

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

IRWIN FEINER

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article ~~(3)~~ 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1967 through 1973.

State of New York
County of Albany

Marsina Donnini, 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 26 day of August, 1977, she served the within
Notice of Decision by (certified) mail upon Irwin
Feiner ~~representative of~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Mr. Irwin Feiner
405 Daub Avenue
Hewlett, New York 11557
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~~ petitioner.

Sworn to before me this

26th day of August, 1977.

Marsina Donnini

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

IRWIN FEINER

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article (X) 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1967 through 1973

State of New York
County of Albany

Marsina Donnini, 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 26 day of August, 1977, she served the within Notice of Decision by (certified) mail upon Leonard Jay Reade, Esq. (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Leonard Jay Reade, Esq.
10 East 40 Street
New York, New York 10016

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 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

26th day of August, 1977.

Marsina Donnini

Janet Mack



STATE OF NEW YORK
STATE TAX COMMISSION
TAX APPEALS BUREAU
ALBANY, NEW YORK 12227

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

August 26, 1977

Mr. Irvin Feiner
405 Daub Avenue
Hewlett, New York 11557

Dear Mr. Feiner:

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

You have now exhausted your right of review at the administrative level. Pursuant to section ~~301~~ **722** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within ~~4 months~~ from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

Paul B. Coburn
Supervising Tax
Hearing Officer

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
IRWIN FEINER	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1967 through 1973.	:	

Petitioner, Irwin Feiner, filed petitions for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1967 through 1973 (File Nos. 13924 and 13925).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 21, 1977 at 10:45 A.M. The petitioner appeared by Leonard Jay Reade, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq. of counsel).

ISSUES

I. Whether the activities of petitioner, Irwin Feiner, during the years in issue as a manufacturer's representative selling ladies' sportswear for various principals constituted the carrying on of an unincorporated business.

II. Whether salary income received by petitioner, Irwin Feiner, from only one principal in 1968, as a designer, was integrated with and a part of his business income subject to unincorporated business tax.

III. Whether salary income received by petitioner, Irwin Feiner, from only one principal in 1969, as a designer, was integrated with and a part of his business income subject to unincorporated business tax.

IV. Whether the activities of the petitioner during the years 1970 through 1973 as a designer of ladies' sportswear for various principals constituted the carrying on of an unincorporated business subject to unincorporated business tax.

V. Whether the gain realized on the sale of race horses in 1973 was a capital gain or the sale of business assets subject to unincorporated business tax.

FINDINGS OF FACT

1. The petitioner, Irwin Feiner, and his wife Elizabeth Feiner filed going New York State resident personal income tax returns for the years 1967, 1968 and 1969. For 1967 the petitioner, Irwin Feiner, reported the net profit from business income as a manufacturer's sales representative in the amount of \$33,850.65. For 1968 petitioner reported salary income of \$4,000.00, plus net profit from business income as a manufacturer's representative in the amount of \$30,712.86. For 1969 petitioner reported salary

income from Cracker Barrel Dress Ltd. in the amount of \$11,750.00, and business income from his sales activities in the amount of \$27,363.00. Petitioner did not file any unincorporated business tax returns for the years 1967, 1968 and 1969.

2. On July 29, 1974, the Income Tax Bureau issued a Statement of Audit Changes to petitioner for the years 1967, 1968 and 1969 which stated that "The income from your activities as executive and salesman is subject to the unincorporated business tax. Salary income is deemed part of unincorporated business income." The Income Tax Bureau imposed the unincorporated business tax in the amount of \$5,565.14, plus interest of \$1,672.88, for a total of \$7,238.02. Accordingly, it issued a Notice of Deficiency therefor.

3. The petitioner and his wife filed combined income tax returns (for resident married persons filing a joint Federal return who elect to file separate New York State returns on the same form) for the years 1970 through 1973. The petitioner did not file unincorporated business tax returns for 1970 and 1971. On July 29, 1974, the Income Tax Bureau issued a Statement of Audit Changes imposing additional personal income tax against petitioner for 1971 to conform to his 1971 Federal credit in the amount of \$197.31, and further imposed unincorporated business tax for the years 1971 and 1972 in the amount of \$5,436.09, with interest of \$936.16, for a total of \$6,569.56. Accordingly, it issued a Notice of Deficiency therefor. The activities of the petitioner for the years 1970 and

1971 were deemed to be subject to the unincorporated business tax. Income reported as wages was deemed to be part of petitioner's business income.

4. The petitioner timely filed a petition for redetermination of the deficiencies for the years 1967 through 1971.

5. The petitioner filed unincorporated business tax returns for 1972 and 1973, including income and losses from business as a manufacturer's sales representative and the business of horse racing. He did not include on said returns salary income. On June 30, 1975, the Income Tax Bureau issued a Statement of Audit Changes against petitioner for the years 1972 and 1973, imposing additional unincorporated business tax in the amount of \$10,242.48, with interest of \$124.21, for a total of \$11,651.87. Accordingly, it issued a Notice of Deficiency therefor. The 1972 overpayment of \$25.98, plus interest of \$4.30, totalling \$30.28 due petitioner's wife was applied against the aforesaid deficiency, leaving a balance due of \$11,621.87. On February 2, 1977, there was an abatement of personal income tax in the amount of \$132.14, with interest of \$21.85, for a total of \$154.39, thereby further reducing the deficiency to the extent indicated. The salary income for 1972 and 1973 was considered to be business related and subject to unincorporated business tax. The gain on the sale of race horses in the amount of \$13,600.00 in 1973 was also held to be business related income, and was treated as gains realized on the sale of business assets.

The petitioner timely filed a petition for redetermination of the deficiency for 1972 and 1973.

6. During each of the years 1967 through 1973, the petitioner, Irwin Feiner, was a manufacturer's sales representative of three to five separate manufacturers, selling non-competitive ladies' sportswear on a straight commission basis.

7. During the years 1967 through 1973, the firms for whom the petitioner sold ladies' sportswear did not withhold Federal and New York State income taxes and social security tax from the commissions paid to him. He was not reimbursed for any of his business expenses. He deducted these business expenses on Schedule "C" of his Federal income tax returns. He maintained an office at home where he kept files and records and had the use of a telephone. He employed his wife as a secretary and paid social security tax on the compensation paid to her. He deducted rent for an office, office supplies, salaries and wages paid to others, advertising, etc. There was no agreement between the various principals as to petitioner's time and effort. The petitioner was free to represent other principals as long as the products carried did not conflict. The firms for whom petitioner sold merchandise did not exercise any supervision or control over his sales activities or techniques, or to the time he devoted to sales, except to limit the territory in which he could sell.

The aforementioned income was for services as a designer of ladies' sportswear and dresses, and as a consultant in the selection of material in connection with the manufacture of dresses and ladies' sportswear. Federal and state income and withholding taxes were deducted from the petitioners salary. There was no agreement between principals as to a division of petitioner's time and effort. None of the principals exercised supervision and control as to time and effort over such activities exercised by petitioner on their behalf.

11. The petitioner owned 25% of the shares of stock of McHowdan Sportswear Inc., a corporation organized under the laws of the State of Pennsylvania.

12. On his unincorporated business tax returns for 1972 and 1973, the petitioner stated that he was engaged in business as a manufacturer's representative and was also engaged in horse racing. During the years 1972 and 1973, petitioner engaged in the business of racing horses. He deducted the trainer's fees, etc. In connection with said business, he bought and sold race horses. The petitioner realized a gain of \$13,600.00 in 1973 from the sale of certain race horses.

CONCLUSIONS OF LAW

A. That the commission income received by the petitioner, Irwin Feiner, from the firms he represented during the years 1967 through 1973 constituted income from his regular business of selling

8. In 1968 the petitioner received \$4,000.00 from Majestic Specialties Inc. This was compensation as a designer and production supervisor. Federal and state income taxes and social security taxes were withheld from such compensation. The services rendered by petitioner were not in any way connected with his selling activities. He had no financial interest in Majestic Specialties Inc. He had no other employment as a designer in that year. Such services were in no way related to his sales activities.

9. In 1969 the petitioner received \$11,750.00 in compensation as a designer of various lines of women's dresses, assisting in the various production processes and advising on piece goods selection. He had no financial interest in this corporation. Federal and state income and social security taxes were withheld from said compensation. He had no other employment as a designer in that year. Such services were in no way related to his sales activities.

10. During the years 1970 through 1973, the petitioner received compensation designated by him as "salary" income from the following firms:

	<u>1970</u>	<u>1971</u>	<u>1972</u>	<u>1973</u>
Cracker Barrel Dress Ltd.	\$13,000.00	\$13,000.00	\$13,250.00	\$6,000.00
I.L.D. Trading Inc.	3,800.00	600.00	1,200.00	6,300.00
McHowdan Sportswear Inc.	28,800.00	38,400.00	58,400.00	66,400.00
Rojill Ltd.			3,400.00	29,400.00
We Three Associates, Inc.			1,000.00	

dressess and ladies' sportswear, and not compensation as an employee exempt from the imposition of the unincorporated business tax, in accordance with the intent and meaning of section 703(b) of the Tax Law.

B. That the aforesaid selling activities of petitioner, Irwin Feiner, during the years 1967 through 1973 constituted the carrying on of an unincorporated business in accordance with the provisions of section 703 of the Tax Law.

C. That the services rendered by petitioner as a designer and the compensation received therefor in 1968 and 1969 constituted the performance of services as an employee; that such services were not integrated with petitioner's business activities as a manufacturer's sales representative; and that such compensation is exempt from the imposition of unincorporated business tax within the intent and meaning of section 703(b) of the Tax Law. (Lampel v. Proccacino, 46 A.D. 2d 966, 362 NYS 2d 58)

D. That the income received by petitioner from his activities during the years 1970 through 1973 as more fully set forth in Finding of Fact "10", supra, constituted income from his regular business of designing ladies' sportswear, and not as compensation as an employee exempt from unincorporated business tax within the intent and meaning of section 703(b) of the Tax Law; that the aforesaid activities constituted the carrying on of an unincorporated business subject to the unincorporated business tax in accordance with the provisions of section 703 of the Tax Law.

E. That the activities of the petitioner in 1972 and 1973 with respect to horse racing constituted the carrying on of an unincorporated business subject to unincorporated business tax; that the gain on the sale of race horses in the amount of \$13,600.00 in 1973 constituted business-related income, since it was realized on the sale of business assets.

F. That the Income Tax Bureau is directed to modify the Notice of Deficiency for the years 1967, 1968 and 1969, by eliminating therefrom the income received by the petitioner in 1968 and 1969 as more fully set forth in Finding of Fact "10", supra, and Conclusion of Law "C", supra, and, accordingly, recompute the unincorporated business taxes for said years.

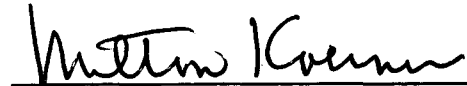
G. That the petitions of Irwin Feiner are granted to the extent indicated in Conclusions of Law "C" and "F", and are in all other respects denied.

DATED: Albany, New York

August 26, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER