

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Irving Silverstein :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1979 & 1980. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 30th day of October, 1985, he served the within notice of Decision by certified mail upon Irving Silverstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Irving Silverstein
2626 Kings Hwy.
Brooklyn, NY 11229

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 October, 1985.

David Parchuck

Annunzio DeGennaro
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1979 & 1980. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 30th day of October, 1985, he served the within notice of Decision by certified mail upon Samuel E. Lang, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel E. Lang
225 Broadway
New York, NY 10007

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 October, 1985.

David Parchuck

Gennie O'Hagan
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 30, 1985

Irving Silverstein
2626 Kings Hwy.
Brooklyn, NY 11229

Dear Mr. Silverstein:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Samuel E. Lang
225 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
IRVING SILVERSTEIN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1979	:	
and 1980.	:	

Petitioner, Irving Silverstein, 2626 Kings Highway, Brooklyn, New York 11229, 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 1979 and 1980 (File No. 42903).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 25, 1985 at 1:15 P.M. Petitioner appeared by Samuel E. Lang, CPA. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamarass, Esq., of counsel).

ISSUE

Whether petitioner may allocate his unincorporated business income to sources without the State of New York.

FINDINGS OF FACT

1. Irving Silverstein (hereinafter "petitioner") timely filed a New York State Income Tax Resident Return for each of the years 1979 and 1980. In conjunction therewith, he filed a New York State Unincorporated Business Tax Return for each of said years whereon he reported the income derived from his activities described thereon as "Traveling Auctioneer". His net profit reported

for each year was \$34,077.00 (1979) and \$12,168.00 (1980). On both the 1979 and 1980 unincorporated business tax returns petitioner allocated his entire net profit to sources without New York State. On business allocation schedules attached thereto, he reported various places of business, all of which were located without New York State.

2. On September 23, 1982, the Audit Division issued a Statement of Unincorporated Business Tax Audit Changes to petitioner wherein the aforesaid net profit reported for each of said years was held fully allocable to the State of New York based on the following explanation:

"Since you do not maintain a bonafide office outside New York State, allocation of income (to sources without New York State) is disallowed."

Accordingly, on January 12, 1983, the Audit Division issued a Notice of Deficiency against petitioner asserting unincorporated business tax for 1979 and 1980 of \$1,156.00, plus penalty of \$57.00 and interest of \$344.48, for a total due of \$1,557.48. Said penalty was asserted for negligence pursuant to section 685(b) of the Tax Law, as incorporated into Article 23 by section 722(a) of the Tax Law.

3. Petitioner did not personally appear for the hearing. His representative alleged that no portion of petitioner's income is allocable to New York since he did not maintain an office in New York. Petitioner claimed in his perfected petition that:

"The Tax Department erroneously assessed an Unincorporated Business Tax for the years 1979-1980. The Taxpayer operated a peculiar type of Business. He is an Auctioneer and conducts his business solely wherever the auction takes place. He maintains no offices other than the place where the auction is conducted. The following is the list of these places:

1979 - McKees Rock (sic), Penn. - Montclair, N.J. -
Ash Tabula (sic), Ohio - Seattle, Washington

1980 - Seattle, Washington - Santa Barba (sic), California -
Va. Beach, Va. - Danville, Va."

4. On petitioner's 1979 and 1980 unincorporated business tax returns his personal residence was reported as his business address.

5. Petitioner's gross income (commissions) for 1979 and 1980 from his activities as an auctioneer was derived from the following two wholesale jewelers:

a. Silverman Sales Enterprises, Inc.
1065 Old Country Road
Westbury, New York

b. Altman & Wachtler
50 West 47th Street
New York, New York

6. The aforestated principals contacted petitioner at his personal residence. When petitioner was not out of state actively auctioning his principals' merchandise, he remained at home.

7. Petitioner's representative conceded that petitioner had no regular place of business without the State of New York.

CONCLUSIONS OF LAW

A. That section 707(a) of the Tax Law provides that:

"If an unincorporated business is carried on both within and without this state...there shall be allocated to this state a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions. If the unincorporated business has no regular place of business outside this state, all of such excess shall be allocated to this state."

B. That petitioner failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, as incorporated into Article 23 by section 722(a), to show that he did not carry on business within New York State during the years 1979 and 1980.


C. That since petitioner had no regular place of business outside New York State, his entire net profit derived from his auctioneering activities is allocable to New York State within the meaning and intent of section 707(a) of the Tax Law.


D. That the petition of Irving Silverstein is denied and the Notice of Deficiency issued January 12, 1983 is sustained together with such additional interest as may be lawfully owing.

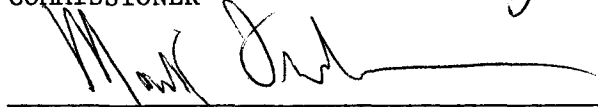
DATED: Albany, New York

STATE TAX COMMISSION

OCT 30 1985


PRESIDENT


COMMISSIONER


COMMISSIONER