STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of JOHN A. & JOAN W. WILSON For Redetermination of Deficiencies or for Refunds of Unincorporated Business Taxes under Article 23 of the Tax Law for the Years 1963, 1964 and 1965	DECISION

The taxpayers, John A. and Joan W. Wilson have timely filed petitions for redetermination of deficiencies or for refund of Unincorporated Business Tax for the years 1963, 1964 and 1965. A Formal Hearing has been held regarding this matter at which the taxpayer, John A. Wilson appeared and gave testimony, and was represented by Milbank, Tweed, Hadley & McCloy, Esqs. (Gerald C. Neary, Esq., of Counsel).

The matter has been examined and considered, and the State Tax Commission finds:

1. The petitioners, John A. and Joan W. Wilson filed New York State income tax resident returns (Form IT-201), and New York State Unincorporated Business Tax returns (Form IT-202), for the years 1963, 1964 and 1965. The petitioners paid unincorporated business taxes of $1610.08, $1604.00 and $1642.02 for the years 1963, 1964 and 1965, respectively.

2. On October 13, 1966, the petitioners filed claims for credit or refund of unincorporated business taxes for the years 1963, 1964 and 1965. The petitioner, John A. Wilson contends that as an insurance agent he was exempt from the Unincorporated Business tax pursuant to Section 703(f), Article 23 of the Tax Law, had erroneously filed returns and paid the tax for the years in question, and was entitled to a full refund of the Unincorporated Business Taxes.

3. The petitioner, John A. Wilson, is a Chartered Life Underwriter and a soliciting life insurance agent. On February 12, 1954, the petitioner signed an agreement with the Equitable Life Assurance Society. The agreement was in effect during the years 1963, 1964 and 1965. The terms of the agreement authorized the petitioner to solicit life insurance on behalf of the said insurance company subject to various conditions and limitations. The agreement specified the commissions to be paid to the agent based upon the types and amounts of insurance sold. The agent agreed not to submit life insurance proposals to any other company unless authorized by the Equitable Society. The agent was not awarded an exclusive territory, could not alter the form or conditions of insurance policies, or bind the Equitable Society in any manner. The agent agreed to participate, when eligible, in the Equitible Society's Retirement Plan for Agents. The agreement could be terminated by either party upon written notice. A final clause specified that nothing contained in the agreement shall be construed to create the relationship of employer and employee between the Equitable Society and the Agent.

4. The petitioner, John A. Wilson, conducted his insurance activities at 331 Madison Avenue, New York City in space provided by the Queally Agency of the Equitable Society. The petitioner required the assistance of two secretaries in his office work, one of whom was a Certified Life Underwriter. The claimant filed New York City Commercial rent and occupancy tax and General Business Tax returns. The petitioner used the trade name "Wilson Agency" on letterheads and a telephone listing. The petitioner employed an automobile, furniture, fixtures and draperies in his business activities and claimed depreciation upon these assets on his Federal income tax returns. Other business expenses deducted on the Federal returns included rent, advertising, dues and subscriptions, entertainment, telephone, travel, postage, stationery, printing, secretarial

3. The petitioner, John A. Wilson, is a chartered life underwriter and a soliciting life insurance agent. On February 15, 1954, the petitioner signed an agreement with the Equitable Life Assurance Society. The agreement was in effect during the years 1963, 1964 and 1965. The terms of the agreement authorized the petitioner to solicit life insurance on behalf of the said insurance company subject to various conditions and limitations. The agreement specified the commissions to be paid to the agent based upon the types and amounts of insurance sold. The agent agreed not to submit life insurance proposals to any other company unless authorized by the Equitable Society. The agent was not awarded an exclusive territory, could not alter the form or conditions of insurance policies, or bind the Equitable Society in any manner. The agent agreed to be eligible, [illegible], in the Equitable Society's retirement plan for agents. The agreement could be terminated by either party upon written notice. A final clause specified that nothing contained in the foregoing shall be construed to create the relationship of employer and employee between the Equitable Society and the agent.

4. The petitioner, John A. Wilson, conducted his insurance activities at [illegible] Avenue, New York City, in space provided by the [illegible] Equitable Society. The petitioner required the assistance of [illegible] in his office work, one of whom was a Certified Life Underwriter. The petitioner filed New York City Commercial Rent and Occupancy Tax and Unincorporated Business Tax returns. The petitioner used the name "Wilson Agency" on letterheads and a telephone listing. The petitioner employed an automobile, furniture, fixtures and equipment in his business activities and claimed depreciation on these assets on his Federal income tax returns. Other business expenses deducted on the Federal returns included rent, [illegible], entertainment, telephone, travel, postage, stationery, [illegible]

expense, promotion expense, and commissions to another agent. The petitioner accepted applications for life insurance which were placed with other insurance carriers.

5. The petitioner has not pleaded or established that he is an employee of the agency or insurance company, or that he is subject to any supervision other than to limit the form of policies which he may accept applications for, or the insurability of the applicant. The petitioner is not restricted to any territory or class of customers. Throughout the years in issue, the petitioner partially reimbursed Equitable for expenses incurred by Equitable in operating the Queally Agency, in an amount based on the claimant's first year commission income. Such reimbursement arrangements, worked out between agents and agency managers, are considered unusual by the insurance company.

6. The petitioner did maintain the style and trade name of "Wilson Agency" which had been used by his father and grand-father for many years. The general agency known by that name was no longer in existence, but the petitioner believed that the continued use of said name and good will would aid in the furtherance of his insurance sales. The petitioner never operated as a general agent during his association with the Equitable Society.

7. The petitioner had sold insurance for more than one enterprise, had utilized space for the maintainence and storage of records normally used in the course of business and employed clerical and secretarial assistance. The use of a trade name and the reimbursement to his principal of part of the expenses of the office used were incident to the furtherance of these purposes. Within the meaning of Section 703 (f) of the Tax Law, the petitioner is not found to be maintaining an office or employing one or more assistants, other than previously enumerated.

[illegible]

5. The petitioner was not a [illegible] in an employee of the agency or insurance company, or was he subject to an adjudication since then to [illegible] which he may accept [illegible] for, or be [illegible] of a [illegible]. [illegible] in any [illegible] or employee. Therefore, on [illegible], the [illegible] [illegible] for [illegible] in [illegible] [illegible] between courts and agency [illegible], or [illegible] in the insurance company.

6. The petitioner [illegible] the [illegible] [illegible] [illegible] for many years. [illegible] in existence, [illegible] [illegible] [illegible]

Based on the foregoing findings, the State Tax Commission hereby

DECIDES:

(a) The activities of the petitioner, John A. Wilson, as a full time solicitor of insurance do not fall within the definition of an unincorporated business as contained in Section 703 of the Tax Law.

(b) The petitioner did file New York State Unincorporated Business Tax Returns for the years 1963, 1964 and 1965, and paid tax as shown thereon of $1610.08 for 1963, $1604.00 for 1964 and $1642.02 for 1965.

(c) The petitioner, John A. and Joan W. Wilson, did timely file claims for refund of the said amounts of Unincorporated Business taxes.

(d) The aforesaid amounts of Unincorporated Business taxes have been erroneously paid to the Department of Taxation and Finance by the petitioners and the Department shall make refund thereof to the petitioners.

(e) Interest shall be added to the said overpayment of taxes being refunded to the petitioners and payment thereof shall be made to the petitioners in accordance with Section 688 of the Tax Law.

/s/ NORMAN GALLMAN
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

/s/ MILTON KOERNER
COMMISSIONER

DATED: September 19, 1969

Based on the foregoing findings of fact, petitioner's contention herein

CONCLUDES:

(a) The petitioner's [illegible] , [illegible] , [illegible] , [illegible] , [illegible] , [illegible] of an unincorporated business, a partnership as defined [illegible] Tax Law.

(b) The petitioner's [illegible] business tax return for the years [illegible] , [illegible] tax as shown thereon [illegible] for [illegible] , [illegible] allowance for [illegible] .

(c) The petitioner, [illegible] , [illegible] , [illegible] , [illegible] , [illegible] time claim for refund of [illegible] business tax.

(d) [illegible] have been [illegible] by the petitioner [illegible] assessed to the petitioner.

(e) Inasmuch as [illegible] being refunded to the petitioner [illegible] made to the petitioner in accordance with section [illegible] .

/s/ NORMAN CALLAMAN

/s/ A. BRUCE MANLEY

/s/ MILTON KOBENKER

DATED: Albany, N.Y., [illegible]