

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

NATHAN SCHWEFEL and HELEN SCHWEFEL

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) 1962, 1963, 1964,
1965 and 1966

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

State of New York
County of Albany

MARTHA FUNARO

, 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 16th day of January, 1973, she served the within

Notice of Decision (or Determination) by (certified) mail upon NATHAN AND

HELEN SCHWEFEL

(representative of) the petitioner in the within

proceeding, by enclosing a true copy thereof in a securely sealed postpaid

wrapper addressed as follows:

Nathan and Helen Schwefel
47 Arlington Avenue
Rockville Centre, New York

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

16th day of January, 1973.

Lynn Wilson

Martha Funaro

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

NATHAN SCHWEFEL and HELEN SCHWEFEL

For a Redetermination of a Deficiency or
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Tax Law for the (Year(s) 1962, 1963, 1964,
1965 and 1966

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State of New York
County of Albany

MARTHA FUNARO, 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 16th day of January, 1973, she served the within
Notice of Decision (or Determination) by (certified) mail upon MICHAEL S.
SCHWEFEL (representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid

wrapper addressed as follows:

Michael S. Schwefel
10 Eastwood Road
West Hartford, Connecticut

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

16th day of January, 1973

Lynn Wilson

Martha Funaro



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
BUILDING 9, ROOM 214A
STATE CAMPUS
ALBANY, N. Y. 12226

STATE TAX COMMISSION

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

AREA CODE 518
457-2655, 6, 7

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

DATED: Albany, New York
January 16, 1973

Nathan and Helen Schwefel
47 Arlington Avenue
Rockville Centre, New York

Dear Mr. and Mrs. Schwefel:

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

Please take further notice that pursuant to
Section(s) **722** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from 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 relative
hereto may be addressed to the undersigned.
These will be referred to the proper party for
reply.

Very truly yours,

Paul B. Coburn
HEARING OFFICER

Enc.

cc: Petitioner's Representative
Law Bureau

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :

of :

NATHAN SCHWEFEL and HELEN SCHWEFEL : DECISION

for Redetermination of Deficiency or :
for Refund of Unincorporated Business :
Tax under Article 23 of the Tax Law :
for the Years 1962, 1963, 1964, 1965 :
and 1966. :

Petitioners, Nathan Schwefel and Helen Schwefel, have filed petitions for redetermination of deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1962, 1963, 1964, 1965 and 1966. (File No.'s 26036960 and 66047070). A formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York on July 11, 1972, at 2:25 P.M. Petitioners appeared by Michael S. Schwefel, Esq. The Income Tax Bureau appeared by Saul Heckelman, Esq., (Albert J. Rossi, Esq., of Counsel).

ISSUES

I. Did petitioner, Nathan Schwefel's selling activities during the years 1962 through 1966 constitute the carrying on of an unincorporated business?

II. If petitioner, Nathan Schwefel was carrying on an unincorporated business during the years 1962 through 1966, what portion of his income derived therefrom should be allocated to New York State?

FINDINGS OF FACT

1. Petitioners, Nathan Schwefel and Helen Schwefel, filed New York State income tax resident returns for the years 1962 through 1966. They did not file New York State unincorporated business tax returns for said years.

2. On May 1, 1967, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, Nathan Schwefel and Helen Schwefel, imposing unincorporated business tax in the sum of \$863.64 upon the income received by petitioner, Nathan Schwefel, from his activities as a salesman during the years 1962, 1963 and 1964, and accordingly issued a Notice of Deficiency in the sum of \$1,015.15.

3. On February 10, 1969, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, Nathan Schwefel and Helen Schwefel, imposing unincorporated business tax in the sum of \$1,002.41 upon the income received by petitioner, Nathan Schwefel, from his activities as a salesman during the years 1965 and 1966. It also corrected an error in computation in their 1966 personal income tax return resulting in an uncontested credit in the sum of \$60.00. In accordance with the aforesaid Statement of Audit Changes, it issued a Notice of Deficiency in the sum of \$1,072.29.

