

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
JOSEPH J. SCHWARTZ, HARVEY SCHWARTZ;  
and MURRAY SCHWARTZ D/B/A "SCHWARTZES"  
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)~~ 1970.:  
~~(s) or Period(s)~~

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Bruce Batchelor, being duly sworn, deposes and says that  
~~he~~ is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 14th day of April, 1977, ~~he~~ served the within  
Notice of Decision by (certified) mail upon Harvey Schwartz and  
D/B/A "Schwartzes" Murray Schwartz  
~~(representative of)~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Joseph J. Schwartz, Harvey Schwartz and  
Murray Schwartz, d/b/a "Schwartzes"  
16 Sinclair Drive  
Kings Point, New York 11024  
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)~~  
~~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

14th day of April, 1977.

Bruce Batchelor

Janet Macch



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

**April 14, 1977**

**Joseph J. Schwartz, Harvey Schwartz and  
Murray Schwartz, d/b/a "Schwartzes"  
16 Sinclair Drive  
Kings Point, New York 11024**

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

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.

**Paul B. Coburn**  
**Supervising Tax**  
**Hearing Officer**

**cc:** [REDACTED]  
[REDACTED]'S Representative.

TA-1.12 (1/76)

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
JOSEPH J. SCHWARTZ, HARVEY	:	
SCHWARTZ and MURRAY SCHWARTZ	:	DECISION
D/B/A "SCHWARTZES"	:	
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Year 1970.	:	

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Petitioners, Joseph J. Schwartz, Harvey J. Schwartz and Murray Schwartz, d/b/a "Schwartzes", 16 Sinclair Drive, Kings Point, New York 11024, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1970. (File No. 00237)

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 26, 1976 at 11:15 a.m. Petitioners, Harvey Schwartz and Joseph J. Schwartz appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (Alexander Weiss, Esq. of counsel).

ISSUE

Whether the petitioners' income in their continued operation of a business, on behalf of a buyer of their corporation, constituted activities as consultants, and thus subjected them to unincorporated business tax.

FINDINGS OF FACT

1. On April 12, 1974, as the result of an audit and subsequent conference, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, Joseph J. Schwartz, Harvey J. Schwartz and Murray Schwartz, d/b/a "Schwartzes", imposing unincorporated business tax upon their business income in 1970, deeming it to be derived from consulting activities. Accordingly, the Income Tax Bureau issued a Notice of Deficiency in the amount of \$2,516.25, plus penalty and interest of \$1,471.01, for a total due of \$3,987.26.

2. In 1969, petitioners, Joseph J. Schwartz, Harvey J. Schwartz and Murray Schwartz, brothers, owners and operators of an oil business known as the Whale Oil Company, entered into a contract for its sale to the American Oil Company, a subsidiary of Standard Oil Company of Indiana. This operation was an oil marketing enterprise. Negotiations began for the

sale of the physical facility owned by the three brothers and known as Deep Water Terminals. Only the marketing business and the trucks, both of which were assets in the name of another corporation, were actually sold. American Oil Company leased Deep Water Terminals with an option to purchase. Said option was not exercised, and the realty property was later sold to the Consolidated Edison Company.

3. Petitioners, Joseph J. Schwartz and Harvey J. Schwartz, had a written agreement with the American Oil Company on the sale of the stock of the Whale Oil Company, that they would continue the operation of the business for eighteen months as consultants. The petitioners' customers of forty years were informed only of a corporate merger. A manager was put in charge. Compensation was drawn as a consulting fee. No taxes were withheld.

4. Petitioner, Murray Schwartz, who was also a State senator, had no agreement with the American Oil Company following the sale of his shares of stock.

5. Petitioners, Joseph J. Schwartz and Harvey J. Schwartz, were advised by their accountant that they were not required to file unincorporated business tax returns for the year 1970.

6. The d.b.a "Schwartzes" was not a legal entity, but was a description used by the Income Tax Bureau in their conclusions on audit.

CONCLUSIONS OF LAW

A. That the income received during the year 1970 by petitioners, Joseph J. Schwartz and Harvey J. Schwartz, as consultants for the American Oil Company, constituted income from their business activities and not compensation as employees 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 Joseph J. Schwartz and Harvey J. Schwartz during 1970 constituted the carrying on of an unincorporated business, and their 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 petitioner, Murray Schwartz, performed no service for American Oil Company in 1970, and received no income from this source.

D. That petitioners, Joseph J. Schwartz and Harvey J. Schwartz, relied upon what they had reason to believe was the

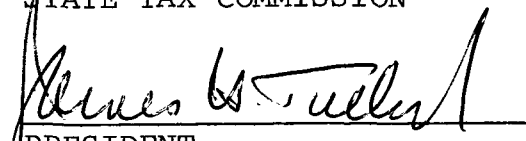
competent advise of a certified public accountant that their business activities were not subject to the unincorporated business tax, and that petitioners were not required to file unincorporated business tax returns. Therefore, the penalty imposed under sections 685(a)(1) and 685(a)(2) of the Tax Law for the year 1970 is cancelled.

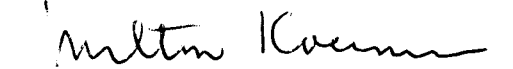
E. That the petition of Murray Schwartz is granted.

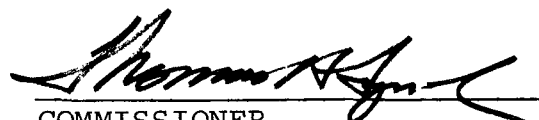
F. That the petition of Joseph J. Schwartz and Harvey J. Schwartz is granted to the extent that the penalties are cancelled. The Income Tax Bureau is directed to accordingly modify the Notice of Deficiency issued April 12, 1974, and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
April 14, 1977

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER