

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

DAVID FISCHOFF AND HENRIETTA FISCHOFF

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) ~~xxxxxx~~ :
1966 and 1967.

AFFIDAVIT OF MAILING

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 22nd day of July, 1977, she served the within Notice of Decision by (certified) mail upon David Fischoff & Henrietta Fischoff ~~(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. David Fischoff
162 Woodlawn Avenue
New Rochelle, 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 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

22nd day of July, 1977.

Marsina Donnini

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

DAVID FISCHOFF AND HENRIETTA FISCHOFF :

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) ~~on Period(s)~~ :
1966 and 1967.

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 22nd day of July , 1977, she served the within
Notice of Decision by (certified) mail upon Sidney Weiss
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Sidney Weiss, CPA
Rosenshein, Neiman & Weiss
61 Broadway
New York, New York 10006
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

22nd day of July , 1977.

Janet Mack

Marsina Donnini



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

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

July 22, 1977

**Mr. & Mrs. David Fischhoff
162 Woodlawn Avenue
New Rochelle, New York**

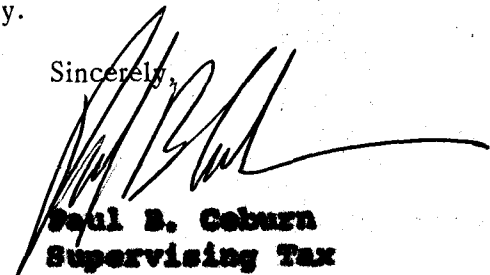
Dear Mr. & Mrs. Fischhoff:

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 **(b) 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 A. Ceburn
Supervising Tax
Hearing Officer**

cc: Petitioner's Representative
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
DAVID FISCHOFF AND HENRIETTA FISCHOFF :
for Redetermination of a Deficiency or :
for Refund of Unincorporated Business :
Taxes under Article 23 of the Tax Law for :
the Years 1966 and 1967. :
DECISION

David Fischoff and Henrietta Fischoff, his wife, residing at 162 Woodlawn Avenue, New Rochelle, New York, 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 1966 and 1967. (File No. 00366).

A formal hearing was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, before Solomon Sies, Hearing Officer, on October 18, 1976 at 1:30 p.m. The petitioners appeared by Sidney Weiss, CPA, of the accounting firm of Rosenshein, Neiman & Weiss. The Income Tax Bureau appeared by Peter Crotty, Esq. (Harris Sitrin, Esq. of counsel).

ISSUES

I. Whether or not the petitioner, Henrietta Fischoff, conducted an unincorporated business or participated in the conduct of an unincorporated business during the years in issue.

II. Whether or not during the years in issue, the petitioner, David Fischhoff, was conducting an unincorporated business subject to unincorporated business tax.

III. Whether or not the income received from capital gains was properly included in the computation of unincorporated business tax.

IV. Whether or not the failure to file unincorporated business tax returns was due to reasonable cause.

FINDINGS OF FACT

1. Petitioners, David Fischhoff and Henrietta Fischhoff, his wife, filed separate returns on a New York State resident combined income tax return for 1966. Mr. and Mrs. Fischhoff filed a joint New York State resident income tax return for 1967. The petitioners did not file any unincorporated business tax returns for either 1966 or 1967.

2. On May 22, 1972, the Income Tax Bureau issued a Statement of Audit Changes against the petitioners for the years 1966 and 1967, imposing unincorporated business tax, plus penalty and interest, in the amount of \$9,391.79. Accordingly, it issued a Notice of Deficiency therefor. Included in said Statement of Audit Changes was the amount of \$106,029.22 for the year 1966, representing capital gains from the sale or exchange of securities and real property held for his own account.

3. The only income of Henrietta Fischhoff was a capital gain of \$4,042.16 from the sale or exchange of securities in 1966. She had no other income in 1966 or 1967.

4. During the years 1966 and 1967, petitioner, Henrietta Fischhoff, was not engaged in any business. She was not involved in any business activity whatsoever with her husband, David Fischhoff.

5. On his Federal income tax returns for the years 1966 and 1967, Mr. Fischhoff reported income from "brokerage." Mr. Fischhoff did not appear at the hearing, but his representative stated that the word "brokerage" was a misnomer. The income reported for the aforementioned years represented fees for services which Mr. Fischhoff rendered to other persons with respect to their real estate.

6. Prior to and during the years in issue, petitioner, David Fischhoff, was a partner in the partnerships that owned real property, as well as a stockholder in corporations which owned real property, mostly apartment houses. Mr. Fischhoff also owned some real property in his own name. All of these properties were managed by independent management agencies, and in none of these was Mr. Fischhoff an officer.

7. On April 30, 1964, the petitioner, David Fischhoff, entered into an agreement with Prudential Building Maintenance Corp., whereby he was to receive \$20,000.00 a year for five years commencing in 1965 for securing maintenance agreements on behalf of Prudential. The agreement provided that "in no event shall the corporation have the right to terminate the obligation to pay."

8. During the years in issue, Mr. Fischhoff received fees from owners of real estate for arranging to reduce their real estate taxes.

9. On his Federal "Schedule C", for the years in issue, Mr. Fischhoff reported the income mentioned in Finding of Fact "8" and the alleged commission received from Prudential in the amount of \$20,000.00 as fees. For 1966, he reported expenses of \$10,487.30, consisting of miscellaneous business and office expenses, \$2,443.57; professional fees \$2,310.00; auto expenses, \$414.88; travel, entertainment and selling, \$3,930.94; sundry business taxes, \$241.20 and telephone and telegraph, \$1,146.71.

10. Mr. Fischhoff maintained an office in his home, and also used the office of his brother. He filed a Federal "Schedule C-3", which is the computation of social security self-employment tax, etc.

11. Mr. Fischhoff did not report on "Schedule C" any income from his real estate operations. He did not deduct the expense items from rental income because it would have been difficult to allocate it specifically to any property.

CONCLUSIONS OF LAW

A. That Henrietta Fischhoff did not conduct or participate in any unincorporated business, and, therefore, she was not subject to unincorporated business tax for the years in issue.

B. That the petition of Henrietta Fischhoff be and the same is hereby granted, and the Income Tax Bureau be and hereby is directed to delete her name from the Statement of Audit Changes and the Notice of Deficiency for the years 1966 and 1967.

C. That the activities of the petitioner, David Fischhoff, during the years 1966 and 1967, in the rendering of services to

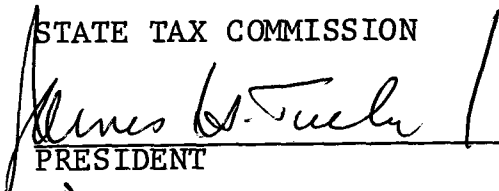
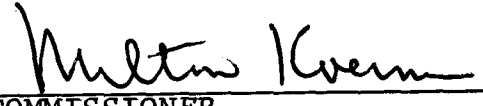
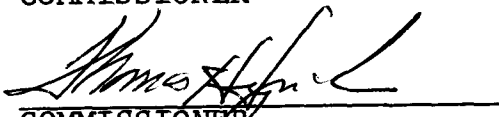
others with respect to their real estate, constituted the carrying on of an unincorporated business subject to unincorporated business tax within the intent and meaning of section 703 of the Tax Law.

D. That the capital gains included as unincorporated business income in the Statement of Audit Changes for 1966 in fact represented a capital gain of David Fischhoff in the amount of \$106,029.22 from the sale of securities and real property for his own account; that the Income Tax Bureau be and hereby is directed to recompute the unincorporated business tax against David Fischhoff by omitting said capital gains.

E. That since reasonable cause exists, the penalty under Section 685(a)(1) of the Tax Law is hereby cancelled.

F. That the petition of David Fischhoff, except as modified in accordance with Conclusions of Law "D" and "E" supra, be and the same is in all other respects denied.

DATED: Albany, New York
July 22, 1977

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER