

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Monroe Seifer :
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 1974 - 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 30th day of September, 1983, she served the within notice of Decision by certified mail upon Monroe Seifer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Monroe Seifer
80 81st St.
Brooklyn, NY 11209

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
30th day of September, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Monroe Seifer :
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 1974 - 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 30th day of September, 1983, she served the within notice of Decision by certified mail upon Robert R. Lewis the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert R. Lewis
230 Park 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
30th day of September, 1983.

Susan Powell

Connie A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

September 30, 1983

Monroe Seifer
80 81st St.
Brooklyn, NY 11209

Dear Mr. Seifer:

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 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
Robert R. Lewis
230 Park Avenue
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MONROE SEIFER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1974	:	
through 1976.	:	

Petitioner, Monroe Seifer, 80 81st Street, Brooklyn, New York 11209, 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 1974 through 1976 (File No. 29910).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 19, 1983 at 2:45 P.M. Petitioner appeared by Robert R. Lewis, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner's services as a motel manager during 1976 constituted the carrying on of an unincorporated business on the basis that he performed such services as an independent contractor rather than as an employee.

II. Whether petitioner may allocate a portion of his unincorporated business income outside New York (assuming that he was carrying on an unincorporated business).

III. Whether petitioner may exclude from his unincorporated business income for each of the three years at issue certain capital gains from the sale of

interests in various motels (assuming that he was carrying on an unincorporated business).

FINDINGS OF FACT

1. On January 16, 1980, the Audit Division issued a Statement of Audit Changes against petitioner alleging unincorporated business tax due of \$3,524.34 plus interest, \$3,545.78 plus interest and \$8,471.51 plus interest for the 1974, 1975 and 1976 tax years, respectively. Penalties under Tax Law §685(a)(1) and (a)(2) and §685(c) were imposed on the alleged tax due for each year at issue, and a penalty under Tax Law §685(b) was also imposed "on the 1976 additional tax due based on Federal audit changes." The Audit Division provided the following explanation:

"The income from your activities in real estate management is subject to the unincorporated business tax based on the State Tax Commission decision of April 30, 1976 and Appellate Division decision of June 30, 1977."

The alleged deficiencies were calculated as follows:

	<u>1974</u>	<u>1975</u>	<u>1976</u>
Net income before salary credit	\$74,078.87	\$74,468.73	\$164,027.43
Less: allowance for services	5,000.00	5,000.00	5,000.00
Balance	<u>\$69,078.87</u>	<u>\$69,468.73</u>	<u>\$159,027.43</u>
Less: exemption	5,000.00	5,000.00	5,000.00
Taxable income	<u>\$64,078.87</u>	<u>\$64,468.73</u>	<u>\$154,027.43</u>
Unincorporated business tax due	\$ 3,524.34	\$ 3,545.78	\$ 8,471.51

2. On January 30, 1980, the Audit Division issued a Notice of Deficiency against petitioner alleging tax deficiencies of \$15,541.63 plus penalty and interest for the tax years at issue. A copy of the Statement of Audit Changes described in Finding of Fact "1", supra, was attached to the Notice of Deficiency.

3. The Audit Division calculated petitioner's unincorporated business income for 1974, 1975 and 1976 as follows:

	<u>1974</u>	<u>1975</u>	<u>1976</u>
Wages/Management Fees	\$ 6,000.00	\$21,400.00	\$ 70,203.92
Other Income	80,077.35	60,315.88	2,875.16
Gains from the sale of property used in unincorporated business	2,581.52	6,672.85	30,568.35
Federal Audit Adjustment			7,400.00
Business Expenses	<u>(14,580.00)</u>	<u>(13,920.00)</u>	<u>(14,020.00)</u>
Unincorporated Business Income	\$74,078.87	\$74,468.73	\$164,027.43 ¹

4. The Audit Division reduced the alleged total deficiency for the three years at issue from \$15,541.63 to \$11,856.63 as the result of a mathematical error in its determination of unincorporated business income for 1976 as described in Finding of Fact "3", supra. The Audit Division reduced petitioner's 1976 unincorporated business income to \$97,027.43. The revised 1976 deficiency alleged by the Audit Division was calculated as follows:

	<u>1976</u>
Net income before salary credit	\$97,027.43
Less: allowance for services	<u>5,000.00</u>
Balance	\$92,027.43
Less: exemption	<u>5,000.00</u>
Taxable business income	\$87,027.43
Unincorporated business tax due	\$ 4,786.51

5. Petitioner conceded his liability for unincorporated business tax for the 1974 and 1975 tax years except to the extent of whether certain capital gains were properly included in his unincorporated business income for such years. The Audit Division recommended that penalties be waived for 1974 and 1975.

6. Petitioner argued that personal long-term capital gains of \$2,581.52, \$6,672.85 and \$30,568.35 were improperly included in his 1974, 1975 and 1976 unincorporated business income, respectively. The 1974 capital gains resulted

¹ Mathematical error as noted in Finding of Fact "4", infra.

from the installment sales of (1) stock in the Hawthorne Circle Hotel, Inc. which was sold in 1961 and on which petitioner collected \$2,072.17 in 1974 of which 87.16 percent was taxable, and (2) a leasehold in the Motel In The Sky, Inc. which was sold in 1960 and on which petitioner collected \$775.42 in 1974 of which 100 percent was taxable. The 1975 capital gains resulted from the installment sales of (1) stock in the Hawthorne Circle Hotel, Inc. which was sold in 1961 and on which petitioner collected \$2,156.39 in 1974 of which 87.16 percent was taxable, (2) a leasehold in the Motel In The Sky, Inc. which was sold in 1960 and on which petitioner collected \$3,028.38 in 1975 of which 100 percent was taxable and (3) stock in the Hotel Wolcott, Inc. which was sold in 1975 and on which petitioner collected \$1,825.00 in 1975 of which 96.71 percent was taxable. The 1976 capital gains resulted from the installment sales of (1) stock in the Hawthorne Circle Hotel, Inc. which was sold in 1961 and on which petitioner collected \$2,244.12 in 1975 of which 87.16 percent was taxable, (2) a leasehold in the Motel In The Sky, Inc. which was sold in 1960 and on which petitioner collected \$1,253.20 in 1976 of which 100 percent was taxable and (3) stock in the Hotel Gregorian Corp. which was sold in 1976 and on which petitioner collected \$28,591.47 in 1976 of which 95.69 percent was taxable.

7. The Audit Division included income from expired call options of \$1,625.00 in its computation of petitioner's 1976 unincorporated business income as noted in Finding of Fact "4", supra.

8. Petitioner was an officer and minority stockholder in six motels: Holiday Inns located in Denver, Colorado; Chapel Hill, North Carolina; Plainview, New York; 57th Street, Manhattan, New York; Yonkers, New York; and Newburgh, New York. These motels were owned by separate and distinct corporations, all of which held Holiday Inn franchises. Petitioner testified that his duties as chief operating officer for each of these motels were "to supervise the operation

of the motel, to retain, hire managers for the operations both in the rooms and the food and beverage, to set up the daily operating policies insofar as the daily routines of the business were concerned, to administer the activities relating to the sales and the marketing of the Holiday Inn and all matters overall pertaining to the direction of the operation."

9. Petitioner attached to his 1976 New York personal income tax return Wage and Tax Statements which show his "wages, tips and other compensation" and taxes withheld by the six motels noted in Finding of Fact "8", supra, as follows:

	<u>Wages, tips & other compensation</u>	<u>Federal income tax withheld</u>	<u>State income tax withheld</u>
New York Motel Enterprises, Inc. (57th St., Manhattan, New York, Holiday Inn)	\$ 3,100.00	None	None
Plainview Enterprises (Plainview, N.Y., Holiday Inn)	\$ 9,000.00	\$1,099.18	\$375.00
Syfus Leasing Corp. (Newburgh, N.Y., Holiday Inn)	\$ 3,230.00	* ²	\$163.00
Motel In The Sky, Inc. (Yonkers, N.Y., Holiday Inn)	\$17,223.02	* ³	\$861.16
Chapel Hill Motel Enterprises, Inc. (Chapel Hill, North Carolina, Holiday Inn)	\$ 6,250.90	None	No North Carolina tax withheld
Denver Motel Enterprises, Inc. (Denver, Colorado, Holiday Inn)	\$31,400.00	None ⁴	No Colorado tax withheld

² A New York Form IT-2102, rather than a United States Form W-2, was filed by petitioner. Therefore, no information is available concerning whether Federal income tax was withheld.

³ Ibid.

⁴ Although petitioner testified that Federal income tax was withheld from his compensation by Denver Motel Enterprises, Inc., the W-2 form attached to his tax return showed that no Federal income tax was withheld.

10. Petitioner testified that the services he performed for each of the six motels was directed and supervised by the board of directors of the respective motel. However, he conceded that he did not report to any supervisor on a day-to-day basis. It also appears that petitioner generally planned his own schedule and activities. Furthermore, petitioner testified that his compensation was determined "by the services that I purvey". He did not show any relationship between the time devoted to each corporation and the compensation received from each.

11. When petitioner visited the motels outside New York State, he was provided with an office for his use which he jointly shared with the manager of the motel operation.

12. On his 1976 United States personal income tax return, petitioner claimed as an adjustment to income a payment to an individual retirement arrangement of \$1,500.00.⁵ Apparently, petitioner did not receive pension benefits from any of the motel corporations. Nor did he offer any proof that he received health or vacation benefits from such corporations.

13. Petitioner claimed on his 1976 Federal income tax return that he incurred \$14,020.00 in employee business expenses which were not reimbursed by the motels during 1976. The Internal Revenue Service disallowed \$7,400.00 of petitioner's claimed business expenses. The negligence penalty was imposed by the Audit Division under Tax Law §685(b) on the 1976 additional tax due resulting from this Federal audit change. Petitioner testified that the disallowed employee business expenses arose "(b)ecause I didn't follow my accountant's advice...".

⁵ Under I.R.C. §219, as effective during 1976, this adjustment was not permitted if an individual was an active participant in a qualified retirement plan provided by an employer.

CONCLUSIONS OF LAW

A. That "(t)he distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used." Matter of Morton, 284 N.Y. 167, 172.

B. That petitioner has failed to sustain his burden of proof, required by Tax Law §689(e), as incorporated into Tax Law §722, to show that the degree of direction and control exercised by the boards of directors of the six motel corporations over his activities was sufficient for the existence of a bona fide employer-employee relationship. Rather, petitioner planned his own schedule and had a great deal of discretion concerning his activities. In addition, only one wage and tax statement shows that Federal income tax was withheld from his compensation, and, in particular, the two out-of-state motel corporations did not withhold either Federal income tax or North Carolina or Colorado state income taxes, respectively. Furthermore, petitioner apparently did not receive any fringe benefits such as pensions, health or vacation benefits from any of the motel corporations, and he took substantial miscellaneous business deductions on his federal income tax return. Therefore, it is reasonable to conclude that petitioner's services as a motel manager during 1976 were not provided as an employee but rather constituted the carrying on of an unincorporated business as an independent contractor. Matter of Monroe Seifer v. State Tax Commission, 58 A.D.2d 726 (1977).

C. That petitioner did not maintain any regular place of business outside New York which would permit him to allocate earnings within and without New York under Tax Law §707(a).

D. That the Audit Division incorrectly included the gains from petitioner's sale of stock and a leasehold as described in Finding of Fact "6", supra, in his unincorporated business income. There is nothing in the record to show that the stock and leasehold were property employed in the conduct of petitioner's unincorporated motel management business within the meaning and intent of Tax Law §705(a).

E. That the Audit Division improperly included personal investment income from expired call options of \$1,625.00 in petitioner's 1976 unincorporated business income as described in Finding of Fact "7", supra.

F. That penalties under Tax Law §685(a)(1) and (a)(2) are cancelled for the years at issue. However, there is no basis to waive the penalties under Tax Law §685(c), and the penalty imposed under §685(b) on the 1976 additional tax due based on the Federal audit change described in Finding of Fact "13", supra, is also sustained.

G. That the petition of Monroe Seifer is granted to the extent noted in Conclusions of Law "D", "E" and "F", but in all other respects is denied.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 30 1983

Roderick W. Cline
PRESIDENT

Francis R. Koening
COMMISSIONER

Mark J. Mallon
COMMISSIONER