

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

JOSEPH M. SCHWARZ

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)~~ :  
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 31st day of March , 1978, she served the within  
Notice of Decision by (certified) mail upon Joseph M. Schwarz

(~~representative of~~) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Mr. Joseph M. Schwarz  
3057 Shore Drive  
Merrick, New York 11566

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

31st day of March , 1978.





STATE OF NEW YORK  
STATE TAX COMMISSION

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State of New York  
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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 31st day of March , 1978, he served the within  
Notice of Decision by (certified) mail upon Walter S. Newman

(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Mr. Walter S. Newman  
175 Main Street  
White Plains, New York 10601

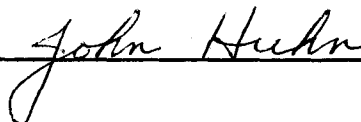
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

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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

31st day of March , 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

**March 31, 1978**

**Mr. Joseph M. Schwarz**  
**3057 Shore Drive**  
**Marriek, New York 11566**

**Dear Mr. Schwarz:**

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 **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,

**Joseph Chyrywaty**  
**Hearing Examiner**

cc: Petitioner's Representative  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|--|---|----------|
| In the Matter of the Petition          | : |          |
| of                                     | : |          |
| JOSEPH M. SCHWARZ                      | : | DECISION |
| for Redetermination of a Deficiency or | : |          |
| for Refund of Unincorporated Business  | : |          |
| Tax under Article 23 of the Tax Law    | : |          |
| for the Years 1969 and 1970.           | : |          |

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Petitioner, Joseph M. Schwarz, residing at 3057 Shore Drive, Merrick, New York 11566, 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 1969 and 1970 (File No. 12374).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, N. Y. on August 17, 1976 at 10:45 A. M. The petitioner appeared by Walter S. Newman. The Income Tax Bureau appeared by Peter Crotty, Esq. (I. A. Levy, Esq., of counsel).

ISSUES

I. Whether petitioner, Joseph J. Schwartz's selling activities during the years 1969 and 1970 constituted the carrying on of an unincorporated business, and whether his income derived therefrom was subject to the unincorporated business tax.

II. Whether petitioner's activities on behalf of Pathway Optical Products, Inc. were so integrated with his other sales activities that his commission income, based on a percentage of sales from Pathway Optical Products, Inc., constituted additional unincorporated business gross income.

III. Whether, if petitioner's activities constituted the carrying on of an unincorporated business, his income was allocable to New York State as a business carried on within and without New York State.

IV. Whether petitioner had reasonable cause for his failure to file timely New York State unincorporated business tax returns for the years 1969 and 1970.

V. Whether worksheets submitted to the Income Tax Bureau constituted the filing of 1969 and 1970 New York State unincorporated business tax returns and, if so, whether the period of limitations for the issuance of a statutory Notice of Deficiency had expired.

#### FINDINGS OF FACT

1. Petitioner, Joseph M. Schwarz, did not file unincorporated business tax returns for the years 1969 and 1970.

2. Upon audit by the Income Tax Bureau, the petitioner's representative, Walter S. Newman, submitted worksheets for the years, 1969 and 1970. Said worksheets were headed "Calculation of Income Subject to the Unincorporated Business Tax", and divided the petitioner's gross income into three categories: (1) amount subject to unincorporated business tax, (2) amount not subject to unincorporated business tax (employer-employee relationship) and (3) amount not subject to unincorporated business tax (outside New York State).

In addition, petitioner's expenses attributable to his gross income were allocated according to these categories, based on the amount of time spent traveling within and without New York State. The unincorporated business tax liability calculated on the worksheets was \$35.10 for 1969 and zero for 1970.

3. The worksheets submitted to the Income Tax Bureau were not signed by the petitioner or by his representative. In addition, the tax liability of \$35.10 shown for 1969 was not paid.

4. On April 21, 1975, the Income Tax Bureau issued a Statement of Audit Changes against the petitioner which held that 100% of the total net business income shown in petitioner's worksheets for the years in question was subject to unincorporated business tax. Said statement imposed penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law. In accordance with this Statement, a Notice of Deficiency was issued against petitioner in the sum of \$2,976.82.

5. Petitioner contended that he and his representative delivered the worksheets to the Income Tax Bureau on July 10, 1972, and that said delivery constituted the filing of an unincorporated business tax return; therefore, the Notice of Deficiency was improper since it was issued after the three-year period of limitation provided by section 683 of the Tax Law.

6. Petitioner was a salesman of optical products, representing various firms located within and without New York State. The petitioner conceded that his activities with the firms located in New York State constituted the carrying on of an unincorporated business, with the exception of Pathway Optical Products, Inc. Petitioner was an executive, an officer and a sales representative

of Pathway Optical Products, Inc. during the years in question. He received a salary and other compensation, from which said firm deducted Federal and state withholding taxes and social security taxes. Other compensation consisted of commission income based on a percentage of sales effected by him from said corporation. Petitioner contended that the other compensation should not be subject to unincorporated business tax, as an employer-employee relationship existed between himself and Pathway Optical Products Inc.

7. The petitioner represented Sol-Optics of San Antonio, Texas and Opticase, Inc. of Rockaway, New Jersey, both of which made office facilities available for petitioner's use. Both firms received, accepted and shipped all orders from their respective offices in New Jersey and in Texas.

8. Although the petitioner maintained an office at his personal residence, he contended that it was used strictly for his activities as an employee of Pathway Optical Products, Inc.

#### CONCLUSIONS OF LAW

A. That the unsigned worksheets submitted to the Income Tax Bureau did not constitute the filing of New York State unincorporated business tax returns for the years 1969 and 1970, within the meaning and intent of Article 23 of the Tax Law. Therefore, the Notice of Deficiency dated August 25, 1975, was properly issued within the meaning and intent of sections 681 and 683 of the Tax Law.

B. That the petitioner was in the business of selling and that his activities constituted the carrying on of an unincorporated business, subject to the unincorporated business tax within the meaning and intent of section 703(a) of the Tax Law.

C. That petitioner failed to sustain the burden of proof required under section 689(e) of the Tax Law to show that Pathway Optical Products, Inc. exercised sufficient direction and control over his sales activities to result in an employer-employee relationship, within the meaning and intent of section 703(b) of the Tax Law. In addition, his sales activities on behalf of Pathway Optical Products, Inc. were so integrated with his other sales business activities that they constituted part of the activities of his regular sales business. Therefore, the commission income received from said principal is subject to unincorporated business tax.

D. That although Sol-Optics and Opticase made office facilities available for petitioner's use outside New York State, petitioner has failed to sustain the burden of proof necessary to show that said facilities constituted his regular places of business. Therefore, the income which petitioner received from said principals must be allocated in full to New York State for unincorporated business tax purposes within the meaning and intent of section 707(a) of the Tax Law.

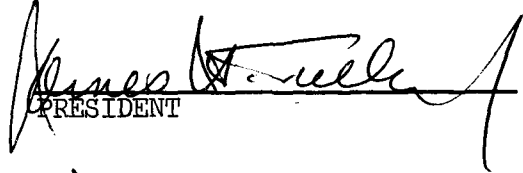
E. That the petitioner failed to show that he had reasonable cause for his failure to file unincorporated business tax returns, or that he had reasonable cause for his failure to pay the tax due from said unfiled returns. Therefore, penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law were properly imposed against petitioner.

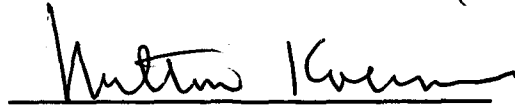


F. That the petition of Joseph M. Schwarz is denied and the Notice of Deficiency issued August 25, 1975 is sustained.

DATED: Albany, New York  
March 31, 1978

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER