

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Melvin Sharpe :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Unincorporated Business Tax :
under Article 23 of the Tax Law
for the Years 1971 & 1972. :

State of New York

County of Albany

Jay Vredenburg, 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 11th day of April, 1980, he served the within notice of Decision by certified mail upon Melvin Sharpe, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Melvin Sharpe
44 Diamond St.
Elmont, NY 11003

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
11th day of April, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Melvin Sharpe

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for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Unincorporated Business Tax :
under Article 23 of the Tax Law
for the Years 1971 & 1972. :

State of New York
County of Albany

Jay Vredenburg, 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 11th day of April, 1980, he served the within notice of Decision by certified mail upon Bertrand Leopold the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Bertrand Leopold
18 Joseph St.
New Hyde Park, NY 11040

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
11th day of April, 1980.

Joanne Knapp

J. Vredenburg

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

April 11, 1980

Melvin Sharpe
44 Diamond St.
Elmont, NY 11003

Dear Mr. Sharpe:

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(s) 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Bertrand Leopold
18 Joseph St.
New Hyde Park, NY 11040
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

MELVIN SHARPE :

DECISION

for Redetermination of a Deficiency :
or for Refund of Unincorporated Business
Tax under Article 23 of the Tax Law for :
the Years 1971 and 1972.

Petitioner, Melvin Sharpe, 44 Diamond Street, Elmont, New York 11003, 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 1971 and 1972 (File No. 00224).

A formal hearing was held before Harry Issler, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 13, 1977 at 2:55 P.M. Petitioner appeared by Bertrand Leopold, Public Accountant. The Income Tax Bureau appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether petitioner's activities as a sales representative during the years 1971 and 1972 constituted the carrying on of an unincorporated business.

II. Whether, during the formal hearing before the hearing officer, petitioner had the burden of proof.

FINDINGS OF FACT

1. Petitioner, Melvin Sharpe, timely filed New York State personal income tax returns for the years 1971 and 1972. He did not file unincorporated business tax returns for said years.

2. The Income Tax Bureau issued a Statement of Audit Changes which was based on the results of a prior year audit (1970) wherein petitioner conceded that his activities constituted the carrying on of an unincorporated business. Accordingly, a Notice of Deficiency was issued against petitioner, Melvin Sharpe, on April 12, 1974 for tax years 1971 and 1972 imposing unincorporated business tax of \$1,249.69, plus interest of \$122.97, for a total of \$1,372.66.

3. Petitioner, Melvin Sharpe, was a sales representative for Catton Bros. and Eli Albert, Inc. During the period in question, he stated that he spent approximately 80 percent of his time on behalf of Catton Bros. and the remainder of his time on behalf of Eli Albert, Inc.

4. Petitioner did not maintain his own office, nor did he hire any assistants.

5. Petitioner was paid on a commission basis by Catton Bros. His compensation was reported on Federal Form 1099. He was not reimbursed for any expenses.

6. Petitioner was paid on a commission basis by Eli Albert, Inc. He received a draw against commissions. His compensation was reported on a Wage and Tax Statement. Income taxes and Social Security were withheld from his earnings. He was reimbursed approximately \$50.00 per week for expenses.

7. Both principals were mainly interested in results. There was little control of petitioner's day-to-day activities. He was not restricted from carrying other lines. There was no agreement as to division of time between his principals. He was not required to work stated hours. He sold his principal's merchandise simultaneously.

8. Petitioner sold merchandise that was designated by his principals. The principals had the right to accept or reject orders, and they determined pricing and discount policies.

9. Petitioner contended that since no unincorporated business tax returns were filed, more than 25 percent of his business income was omitted; therefore, the burden of proof rests on the State Tax Commission.

CONCLUSIONS OF LAW

A. That during 1971 and 1972, petitioner, Melvin Sharpe, in his capacity as a sales representative was an independent contractor rather than an employee. He was not exempt from unincorporated business taxes within the meaning and intent of Section 703(b) of the Tax Law.

B. That petitioner's sales activities during 1971 and 1972 constituted the carrying on of an unincorporated business, in accordance with Section 703(a) of the Tax Law. (Singer v. State Tax Commission (1976), 55 AD2d 780, 389 NYS 2d 489.)

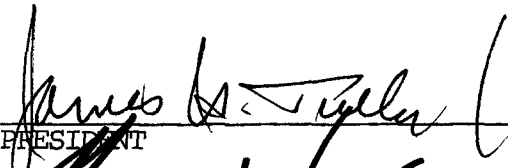

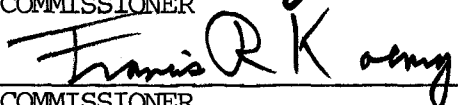
C. The burden of proof shall be on petitioner as described in Section 689(e) of the Tax Law (Lieberman v. Gallman, 41 NY 2d 774).

D. That the petition of Melvin Sharpe is denied and the Notice of Deficiency dated April 12, 1974 is sustained.

DATED: Albany, New York

APR 11 1980

STATE TAX COMMISSION


PRESIDENT

COMMISSIONER

COMMISSIONER