

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

AFFIDAVIT OF MAILING

ALEXANDER WEINSTEIN and VIVIAN WEINSTEIN

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) ~~xxx Period(s)~~ :  
1964 and 1965.

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 1st day of September , 1978, ~~she~~ served the within  
Notice of Decision by (certified) mail upon Alexander & Vivian  
Weinstein (~~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. Alexander Weinstein  
167 Beach 144th Street  
Neponsit, New York 11694  
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

1st day of September , 1978.

John Huhn

[Signature]

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
ALEXANDER WEINSTEIN and  
VIVIAN WEINSTEIN

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Unincorporated Business Tax :  
Taxes under Article ~~(22)~~ 23 of the :  
Tax Law for the Year(s) ~~xxx~~ ~~xxxx~~ ~~xxxx~~ :  
1964 and 1965

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 1 day of September, 1978, he served the within  
Notice of Decision by (certified) mail upon Richard Reitman, C.P.A.

(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Richard Reitman, C.P.A.  
8 West 40th Street  
New York, New York 10018

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

1 day of September , 1978.

W. W. Wacker

John Huhn



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

**September 1, 1978**

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

**Mr. & Mrs. Alexander Weinstein  
167 Beach 144th Street  
Neponsit, New York 11694**

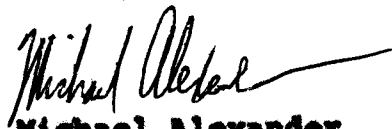
**Dear Mr. & Mrs. Weinstein:**

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,

  
**Michael Alexander  
Supervising Tax  
Hearing Officer**

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	:	
ALEXANDER WEINSTEIN and VIVIAN WEINSTEIN	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1964 and 1965.	:	

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Petitioners, Alexander Weinstein and Vivian Weinstein, 167 Beach 144th Street, Neponsit, New York 11694, filed a petition for redetermination of a deficiency in unincorporated business tax under Article 23 of the Tax Law for the years 1964 and 1965 (File No. 01409).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1976 at 10:45 A.M. and continued on November 17, 1976 at 9:15 A.M. The petitioners appeared by Richard Reitman, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the salary received as an officer of a wholly-owned corporation was exempt from unincorporated business tax, where the salaried officer carried on a similar unincorporated business.

FINDINGS OF FACT

1. Petitioner Alexander Weinstein and his wife, Vivian, filed New York State income tax resident returns for the tax years 1964 and 1965. Petitioner Alexander Weinstein filed New York State unincorporated business tax returns (Form IT-202) for 1964 and 1965 and paid the taxes shown to be due.

2. On September 25, 1967, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, Alexander Weinstein and Vivian Weinstein, his wife, imposing additional unincorporated business tax for 1964 and 1965. The statement indicated that salary income from Adams Oil Corp. was considered business-connected and, thus, subject to unincorporated business tax under Article 23 of the Tax Law. The reported salary from Adams Oil Corp. of petitioner Alexander Weinstein was added to his reported income from his unincorporated business, and the Income Tax Bureau recomputed the tax due. A Notice of Deficiency dated September 25, 1967 was sent to petitioners, Alexander Weinstein and Vivian Weinstein, assessing a deficiency of \$554.61 for 1964 and \$540.20 for 1965.

3. On January 24, 1968, petitioner Alexander Weinstein filed a petition for a redetermination or for refund of unincorporated business tax.

4. Petitioner Alexander Weinstein, 167 Beach 144th Street, Neponsit, New York 11694, was engaged in the sale and service of fuel oil to both commercial and domestic users during 1964 and 1965. Petitioner Alexander Weinstein was the president and sole stockholder of Adams Oil Corp., a New York corporation organized July 1, 1963. The Adams Oil Corp. owned a two-story premise at 5602 Avenue U, Brooklyn, New York.

5. Petitioner Alexander Weinstein also operated a fuel oil business out of 5602 Avenue U, Brooklyn, New York, from January 1, 1964 under the name of Rex Fuel Oil. This was operated (and reported on petitioner's New York State income tax returns) as a single proprietorship. Rex Fuel Oil used one room of the Adams Oil Corp. office building as its office and paid Adams a set amount per gallon to cover delivery, service and alleged "rent" of the premises. Rex Fuel Oil sold only Grade No. 2 fuel oil to the owners of homes and small apartment buildings. The fuel oil sold by Rex was purchased largely from Metropolitan, a division of the Pittston Co.

6. Rex Fuel Oil had no employees. Its books were kept by an outside bookkeeping consultant. Petitioner Alexander Weinstein supervised the purchase of fuel oil, its delivery and the servicing of customers, the checking of purchasers' credit, the follow-up of collections and other administrative duties. Petitioner

Alexander Weinstein performed essentially the same services for Adams Oil Corp. Petitioner devoted the preponderance of his working time to the business of the corporation, but made no allocation of his time and kept no time records.

7. The terms of the agreement made July 1, 1963, by which petitioner's wholly-owned Adams Coal Corporation (now Adams Oil Corp.) became a division of the Pittston Company, provided that petitioner could not purchase fuel oil under the Adams corporate name from any supplier other than Pittston. Consequently, when petitioner Alexander Weinstein purchased Rex Fuel Oil on January 1, 1964, he was forced to operate as a fuel oil dealer outside the aegis of Adams Oil Corp.

8. The Adams Oil Corp. and Rex Fuel Oil serviced entirely different customers. The Adams Oil Corp. alone had payroll, payroll taxes, social security and withholding taxes, workmen's compensation, disability and the like. In the respective corporate tax years ended June 30, 1964 and June 30, 1965, petitioner Alexander Weinstein received from Adams Oil Corp., as salary, the amounts of \$15,900.00 and \$15,600.00. He was president and sole stockholder. According to the U.S. Corporation income tax return (Form 1120), petitioner devoted all his time to the corporation. Both Federal and New York State income taxes were withheld from petitioner's corporate salary.

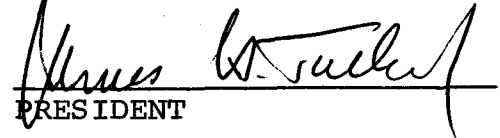
CONCLUSIONS OF LAW

A. That the salary received by petitioner Alexander Weinstein, as an officer and employee of Adams Oil Corp. in the tax years 1964 and 1965 was not exempt from unincorporated business tax, since his business activities were essentially the same in both his corporate officer's capacity and in his operation of the single proprietorship, Rex Oil. Section 703(b) of the Tax Law specifically states that the salaries of an employee shall not be deemed unincorporated business "...unless such services constitute part of a business regularly carried on by such individual." 20 NYCRR 203.10(d)(2)

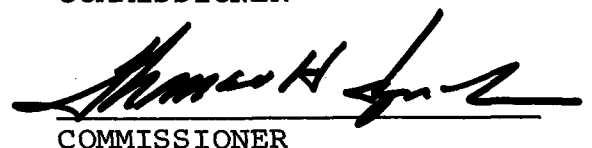
B. That the petition of Alexander Weinstein is in all respects denied and the Notice of Deficiency dated September 25, 1967 is sustained.

DATED: Albany, New York  
September 1, 1978

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER