

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
IRVING J. SCHILDKRAUT
and
MAXINE M. SCHILDKRAUT
For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article ~~XX~~ 23 of the :
Tax Law for the Year(s) ~~1967, 1968, 1969 and 1970.~~ :
1967, 1968, 1969 and 1970.

AFFIDAVIT OF MAILING

State of New York
County of Albany

Catherine Steele, 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 25th day of August, 1976, she served the within
Notice of Decision by (certified) mail upon Irving J. Schildkraut &

Maxine M. Schildkraut ~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Mr. & Mrs. Irving J. Schildkraut
2817 Mandalay Beach Road
Wantagh, New York 11793

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 Postal Service within the State of New York.

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

25th day of August, 1976

Janet Mack

Catherine Steele



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

August 25, 1976

TELEPHONE: (518) **457-3850**

Mr. & Mrs. Irving J. Schildkraut
2817 Mandalay Beach Road
Wantagh, New York 11793

Dear Mr. & Mrs. Schildkraut:

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

Please take further notice that pursuant to
Section ~~XX~~ **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.

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. They
will be referred to the proper party for reply.

Very truly yours,

Paul B. Coburn
Supervising Tax
Hearing Officer

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
IRVING J. SCHILDKRAUT	:	
and	:	DECISION
MAXINE M. SCHILDKRAUT	:	
for Redetermination of a Deficiency	:	
or for Refund of Unincorporated Business	:	
Taxes under Article 23 of the Tax Law	:	
for the Years 1967, 1968, 1969 and 1970.	:	
	:	

Petitioners, Irving J. Schildkraut and Maxine M. Schildkraut, residing at 2817 Mandalay Beach Road, Wantagh, New York 11793, have filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1967, 1968, 1969 and 1970. (File No. 00081). A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 31, 1976 at 1:15 P.M. Petitioners appeared by Seymour D. Weiss, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq., (Richard Kaufman, Esq., of counsel).

ISSUES

I. Whether the business activities of petitioners, Irving J. Schildkraut and Maxine M. Schildkraut, constituted the conduct of an unincorporated business under section 703 of the Tax Law.

II. Whether the petitioners, Irving J. Schildkraut and Maxine M. Schildkraut, were properly subject to penalties under section 685(a) of the Tax Law.

FINDINGS OF FACT

1. Petitioners, Irving J. Schildkraut and Maxine M. Schildkraut, timely filed joint income tax returns for each of the years 1967 through 1970, but did not file an unincorporated business tax return for any year.

2. A Notice of Deficiency for unincorporated business tax was issued May 22, 1972 against both petitioners. On the same date, a Statement of Audit Changes detailed the unincorporated business tax liability as \$2,543.52 plus penalties of \$721.73 and interest of \$448.85 for a total of \$3,714.10.

3. The Income Tax Bureau determined that petitioner, Irving J. Schildkraut's activities as a salesman were subject to unincorporated business taxes in the years 1967 to 1970, that he had failed to file a tax return and pay the unincorporated business tax for those years. The Income Tax Bureau added penalties to the business tax deficiency determined.

4. Petitioners, Irving J. Schildkraut and Maxine M. Schildkraut, timely filed a petition for redetermination of the tax and penalty for the years 1967 - 1970. They had been advised by their accountant that they were not required to file unincorporated business tax returns for the years in question.

5. Petitioner, Maxine M. Schildkraut, did not take part in any unincorporated business during the years in question.

6. Petitioner, Irving J. Schildkraut, was an outside salesman of printed packaging materials, primarily for Award Packaging Corp. He also represented at least three other non-competitive producers of packaging materials. These were Berles Carton Company, Inc. of Paterson, New Jersey, Reliance Packaging Products, Inc. of Long Island City, New York and Cellu-Craft Products Co. of Garden City, New York.

7. Petitioner, Irving J. Schildkraut, was paid a straight commission on gross sales for all principals except Award Packaging Corp. That company had an oral contract by which he was paid an annual amount, divided by agreement into monthly payments. This gross monthly payment included partial reimbursement for expenses incurred by him in his sales activities. For some expenditures, particularly on trips for Award Packaging where he gave technical advice and assistance to customers of the firm, he submitted vouchers and was specifically repaid for these outlays. Which of the expenditures were reimbursable at any given time was said to be matter of almost constant negotiation between him and officers of Award Packaging.

8. Award Packaging did not withhold income taxes or Federal social security taxes from any payments to petitioner, Irving J. Schildkraut. Payments to him were reported annually on Form 1099 to Internal Revenue Service.

9. Petitioner, Irving J. Schildkraut, was assigned accounts by Award Packaging. Whether he visited assigned accounts, or "house accounts", his remuneration remained at the annual figure negotiated at yearly "reviews" between him and officers of Award. This varying stipend to him took no account of whatever commissions he was able to garner from sales for other principals.

10. Petitioner, Irving J. Schildkraut, filed a Schedule "C" with his Federal income tax return for the years 1967 to 1970 showing "profit (or loss) from business or profession." On this he itemized depreciation of office furniture, stationery, printing, business entertainment, auto expense and the like.

11. Petitioner made daily reports of his activities to Award Packaging. His itinerary on the road had to be approved in advance by Award Packaging. His vacation had to be approved by Award and was not allowed to interfere with the requirements of Award's needs for petitioner's services to Award customers. How and when he worked was at his own discretion subject to the general supervision of Award officers.

12. The petitioner maintained an office at home as well as had office facilities at Award which the principal provided for him. He had no employees or assistants.

CONCLUSIONS OF LAW

A. That no unincorporated business tax liability has been determined against petitioner, Maxine M. Schildkraut, and she has no liability for unincorporated business tax or penalty.

B. That petitioner, Irving J. Schildkraut, was not an employee of Award Packaging Corporation, but was an independent contractor selling packaging supplies on commission for at least three other firms during the period 1967 to 1970. That Award Packaging Corp. did not exercise such a degree of control and direction over the activities of the petitioner as to warrant his being considered an employee. Britton v. State Tax Commission 22 A.D. 2d 987 aff'd 19 NY 2d 613.

C. That petitioner, Irving J. Schildkraut, was not exempt from unincorporated business tax under Tax Law, section 703(f). That portion of Article 23 is not an exemption from the unincorporated business tax but merely limits the factors which may be relied upon to conclude that the individual is self-employed as opposed to being a mere employee of his principals. Frishman v. New York State Tax Commission, 33 A.D. 2d 1071, 307 NYS 2d 609, 611 (3rd Dept. 1970). With full consideration being given all factors involving his business activities, petitioner, Irving J. Schildkraut, did not adduce any substantial evidence to show that he was an employee of Award Packaging Corp. rather than an independent contractor representing several non-competing firms.

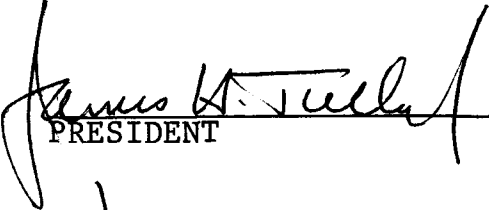
D. That the petitioner relied upon what he had reason to believe was credible and competent advice of Award's CPA. There were reasonable grounds for his belief that his activities were not

subject to the unincorporated business tax, and that he was not required to file returns. The penalty under former section 685(a) and under sections 685(a)(1) and (2) of the Tax Law is cancelled.

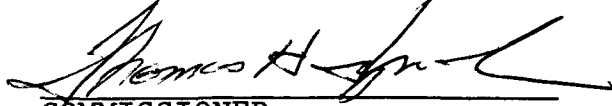
E. That the petition of Irving J. Schildkraut and Maxine M. Schildkraut is granted to the extent that the penalties under former section 685(a) and sections 685(a)(1) and 685(a)(2) are cancelled; that the Notice of Deficiency as against petitioner, Maxine M. Schildkraut, is cancelled; that the Income Tax Bureau is directed to modify the Notice of Deficiency issued May 22, 1972; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
August 25, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER