

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Herbert Swersky :

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 Year 1970. :

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 5th day of September, 1980, he served the within notice of Decision by certified mail upon Herbert Swersky, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert Swersky
31-50 140th St.
Flushing, NY 11354

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
5th day of September, 1980.

Debbie Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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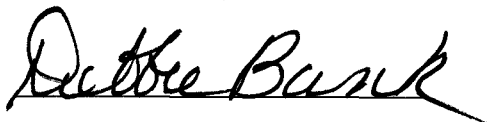
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of September, 1980, he served the within notice of Decision by certified mail upon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

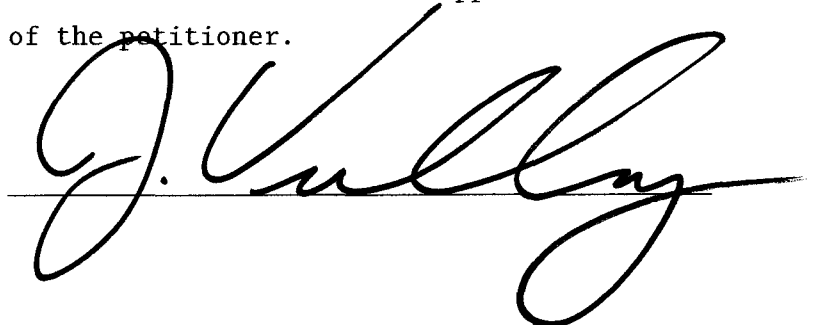
Sirs
Geller and Geller
290 Madison Avenue
New York, NY 10017

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
5th day of September, 1980.





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

September 5, 1980

Herbert Swersky
31-50 140th St.
Flushing, NY 11354

Dear Mr. Swersky:

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
Geller and Geller
290 Madison Avenue
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HERBERT SWERSKY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1970.	:	

Petitioner, Herbert Swersky, 31-50 140th Street, Flushing, New York 11354, filed a petition for redetermination of a deficiency or for a refund of unincorporated business tax under Article 23 of the Tax Law for the year 1970 (File No. 12425).

On March 4, 1980, petitioner informed the State Tax Commission, in writing, that he desired to waive a small claims hearing and to submit the case to the State Tax Commission, based on the entire record contained in the file. After due consideration of the record, the Commission renders the following decision.

ISSUE

Whether the income derived from petitioner's activities as a sales representative is subject to the unincorporated business tax.

FINDINGS OF FACT

1. Petitioner Herbert Swersky and Selma Swersky, his wife, timely filed a New York State Combined Income Tax Return for the year 1970, on which he reported net commission income from his activities as a salesman. Petitioner did not file an unincorporated business tax return for the year 1970.

2. On February 8, 1974, the Department of Taxation and Finance validated a signed consent, in accordance with section 683(c)(2) of the Tax Law, extending the period of limitation for 1970 to April 15, 1975.

3. On March 11, 1975, as a result of a field audit, the Audit Division issued a Statement of Audit Changes, along with an explanatory Schedule of Audit Adjustments, on which:

(a) The personal income tax (Article 22 of the Tax Law) of petitioner and his wife was increased to reflect various adjustments to income and expense items reported on their combined tax return. The additional personal income tax due of \$187.25 was paid on March 17, 1975 and is not at issue. However, the interest attributable to the aforementioned \$187.25 was not paid and is outstanding.

(b) The net commission from petitioner's activities as a salesman was held subject to the unincorporated business tax.

On April 11, 1975, the Audit Division issued a Notice of Deficiency for the year 1970 against petitioner, Herbert Swersky, in the sum of \$3,035.06. This deficiency was based on the aforementioned Statement of Audit Changes and consisted of an unincorporated business tax of \$2,262.15, a personal income tax of \$187.25, and interest of \$585.66. A notation on the deficiency indicated that the previous remittance of \$187.25 was being applied to the total amount due, leaving an outstanding amount due of \$2,847.81.

4. Petitioner, Herbert Swersky, was a sales representative during the year 1970 and received commission income from fourteen different firms in the sum of \$77,582.29.

5. Petitioner was compensated on a commission basis with no withholding of payroll taxes and no reimbursement of expenses. Petitioner paid self-employment taxes and contributed to a self-employed retirement plan (Keogh Plan) created on March 16, 1967. Federal form 2950 SE listed the name of the retirement plan as "Herbert Swersky Retirement Fund". In addition, petitioner was described on the form as self-employed and as a sole proprietor.

6. One of the fourteen firms represented by petitioner during 1970 was Century Products, Inc. ("Century"). Century restricted petitioners territory and required him to make weekly reports on accounts serviced by him. Century allowed petitioner to sell nonconflicting lines of products, but retained the right to forbid him to do so in the event that these other lines interfered with his selling activities. In addition, Century required petitioner to attend sales meetings, trade shows, and periodically operate its showroom. No information or evidence was submitted as to whether Century controlled and directed the details and means of petitioner's selling activities.

7. Century paid petitioner commissions in the sum of \$14,466.40 during the year 1970. Petitioner contended that he was an "employee" of Century and that the income derived therefrom was not subject to the unincorporated business tax.

8. The nature and character of petitioner's business relationship between himself and the other thirteen firms he represented was not disclosed or established by the record.

CONCLUSIONS OF LAW

A. That the principals represented by petitioner, Herbert Swersky, did not exercise sufficient direction and control over his activities so as to cause him to become an employee of any such principal.

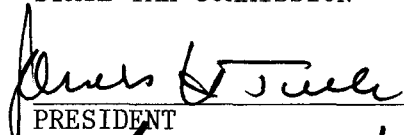
B. That the selling activities of petitioner, Herbert Swersky, constituted the carrying of an unincorporated business and the income derived therefrom is subject to the unincorporated business tax in accordance with the meaning and intent of section 703 and 701 of the Tax Law.

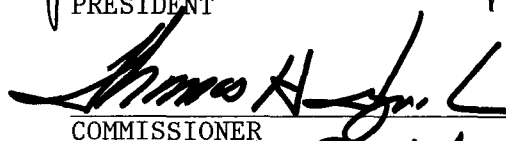
C. That the petition of Herbert Swersky is denied and the Notice of Deficiency issued April 11, 1975 for the year 1970 is sustained, together with such additional interest lawfully owing.

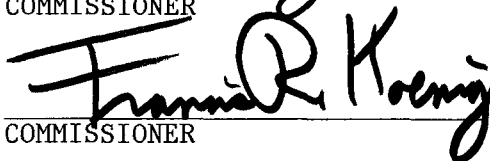
DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER