

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Frank Schenck :
: 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, 1973, 1975 & 1976. :
_____ :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Frank Schenck, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank Schenck
187 Maple Ave.
Patchogue, NY 11772

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
10th day of November, 1983.

Martha L. Smalley

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

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Frank Schenck :
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Business Tax under Article 23 of the Tax Law for :
the Years 1971, 1972, 1973, 1975 & 1976. :
:

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Arthur Riber the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur Riber
275 Broad Hollow Rd., Suite 429
Melville, NY 11747

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
10th day of November, 1983.

Martha L. Sennelle

Connie A. Hagelund

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

November 10, 1983

Frank Schenck
187 Maple Ave.
Patchogue, NY 11772

Dear Mr. Schenck:

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) 690 & 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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Arthur Riber
275 Broad Hollow Rd., Suite 429
Melville, NY 11747
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
FRANK SCHENCK	:	DECISION
for Redetermination of Deficiencies or for	:	
Refunds of Unincorporated Business Taxes under	:	
Article 23 of the Tax Law for the Years 1971,	:	
1972, 1973, 1975 and 1976.	:	

Petitioner, Frank Schenck, 187 Maple Avenue, Patchogue, New York 11772, filed petitions for redetermination of deficiencies or for refunds of unincorporated business taxes under Article 23 of the Tax Law for the years 1971, 1972, 1973, 1975 and 1976 (File Nos. 20582 and 27934).

A small claims hearing was held before Anthony J. Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 11, 1983 at 2:45 P.M. Petitioner appeared with Arthur Riber, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Frank Schenck, and his wife, Muriel, timely filed joint New York State income tax returns for 1971 and 1972. On each return, petitioner reported business income. Petitioner, Frank Schenck, and his wife, Muriel, timely filed separately on one return New York State income tax returns for 1973, 1975 and 1976. On each of these returns petitioner reported business

income. He did not file unincorporated business tax returns for any of the years at issue.

2. On January 7, 1977, the Audit Division issued a Statement of Audit Changes to petitioner for 1971, 1972 and 1973 which contained the following explanation: "The income from your activities in advertising is subject to the unincorporated business tax." Accordingly, on September 26, 1977, the Audit Division issued a Notice of Deficiency to petitioner for 1971, 1972 and 1973 imposing unincorporated business tax of \$3,033.64, penalties pursuant to sections 685(a)(1) and (a)(2) of the Tax Law of \$1,387.77, interest of \$908.82, for a total of \$5,330.23.

3. On February 28, 1979, the Audit Division issued a Statement of Audit Changes to petitioner based on a field audit which increased gross receipts reported on Federal Schedules C by \$38,419.86 for 1975 and \$38,340.54 for 1976, disallowed as unsubstantiated rent expense of \$1,800.00 for each year and adjusted the statutory limitation for medical deductions for each year. The Statement imposed the following taxes:

	<u>1975</u>	<u>1976</u>	
Personal Income Tax	\$ 6,369.31	\$6,356.75	
Unincorporated Business Tax	<u>3,863.32</u>	<u>2,779.21</u>	
Total	<u>\$10,232.63</u>	<u>\$9,135.96</u>	\$19,368.94 ¹
Penalty pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law			\$ 2,656.32

Accordingly, on August 2, 1979, the Audit Division issued a Notice of Deficiency to petitioner imposing additional tax due of \$19,368.59, total penalty and interest of \$7,596.42, for a total due of \$26,965.01.

¹ The correct total is \$19,368.59 which was corrected when the Notice of Deficiency was issued.

On September 2, 1981, petitioner's representative signed a Withdrawal of Petition and Discontinuance of Case which decreased the taxes for 1975 and 1976 to the following amounts:

<u>1975</u>	<u>Tax</u>	<u>1976</u>	
\$1,746.22	\$1,286.07		Personal Income Tax -
			Agreed
\$2,221.44	\$1,031.54		Unincorporated Business Tax -
			Not Agreed

<u>1975</u>	<u>Penalty</u>	<u>1976</u>	
\$ 499.82	\$ 232.09		Section 685(a)(1) -
			Not Agreed
\$ 555.37	\$ 257.88		Section 685(a)(2) -
			Not Agreed

Interest at the minimum statutory rate.

At the hearing it was agreed by both parties that the personal income tax amounts shown on the Withdrawal are correct and that there is no issue in reference thereto. The only issue is in reference to whether or not Mr. Schenck is subject to the unincorporated business tax.

4. Petitioner, Frank Schenck, was an advertising space salesman for the Long Island Pennysaver News (hereinafter "Pennysaver") during the years at issue. He was paid on a commission basis and he reported business income as follows:

<u>Year</u>	<u>Business Income</u>
1971	\$18,729.95
1972	30,999.40
1973	34,173.70 ²
1975	40,022.28 ²
1976	20,390.62 ²

² This is the business income reported by Mr. Schenck on his income tax returns prior to the field audit adjustments.

Mr. Schenck reported as an adjustment to income for each year payment to a Keogh plan (self-employment retirement plan). Attached to the 1976 income tax return was a copy of Federal Schedule C - Profit or (Loss) From Business or Profession - which listed his principal business activity as "Adv. Sales Prom.", business name "Pennysaver" and an employer identification number.

5. Mr. Schenck worked within a restricted territory on Long Island. He was supplied leads by Pennysaver and he also sought leads on his own. All advertising sales made in his territory were credited to Mr. Schenck. All the sales Mr. Schenck made and all the advertising layouts and material that he brought back to his home office was subject to approval before the order was accepted. Mr. Schenck was covered by Pennysaver's group insurance plans. He was required to be at Pennysaver's office daily. However, he had no set hours. He submitted weekly operating reports to the Pennysaver and he attended monthly sales and promotion meetings at Pennysaver.

6. Petitioner, Frank Schenck, was not reimbursed by Pennysaver for his expenses. He employed anywhere from one to four people to pick up and deliver advertising copy for him. He hired and paid the salaries of the people he employed. No income taxes or social security taxes were withheld from his compensation. Mr. Schenck was provided desk space at Pennysaver's office and he also had an office in his home to do clerical work. No testimony was given as to whether Mr. Schenck was covered by Worker's Compensation, Unemployment Insurance or Disability Insurance. Pennysaver did not provide Mr. Schenck with a paid vacation.

7. No evidence or testimony was given as to whether Mr. Schenck had reasonable cause for not filing unincorporated business tax returns or paying the tax due.

CONCLUSIONS OF LAW

A. That whether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case. Factors to be considered in determining if there is a sufficient exercise of direction and control resulting in an employer-employee relationship are whether the individual performing the services maintains his own office, engages his own assistants or hires his own employees, or incurs expenses without reimbursement. Other factors which may have some bearing are whether or not personal income taxes or Federal insurance contributions are deducted from compensation, whether or not the entity from whom the services are performed pays unemployment insurance, or whether or not the individual is a member of an employee pension plan [20 NYCRR 203.10(c)] (adopted February 1, 1974).

B. That while Pennysaver did exercise some direction and control over Mr. Schenck, in view of the facts that Mr. Schenck was not reimbursed for his expenses, that he hired and paid his own employees, that no personal income taxes were deducted from his compensation, that no evidence was submitted to show that Mr. Schenck was covered by unemployment insurance, and that Mr. Schenck contributed to his own retirement plan, shows he was not subject to sufficient direction and control to be an employee of Pennysaver. Accordingly, Mr. Schenck was self-employed and the income from his activities is subject to the unincorporated business tax imposed by section 701 of the Tax Law.

C. That the penalties imposed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are sustained since no evidence was submitted to show that Mr. Schenck had reasonable cause for failing to file unincorporated business tax returns and paying the tax due.

D. That the Audit Division is directed to reduce the Notice of Deficiency dated August 2, 1979 in accordance with Finding of Fact "3", supra.

E. That the petitions of Frank Schenck are granted to the extent indicated in Conclusion of Law "D", supra, and in all other respects denied, and the Notice of Deficiency dated September 26, 1977 is sustained and the Notice of Deficiency dated August 2, 1979 is sustained in the reduced amounts.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983



PRESIDENT



COMMISSIONER



COMMISSIONER