

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Marvin Wolfish :
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 1969. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, 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 2nd day of April, 1982, she served the within notice of Decision by certified mail upon Marvin Wolfish, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Marvin Wolfish
67 Rosedale Blvd.
Eggertsville, NY 14226

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
2nd day of April, 1982.

Connie A. Hagelund

Kathy Pfaffenbach

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

April 2, 1982

Marvin Wolfish
67 Rosedale Blvd.
Eggertsville, NY 14226

Dear Mr. Wolfish:

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) 720 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MARVIN WOLFISH	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1969.	:	

Petitioner, Marvin Wolfish, 67 Rosedale Boulevard, Eggertsville, New York 14226, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1969 (File No. 01758).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on June 12, 1980 at 2:45 P.M. Petitioner appeared pro se. The Income Tax Bureau appeared by Ralph J. Vecchio, Esq. (Ellen Purcell, Esq., of counsel).

ISSUE

Whether income derived from petitioner's activities as a salesman was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Marvin Wolfish, and Belle Wolfish, his wife, timely filed a New York State Combined Income Tax Return for 1969. Petitioner did not file an unincorporated business tax return for said year.

2. On June 4, 1971, the Income Tax Bureau issued a Statement of Audit Changes against petitioner for 1969 based on its determination that petitioner's activity as a salesman constituted the carrying on of an unincorporated business

and the income derived therefrom was subject to unincorporated business tax pursuant to Article 23 of the Tax Law. In addition, penalties were imposed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law. Accordingly, the Income Tax Bureau issued a Notice of Deficiency to petitioner on November 29, 1971 imposing unincorporated business tax of \$971.91 plus penalties and interest.

3. During 1969, petitioner was a salesman whose primary source of income was from Block Industries Inc. Block Industries Inc., which was located in Wilmington, North Carolina, did not have an office in New York State. Petitioner resided in Eggertsville, New York in 1969 and maintained an office in his personal residence.

4. Petitioner's sales territory was limited to upstate New York and Canada. Petitioner made his own appointments and arranged his own itinerary; however, he was required to submit such plans weekly to the home office. Petitioner also contacted the home office by telephone three to four times a week, and was required to attend two national sales meetings annually and any subsidiary meetings scheduled by Block Industries Inc.

5. Petitioner was compensated on a commission basis and was not reimbursed for any selling expenses incurred.

6. Petitioner shared in Block Industries Inc. pension plan, bonus arrangement, and medical plans. Block Industries Inc. withheld Federal income taxes and social security taxes on commission income earned by petitioner.

7. Block Industries Inc. furnished petitioner with samples, stationary, and office supplies. Petitioner was not responsible for invoicing his customers, collection of monies or shipping of merchandise. Block Industries Inc. had the right to accept or reject any customer orders submitted by petitioner.

8. Petitioner was permitted by Block Industries Inc., subject to its approval, to sell noncompetitive clothing lines for other principals as long as such activity did not affect or interfere with his established volume of sales.

9. During 1969, petitioner sold merchandise for three other principals: Excelled Sheepskin and Leather Coat Co., Inc., Pajama Corp. of America, and Lad' & Dad Slacks, Inc. from which he received commissions of \$8,018.62.

CONCLUSIONS OF LAW

A. That the activities of petitioner Marvin Wolfish, with respect to services performed for Block Industries Inc., did not constitute the carrying on of an unincorporated business within the meaning and intent of section 703 of the Tax Law; that sufficient direction and control was exercised over petitioner's activities so as to create an employer-employee relationship within the meaning and intent of section 703(b) of the Tax Law; therefore, the income derived therefrom was not subject to unincorporated business tax.

B. That petitioner's activities as a salesman during 1969 for other principals referred to in Finding of Fact "9" supra, constituted income subject to unincorporated business tax within the meaning and intent of section 703 of the Tax Law. However, the amount received in 1969 was insufficient to result in a tax liability.

C. That the petition of Marvin Wolfish is granted and the Notice of Deficiency issued November 29, 1971 is cancelled.

DATED: Albany, New York

APR 02 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER