subject to the direction and control of the companies whose products he sold as to the manner in which he was to make such sales.

TO: Commissioners Murphy, MacDuff and Conlon

RE: Leonard Frishman

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I am of the opinion that the taxpayer was not an employee of the various firms he represented on a commission basis; that the principals whom he represented did not exercise supervision or control as to manner or means in which he was to make such sales; that he was an independent contractor and therefore subject to unincorporated business tax in accordance with the intent and meaning of Section 703(c), Article 23, of the Tax Law.

For the reasons stated above, I recommend that the decision of the Tax Commission in this matter be substantially in the form herewith.

FEB 28 1967

SOLOMON SIES
Hearing Officer

/s/ MARTIN SCHAPIRO
Approved

/s/ SAUL HECKELMAN
Approved

10-18-67

STATE OF NEW YORK

STATE TAX COMMISSION

.....
IN THE MATTER OF THE PETITION

OF

LEONARD FRISHMAN

FOR A DETERMINATION OF A DEFICIENCY OR
FOR REFUND OF UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW FOR
THE YEARS 1961 AND 1962.
.....

The taxpayer herein having filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1961 and 1962 (File No. A-3673976) and a hearing having been held in connection therewith at the office of the State Tax Commission at 89 Centre Street, New York, N.Y., on the 11st day of March, 1966, before Solomon Sien, Hearing Officer of the Department of Taxation and Finance at which hearing the taxpayer appeared personally and was represented by Bernard Nevin, Esq., testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Leonard and Betty Jean Frishman filed a joint New York State Income Tax Resident Return for the years 1961 and 1962; that for 1962, the taxpayer Leonard Frishman reported on Schedule A, Business Income, as a "manufacturer's representative"; that the aforementioned taxpayer did not file any unincorporated business tax returns for said years; that on November 9, 1964 the Department of Taxation & Finance issued a statement of audit charges against the taxpayer, Leonard Frishman, holding that his business activities constituted the carrying on of an unincorporated business and that the income derived therefrom was subject to unincorporated business tax, imposed unincorporated business tax in the amounts of \$468.93 and 1996.63 for the years 1961 and 1962, respectively, and accordingly issued a notice of deficiency against said taxpayer in the amount of \$2,465.56 for the years 1961 and 1962.

(1) That during the years 1961 and 1962 and prior thereto the taxpayer was a sales representative for six (6) manufacturers selling plastic table covers, cloth curtains, scatter rugs, plastic shower curtains and draperies on a straight commission basis; that the various products which taxpayer sold were non-competitive; that the taxpayer was not reimbursed for any of his expenses; that all of the products which the taxpayer handled for the various principals were sold exclusively to F.W. Woolworth & Co.; that in connection with his activities the taxpayer visited the various regional buyers offices of F.W. Woolworth & Co. located in principal cities throughout the United States; that the taxpayer endeavored to effect sales of all the products he handled on behalf of the various principals to the buyer of each regional office he contacted.

(2) That in connection with his activities during the years in issue, the taxpayer maintained a showroom in the City of New York; that the taxpayer had no employees or assistants; that the taxpayer did, on occasion, receive orders in the showroom.

(3) That none of the principals whom the taxpayer represented deducted withholding taxes or paid social security or unemployment insurance on his behalf; that the taxpayer was not regarded by his various principals as an employee for payroll tax purposes.

(4) That no arrangement existed whereby taxpayer was required to devote a specific portion of his time to the representation of any one principal, even though all such principals knew and permitted such multiple representation; that taxpayer was not subject to the direction and control of the companies whose products he sold as to the manner in which he was to make such sales.

Based upon the foregoing findings and all of the evidence presented herein

The State Tax Commission hereby

DECIDES:

That the taxpayer during the years 1961 and 1962 was not an employee of the various firms he represented but was an independent contractor carrying on an unincorporated business solely within the State of New York; that the income derived therefrom was subject to unincorporated business tax within the intent and meaning of Section 703(f), Article 23, of the Tax Law; that accordingly, the statement of audit changes and notice of deficiency for the years 1961 and 1962 are correct; that the same do not include any tax or other charge which could not have been lawfully demanded and that the taxpayer's petition for redetermination of a deficiency filed by him with respect thereto be and the same is hereby denied.

DATED, Albany, N. Y. on the 27th day of November, 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

Commissioner

/s/

WALTER MACLYN CONLON

Commissioner

SS:MM