4. It was stipulated at the formal hearing by the Income Tax Bureau that the notices of deficiency as against petitioner, Helen Schwefel, should be cancelled since she was not engaged in business during the years in issue.

5. It was stipulated at the formal hearing by the petitioners, Nathan Schwefel and Helen Schwefel, that they will pay any additional New York State personal income tax that may be due as the result of a federal audit for the year 1964. Petitioner, Nathan Schwefel, further stipulated that in the event of adverse decision upon the issue of his liability for unincorporated business tax for the year 1964, he would consent to any adjustments to the amount of unincorporated business tax due for said year resulting from the aforesaid federal audit. These represent adjustments that were not set forth in the Statement of Audit Changes dated May 1, 1967.

6. Petitioner, Nathan Schwefel, was a children's wear salesman during the years 1962 through 1966. He represented Cute Togs and Sea Isle Sportswear, Inc. in the sale of children's wear. The two firms were not affiliated. The products sold by him for each firm were noncompetitive and were generally sold to the same customers. He employed assistants to help display merchandise to his customers.

7. Petitioner, Nathan Schwefel, sold children's wear on a commission basis. He received a draw against commissions from Cute Togs. Federal and New York State income taxes, social security tax and unemployment insurance premiums were withheld from the amount of the draw. These items were not withheld from the balance of his commissions received from Cute Togs or from the commissions he received from Sea Isle Sportswear, Inc. He was not reimbursed for any of his business expenses. Expense advances received from Cute Togs were eventually deducted from his commissions. The firms for whom he sold merchandise did not exercise any substantial direction or control over his sales activities and techniques or over the time he devoted to sales except to limit the territory in which he could sell.

8. Petitioner, Nathan Schwefel, sold children's wear during the years 1962 through 1966 in Virginia, Maryland, Washington, D.C., and portions of Pennsylvania and New Jersey. Substantially, all of his sales were made outside of New York State. He maintained his office and business headquarters at the New York City offices of the firms for whom he sold merchandise. He generally displayed his merchandise in his hotel room in the various cities that he visited. He had no office telephone listings outside of New York State. He had no regular place of business outside of New York State.

CONCLUSIONS OF LAW

A. That the income received by petitioner, Nathan Schwefel, from the two firms that he represented during the years 1962 through 1966 constituted income from his regular business of selling children's wear and not compensation as an employee exempt from the imposition of the unincorporated business tax in accordance with the meaning and intent of section 703(b) of the Tax Law.

B. That the aforesaid activities of petitioner, Nathan Schwefel, during the years 1962 through 1966 constituted the carrying on of an unincorporated business and his income derived therefrom was subject to the unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law.

C. That since petitioner, Nathan Schwefel, did not have a regular place of business outside of New York State during the years 1962 through 1966, all of his business income, including that income derived from out-of-state sales, was properly allocated to New York State in accordance with the meaning and intent of section 707(a) of the Tax Law.

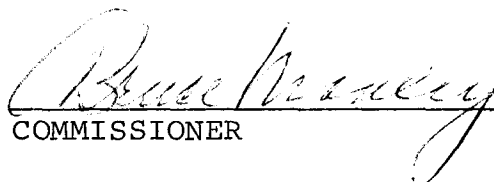
D. That the petitions of Nathan Schwefel and Helen Schwefel are granted to the extent of cancelling the notices of deficiency issued May 1, 1967, and February 10, 1969, as against petitioner, Helen Schwefel, and, except as so granted, the petitions are in all other respects denied and Notice of Deficiency issued May 1, 1967, as modified by paragraph "5" of this decision and the

Notice of Deficiency issued February 10, 1969, as against petitioner,
Nathan Schwefel, are sustained.

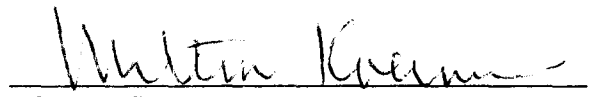
DATED: Albany, New York
January 16, 1973

STATE TAX COMMISSION

COMMISSIONER



COMMISSIONER



COMMISSIONER