

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

BERNARD AND NORINE SELBY

For a Redetermination of a Deficiency or
a Refund of Unincorporated Business ;
Taxes under Article(s) 23 of the
Tax Law for the (Year(s) 1965 and 1966

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

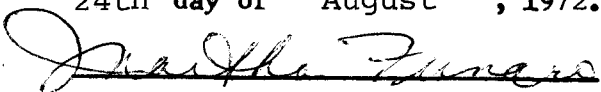
State of New York
County of Albany

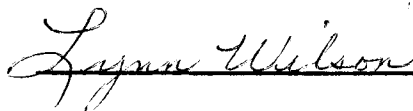
Lynn Wilson , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 24th day of August , 19 72, she served the within
Notice of Decision (or Determination) by (certified) mail upon BERNARD AND
NORINE SELBY (representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Bernard and Norine Selby
120 Esplanade Drive
Rochester, New York 14610
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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) 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

24th day of August , 1972.





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STATE TAX COMMISSION

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State of New York
County of Albany

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she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 24th day of August , 19 72, she served the within
Notice of Decision (or Determination) by (certified) mail upon RUBIN & LEVEY,
ESQS.

(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Rubin & Levey, Esqs.

44 Exchange Street
Suite 404

Rochester, New York 14614
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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) 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

24th day of August , 19 72

Matthew J. Farnard

Lynn Wilson



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A
STATE CAMPUS
ALBANY, N. Y. 12227

AREA CODE 518
457-2655, 6, 7

STATE TAX COMMISSION

NORMAN F. GALLMAN, PRESIDENT
A. BRUCE MANLEY
MILTON KOERNER

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

DATED: Albany, New York
August 24, 1972

Bernard and Morine Selby
120 Esplanade Drive
Rochester, New York 14610

Dear Mr. and Mrs. Selby:

Please take notice of the **DECISION** of
the State Tax Commission enclosed herewith.

Please take further notice that pursuant to **section 722** of
the Tax Law any proceeding in court to review an adverse decision
must be commenced within **4 months** after
the date of this notice.

Any inquiries concerning the computation of tax due or refund allowed
in accordance with this decision or concerning any other matter relat-
ing hereto may be addressed to the undersigned. These will be referred
to the proper party for reply.

Very truly yours,

L. Robert Leisner
HEARING OFFICER

cc Petitioner's Representative
Law Bureau

STATE OF NEW YORK
STATE TAX COMMISSION

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| of | : | |
| BERNARD AND NORINE SELBY | : | DECISION |
| for a Redetermination of a Deficiency | : | |
| or for Refund of Unincorporated Business | : | |
| Taxes under Article 23 of the Tax Law | : | |
| for the Years 1965 and 1966. | : | |

Bernard and Norine Selby petitioned for a redetermination of deficiencies in unincorporated business taxes under Article 23 of the Tax Law for the years 1965 and 1966.

Formal hearings were held at the offices of the State Tax Commission, in Rochester, New York on July 15, 1971, and in New York City on December 10, 1971, before L. Robert Leisner, Hearing Officer. The taxpayers were represented by Sherman Levey and the Income Tax Bureau was represented by Edward H. Best, Esq., (Alexander Weiss, Esq., of Counsel).

ISSUE

Was salary income received by Bernard Selby during 1965 and 1966 from Brand and Oppenheimer, Inc. so interrelated with the petitioner's other business as to constitute taxable unincorporated business income within the meaning of section 703(b) of the New York Tax Law?

FINDINGS OF FACT

1. Petitioners timely filed New York State income tax and unincorporated business tax returns for the years 1965 and 1966.
2. A Notice of Determination of deficiencies in unincorporated business taxes for the years 1965 and 1966 was issued on December 5, 1967, against Bernard and Norine Selby under File No. 52276285.
3. The taxpayers petitioned for redetermination of the deficiencies.

4. Bernard Selby has been a self employed manufacturer's representative for approximately fifteen years operating an office out of Rochester, New York. He represents companies who sell components to men's clothing manufacturers. He has generally represented six or eight suppliers at a time and he ordinarily sells to about fifteen clothing manufacturers, most of whom are in the Rochester area.

5. His relationship with all of the concerns other than Brand and Oppenheimer (hereinafter called B & O) is that of an independent sales agent selling on a commission basis. That income was subject to unincorporated business tax and the petitioner has always filed his return and paid his tax on that basis.

6. The taxpayer's arrangement with B & O was different. He was paid \$12,000.00 a year, regardless of sales. In addition, the taxpayer was paid an additional flexible amount whereby petitioner was given extra compensation for exceptionally good sales. In 1965, taxpayer was paid \$18,942.77 and in 1966, \$13,943.08. All of the money paid to the taxpayer was treated as wages and salary by both B & O and taxpayer.

7. Federal income tax, New York State income tax and social security taxes were withheld from the taxpayer. B & O also paid its employees share of social security taxes and also paid the other usual payroll taxes such as Workmen's Compensation and unemployment insurance.

8. The taxpayer also received from B & O numerous other employee fringe benefits including noncontributory major medical and life insurance plans, and participation in a noncontributory profit-sharing plan. With one exception no other sales representative participated in any of these programs, nor was there withholding on payments made to any other sales representative.

9. Petitioner's relationship with B & O went back to 1955 when he was a regular manufacturers representative on commission. In 1961, when Mr. Oppenheimer died, petitioner was offered a full time job as president which he declined. However, he was put on a salary and he did agree to devote a substantial amount of time to the administrative and sales program of the company. Mainly in 1961 and 1962, petitioner spent several days a week in New York City setting up the existing sales program and training all key sales personnel in the company. Once this work was completed, he continued his work with B & O by constant consultation and advisory work in all areas of purchasing, sales and marketing.

10. Petitioner would meet with the principals of B & O an absolute minimum of five or six times a year to discuss general problems, including the all important pricing structure. Petitioner was in constant telephone contact three or four times a week with the principals or key employees to discuss general business matters and again the ever fluid pricing structure and bidding process in the industry. Petitioner was privy to information and decisions far outside the scope of the work of any manufacturers representative. The offices and facilities of B & O in New York City were made available to the petitioner.

11. Petitioner also had performed other services including looking for and investigating mergers and acquisitions, carrying on negotiations for the same, investigation of new product lines or different product lines and other general administrative work.

CONCLUSIONS OF LAW

A. Petitioner was a key man employee of Brand and Oppenheimer. Petitioner's work as a key man employee for B & O was separate and distinct from his other business activities for other concerns in 1965 and 1966.

B. The income from Brand and Oppenheimer was salary and was not subject to unincorporated business tax.

C. The taxpayer's petition is sustained and it is determined that there is no deficiency in unincorporated business tax for the years 1965 and 1966.

DATED: Albany, New York

August 24, 1972

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER