

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

HERBERT SCHILLER

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)~~ :
1968, 1969 and 1970.

State of New York
County of Albany

John Huhn, 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 13th day of October, 1978, ~~she~~ served the within
Notice of Decision by (certified) mail upon Herbert Schiller

(~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Mr. Herbert Schiller
142 Hillturn Lane
Roslyn Heights, New York 11577

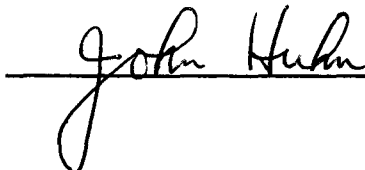
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

13th day of October, 1978.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

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HERBERT SCHILLER

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
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of Unincorporated Business :
Taxes under Article ~~(x)~~ 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1968, 1969 and 1970.

State of New York
County of Albany

John Huhn , 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 13th day of October , 1978, he served the within
Notice of Decision by (certified) mail upon Benjamin Lewis

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Benjamin Lewis, Esq.
Lapatin Lewis Green Kitzes & Blatteis, P.C.
475 Fifth Avenue
New York, New York 10017

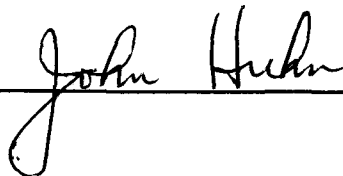
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

13th day of October , 1978







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

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

October 13, 1978

Mr. Herbert Schiller
142 Hillturn Lane
Roslyn Heights, New York 11577

Dear Mr. Schiller:

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 **(x) 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,

Michael Alexander
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

HERBERT SCHILLER

DECISION

for Redetermination of a Deficiency or
for Refund of Unincorporated Business
Tax under Article 23 of the Tax Law for
the Years 1968, 1969 and 1970.

Petitioner, Herbert Schiller, 142 Hillturn Lane, Roslyn Heights, New York 11577, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1968, 1969 and 1970 (File No. 13397).

A formal hearing was held before Edward Goodell, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 10, 1977 at 9:05 A.M. Petitioner appeared by Lapatin, Lewis, Green, Kitze & Blatteis, PC (Benjamin Lewis, Esq., of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUE

Whether petitioner, in his relationship to Audio Magnetics Corp. and Sound Design Corp. during the years 1968, 1969 and 1970,

was an independent contractor subject to the unincorporated business tax or an employee of each of said corporations and, therefore, not subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Herbert Schiller, and his wife, Phyllis Schiller, filed New York State combined income tax returns for the years 1968, 1969 and 1970, but did not file unincorporated business tax returns for any of said years.

2. On March 25, 1974, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against petitioner, imposing unincorporated business tax for 1968, 1969 and 1970 in the amount of \$10,361.95, including interest. This was done on the grounds that "...the income from your activities as a Manufacturer's Representative is subject to the Unincorporated Business Tax."

3. During 1968, 1969 and 1970, petitioner acted as a sales representative for 11 non-competitive companies engaged in the manufacture and sale of electronic products used for home entertainment, i.e., tape recorders, cassettes, cassette tapes, stereo machines, radios and kindred items:

a. Said companies for which petitioner acted as a sales representative during 1968 were Audio Magnetics Corp., Sound Design Corp., Mayfair Electronics, Emenee Corporation and "Caf."

b. Said companies for which petitioner acted as a sales representative during 1969 were Audio Magnetics Corp., Sound Design Corp. (including its division known as "Realtone Western"), Mayfair Electronics and Emenee Corporation.

c. Said companies for which petitioner acted as a sales representative during 1970 were Audio Magnetics Corp., Sound Design Corp., Emenee Corporation, "Trans Aire", Coastphono Manufacturing, "WM 1", Dyn Electronics, Toyo Electronics and Fidelity Products.

4. During the course of the hearing, petitioner conceded that with the exception of Audio Magnetics Corp. and Sound Design Corp., he was an independent contractor subject to unincorporated business tax in his relationship to all of the above-mentioned companies during 1968, 1969 and 1970.

5. Petitioner's principal sources of compensation during 1968, 1969 and 1970 were Audio Magnetics Corp. and Sound Design Corp.; except that Sound Design Corp. was the petitioner's third largest source of compensation during 1970.

6. It is petitioner's claim that he was an employee of both Audio Magnetics Corp. and Sound Design Corp. during 1968, 1969 and 1970, each of which is an independent entity unrelated to the other.

7. During 1968, 1969 and 1970, Audio Magnetics Corp. was located in the State of California and was engaged in the manufacture and sale of various electronic products used for home entertainment, in the years at issue.

8. During 1968, 1969 and 1970, Sound Design Corp. was located in the State of New Jersey and was also engaged in the manufacture and sale of various electronic products used for home entertainment, in the years at issue.

9. Neither Audio Magnetics Corp. nor Sound Design Corp. had an office or showroom in New York from 1968 through 1970.

10. From 1968 to 1970, inclusive, petitioner was compensated on a commission basis for his services as a sales representative of Audio Magnetics Corp. and Sound Design Corp.

11. From 1968 through 1970, both Audio Magnetics Corp. and Sound Design Corp. limited the area of petitioner's activity as a sales representative for each to the Metropolitan New York area, consisting of the five boroughs of New York City, as well as Westchester County, Fairfield County in Connecticut and northern New Jersey.

12. Both Audio Magnetics Corp. and Sound Design Corp. required petitioner (in the performance of his duties as a sales representative) to submit regular sales reports, visit customers as directed

by their home offices, report to their respective sales managers or vice-presidents' in charge of sales, attend sales meetings at their home offices, attend trade shows on behalf of each of them, man their respective booths at such trade shows and sell their products on the basis of the prices and warranties determined by their home offices. Each required petitioner to obtain its prior approval to act as a sales representative for other companies engaged in the manufacture or sale of electronic products in the home entertainment field.

13. In connection with the rendering of his services as sales representative for Audio Magnetics Corp. and Sound Design Corp. from 1968 through 1970, petitioner maintained an office at his own expense in his home during each of said years, from which he communicated to and received communications by telephone and correspondence from both of said companies and from customers.

14. In connection with the rendering of his services as sales representative for Audio Magnetics Corp. and Sound Design Corp. from 1968 through 1970, petitioner paid (without reimbursement) all expenses related to his efforts as a sales representative for each of said companies, including travel expenses, hotels, lunches, gifts and entertainment of customers; except that expenses incurred by petitioner during trade shows were reimbursed and telephone calls to the office of Audio Magnetics Corp. in California were made collect.

15. At no time during 1968, 1969 and 1970 did Audio Magnetics Corp. or Sound Design Corp. deduct either withholding taxes or social security taxes from the commissions paid by them to petitioner. He was not included by either of them in their pension plans or health plans, nor was he included in or covered by the collective bargaining agreements or the workmen's compensation or unemployment insurance coverage of either.

16. From 1968 through 1970, petitioner was covered by a "Keogh" plan.

17. Petitioner's engagements to render services as a sales representative for Audio Magnetics Corp. and Sound Design Corp. were not subject to a restrictive covenant with respect to either, preventing him (in the event of the termination of his services) from soliciting orders from the same customers from whom he had solicited and obtained orders for them.

18. Petitioner was not confined in his selling efforts on behalf of Audio Magnetics Corp. or Sound Design Corp. to named prospects or listed customers, but was free to procure and promote sales as he saw fit by his own methods, subject to their approval of credit. Petitioner could also drop accounts on his own authority as well as with the authorization of Audio Magnetics Corp. or Sound Design Corp.

19. All communications between petitioner and Audio Magnetics Corp. and Sound Design Corp. were made either by telephone calls, correspondence or visits by petitioner to their home offices. There is nothing in the record to indicate that petitioner was subject to control by either of said companies as to the manner or method by which he was to make sales, the time or the effort he was required to devote to the selling of their respective products, or the division of his time and effort as between either of them or as between each of them and the other nine companies for which he acted as sales representative during 1968, 1969 and 1970.

20. Neither Audio Magnetics Corp. nor Sound Design Corp. exercised control with respect to petitioner's vacation time.

21. In connection with each of his Federal income tax returns for 1968, 1969 and 1970, petitioner filed Schedule "C" (Form 1040) entitled "Profit (or Loss) From Business or Profession," in which he stated that his "Principal business activity" was that of "Mfg. Rep." or "Manu Repres." He also set forth the amounts of "gross receipts or gross sales," his "gross profits", his "business deductions" (including, among others, "Christmas Gifts", "Hotels", "Entertainment", "Telephone", "Auto Repairs", "Office Repair and Supp" and "Office Cleaning") and his "net profit" from the business for each year at issue.

CONCLUSIONS OF LAW

A. That during 1968, 1969 and 1970, petitioner, Herbert Schiller, in his capacity as a sales representative of Audio Magnetics Corp., acted as an independent contractor and not as its employee.

B. That during 1968, 1969 and 1970, petitioner, Herbert Schiller, in his capacity as a sales representative of Sound Design Corp. (including its division known as Realtone Western) acted as an independent contractor and not as its employee.

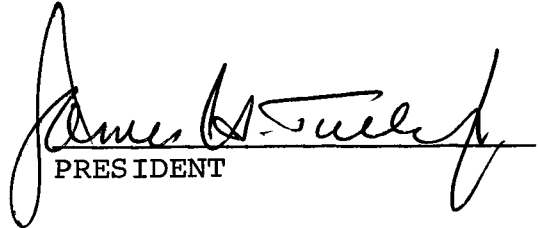
C. That during 1968, 1969 and 1970, petitioner, Herbert Schiller, in his capacity as a sales representative of Mayfair Electronics, Emenee Corporation, "Caf", "Trans Aire", Coastphono Manufacturing, "WM 1", Dyn Electronics, Toyo Electronics and Fidelity Products, acted as an independent contractor with respect to each of them and not as an employee of any of them.

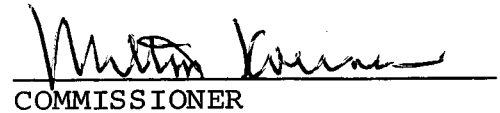
D. That petitioner is subject to unincorporated business tax for 1968, 1969 and 1970, inclusive.

E. That the petition of Herbert Schiller is denied and the Notice of Deficiency dated March 25, 1974 is sustained.

DATED: Albany, New York
October 13, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER