

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
SANFORD D. LEVY & JEAN R. FISHEL, :
As Executors of the ESTATE OF MILTON A. :
FISHEL :
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) 1970 & 1971 :

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

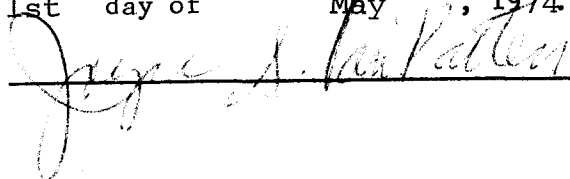
State of New York
County of Albany

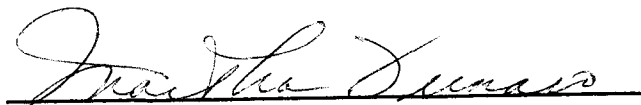
Martha Funaro , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 1st day of May , 1974, she served the within
Notice of Decision (or Determination) by (certified) mail upon Estate of Milton A.
Sanford D. Levy & Jean R. Fishel,
Fishel, Executors (representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Estate of Milton A. Fishel
Sanford D. Levy & Jean R. Fishel, Executors
c/o Sanford D. Levy
100 Park Avenue, New York, N.Y. 10017
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

1st day of May , 1974.





STATE OF NEW YORK
STATE TAX COMMISSION

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of
SANFORD D. LEVY & JEAN R. FISHEL, :
As Executors of the ESTATE OF MILTON A. :
FISHEL :
For a Redetermination of a Deficiency or
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State of New York
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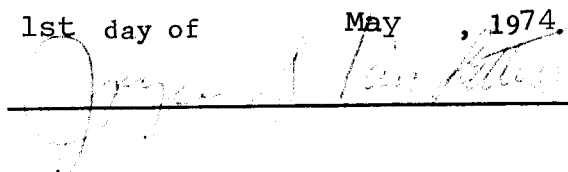
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STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A
STATE CAMPUS

ALBANY, N. Y. 12227

AREA CODE 518

457-2655, 6, 7

STATE TAX COMMISSION

Mario A. Procaccino
~~NORMAN F. GALEMAN~~, PRESIDENT

A. BRUCE MANLEY

MILTON KOERNER

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

Dated: Albany, New York

May 1, 1974

**Estate of Milton A. Fishel
Sanford D. Levy & Jean R.
Fishel, Executors
c/o Sanford D. Levy, Esq.
100 Park Avenue
New York, New York 10017**

Dear Mr. Levy & Mrs. Fishel:

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,


Paul B. Coburn

HEARING OFFICER

cc Petitioner's Representative
Law Bureau

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
SANFORD D. LEVY and JEAN R. FISHEL,	:	
as Executors	:	
of the ESTATE of MILTON A. FISHEL	:	DECISION
for Redetermination of Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law	:	
for the Years 1970 and 1971.	:	

Sanford D. Levy and Jean R. Fishel, as executors of the Estate of Milton A. Fishel, have filed petitions for redetermination of deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1970 and 1971. (File No. 1477.) A formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, 2 World Trade Center, New York, New York, on March 18, 1974, at 3:00 P.M. Petitioners appeared by Sanford D. Levy, Esq. The Income Tax Bureau appeared by Saul Heckelman, Esq., (Francis X. Boylan, Esq., of Counsel).

ISSUES

I. Were the executors of the Estate of Milton A. Fishel engaged in the liquidation of the deceased's unincorporated business during the years 1970 and 1971?

II. If the executors were engaged in the liquidation of the deceased's unincorporated business during the years 1970 and 1971, are they entitled to the deduction for reasonable

compensation for personal services allowed by section 708(a) of the Tax Law?

FINDINGS OF FACT

1. On January 18, 1972, petitioners, Sanford D. Levy and Jean R. Fishel, as executors of the Estate of Milton A. Fishel, filed a New York State unincorporated business tax return for the period from September 25, 1970 through December 31, 1970. Attached to the return was a rider alleging that the petitioners were not subject to unincorporated business tax and demanding that the sum of \$482.54 plus interest paid with said return be refunded. A personal service allowance in the sum of \$2,525.58 was claimed on said return.

2. On July 6, 1972, petitioners, Sanford D. Levy and Jean R. Fishel, as executors of the Estate of Milton A. Fishel, filed a claim for credit or refund of unincorporated business tax for the year 1970.

3. On March 26, 1973, the Income Tax Bureau issued a Statement of Audit Changes against the Estate of Milton A. Fishel imposing additional unincorporated business tax for the year 1970 in the sum of \$138.91 upon the grounds that the personal service allowance is not an allowable deduction for a fiduciary in computing the unincorporated business tax. In accordance with the aforesaid Statement of Audit Changes, it issued a Notice of Deficiency in the sum of \$138.91.

4. On April 30, 1973, petitioners, Sanford D. Levy and Jean R. Fishel, as executors of the Estate of Milton A. Fishel, filed a New York State unincorporated business tax return for

the year 1971 indicating a tax due in the sum of \$390.02 which sum was not paid by them. Accompanying said return was a letter stating that the estate was not subject to the unincorporated business tax, and that the return was filed for informational purposes only. It was stipulated at the formal hearing that said letter would be deemed a claim for refund which was denied by the Income Tax Bureau and a petition for redetermination of deficiency or for refund of unincorporated business tax for the year 1971.

5. Decedent, Milton A. Fishel, died a resident of the City, County and State of New York on September 25, 1970, and his Last Will and Testament was admitted to probate in the Surrogate's Court, New York County, on October 20, 1970. Letters testamentary were issued thereon to Jean R. Fishel and to Sanford D. Levy, attorney for the executors, by said Surrogate's Court on October 20, 1970.

6. Decedent, Milton A. Fishel, was sole sales representative in New York City for Coby Glass Products Co., a manufacturer of Christmas tree ornaments, of Woonsocket, Rhode Island, with respect to the chain and variety stores hereinafter mentioned, pursuant to a verbal agreement with its president, Mr. James V. Pugliese. He also acted as sales representative for Holly Decorations, Inc., an affiliate of Coby Glass Products Co., under a similar verbal agreement, but sales for Holly Decorations, Inc. were relatively small. The agreement with the manufacturers provided, in substance, that decedent would contact the buyers

of Christmas tree ornaments of the following chain or variety stores:

S. S. Kresge Co.
W. T. Grant Co.
Woolco (subsidiary of Woolworth)
Neisner Bros. Inc.
PX Exchange (Army)

and display the manufacturer's Christmas tree ornaments to them for the purpose of inducing the stores to place purchase orders with the manufacturers. Decedent would be entitled to commissions at four (4%) percent on orders which would be placed by the customers with the manufacturer, but not until after deliveries were made to and accepted by and paid for by the customers.

7. The business was conducted by decedent in the following manner: In January, February and March each year the buyers would inspect samples of Christmas tree ornaments which were furnished by the manufacturers to decedent for display. The largest customer was S. S. Kresge Co., who's buyer, Mr. William J. Griffin, would call at decedent's office in early February, sometimes with its merchandise manager, and at such meeting Mr. Pugliese, president of the manufacturer, would come to New York and attend the meeting. The buyers for Neisner Bros. Inc. and the PX Exchange would also call at decedent's office to inspect the samples. In the case of W. T. Grant Co. and Woolco, decedent would take his samples to their buying offices in New York City.

In each case, the buyer would tentatively select the various items in which he was interested, but quantities would not be positive until they had the opportunity to discuss the ornaments

with their various store managers and other personnel.

Orders for merchandise would be sent by the customers directly to the manufacturer and did not channel through decedent. Deliveries of merchandise would be made by the manufacturer later in the year directly to the customers and were not handled in any manner by decedent.

8. Decedent's services were completed after he had contacted the buyers and displayed to them the manufacturer's samples either at decedent's office or at the buyer's office, as aforesaid. Decedent did not own, possess or deal with any merchandise, nor did he collect or receive payment of the purchase price for any merchandise, nor was he obligated to render any other service in connection with orders placed by the customers. He maintained very friendly relations with the buyers and occasionally would assist in clearing up some minor matter or in expediting payment, but this was not part of decedent's obligation under the terms of his agreement with the manufacturer.

9. Decedent had no employees, except that Jean R. Fishel kept her husband's records of commissions owing and received. There was no stock in trade, no manufacturing equipment or other business assets, except an insubstantial amount of office equipment. The office consisted of one room, which was divided into two sections. Some of the office furniture was furnished by and belonged to the landlord.

10. The manufacturer, Coby Glass Products Co. paid one-half of the office rent of \$135.00 a month.

11. Decedent became terminally ill in April, 1970, was in the hospital and engaged in no activity whatsoever for a period of over four months prior to his death.

12. As deliveries were made to the various stores, a pink copy of the manufacturer's invoice would be sent to decedent's office, the bulk of them arriving beginning in September of each year. Shortly after the end of each month a yellow statement would be received from Coby Glass Products Co. showing total deliveries to each company and the amount of the commissions which would be due decedent on the total for the month.

13. An unincorporated business tax return for the period from January 1, 1970 to September 25, 1970, the date on which decedent passed away, was filed and the tax shown thereon was paid.

14. Although decedent engaged in no business activity for many months prior to his death, commissions became payable after he had passed away on merchandise delivered by the manufacturers to the customers for the succeeding Christmas season. These commissions did not become owing during decedent's lifetime, but were claims belonging to his estate. They were included as assets in decedent's estate tax return and the estate tax was paid thereon. They were also included as income in the estate's fiduciary income tax returns for 1970 and 1971 and income taxes were paid thereon. The commissions so received from the manufacturers were as follows:

From Coby Glass Products Co.

11/25/70	\$ 3,000.00
11/27/70	3,000.00
12/21/70	4,000.00
12/29/70	3,000.00
2/16/71	2,000.00
3/19/71	2,000.00
4/30/71	1,000.00
5/28/71	1,000.00
7/6/71	2,000.00
8/24/71	<u>2,801.99</u>
	\$23,801.99

From Holly Decorations, Inc.

1/4/71	\$2,179.66
2/23/71	<u>2,132.48</u>
	<u>\$4,312.14</u>

15. Decedent left no stock in trade to be disposed of. Samples, as usual, were given to hospitals and other institutions, or to employees in the building. The small amount of office equipment owned by decedent was sold for \$141.00.

16. The executors did nothing in connection with the business which decedent had conducted other than passively to receive payment of commissions which automatically were made by the manufacturers without solicitation. No orders were solicited or obtained by the fiduciaries.

CONCLUSIONS OF LAW

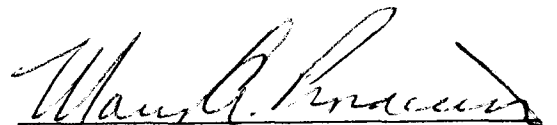
A. That petitioners, Sanford D. Levy and Jean R. Fishel, as executors of the Estate of Milton A. Fishel, during the years 1970 and 1971 carried on the liquidation of the unincorporated business of the deceased for whose estate they acted and therefore the income derived therefrom was subject to the unincorporated business tax in accordance with the meaning and intent of section 703(a) of the Tax Law.

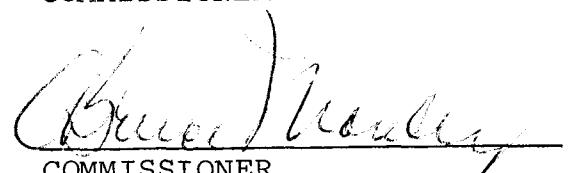
B. That petitioners, Sanford D. Levy and Jean R. Fishel, as executors of the Estate of Milton A. Fishel, are not considered proprietors or partners for the purposes of section 708(a) of the Tax Law, even though they carried on the liquidation of the unincorporated business of the deceased for whose estate they acted during the years 1970 and 1971, and are therefore not entitled to the deduction for reasonable compensation for personal services allowed by said section.

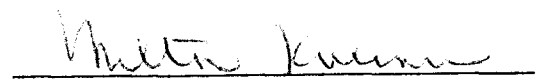
C. That the petitions of Sanford D. Levy and Jean R. Fishel, as executors of the Estate of Milton A. Fishel, are denied; their claim for refund for the year 1970 is denied; the Notice of Deficiency issued March 26, 1973 is sustained, and the Income Tax Bureau is directed to issue a Notice of Deficiency against them for the year 1971 to include the disallowance of the deduction for reasonable compensation for personal services together with such interest as may be lawfully due.

DATED: Albany, New York
May 1, 1974

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER