

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

PETER S. RAYNOR

DETERMINATION

for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1971
through 1976.

Petitioner, Peter S. Raynor, 2 Fifth Avenue, New York, New York 10011,
filed a petition for redetermination of a deficiency or for refund of unincor-
porated business tax under Article 23 of the Tax Law for the years 1971 through
1976 (File No. 27057).

A hearing was held at the offices of the State Tax Commission, Two World
Trade Center, New York, New York, on October 28, 1981 at 9:15 A.M. Petitioner
appeared by Fanette Pollack, Esq. The Audit Division appeared by Ralph J.
Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the activities engaged in by petitioner as a salesman constituted
the carrying on of an unincorporated business.

11. Whether a penalty under Tax Law section 685(c) was properly asserted.

FINDINGS OF FACT

1. Petitioner, Peter S. Raynor, filed New York State income tax resident
returns for the years 1971 through 1976, whereon he reported salary income
derived from his activities as a salesman. He filed unincorporated business
tax returns for the years 1975 and 1976.

2. On January 17, 1979, the Audit Division issued two statements of audit
changes to petitioner wherein it stated that "the income from your activities

as Salesman is subject to the unincorporated business tax based on the Appellate Division decision of April 6, 1978."¹ Penalties were imposed pursuant to section 685(c) of the Tax Law for the years 1971 through 1974. Accordingly, two notices of deficiency were issued against petitioner on February 7, 1979. One Notice of Deficiency asserted unincorporated business tax of \$3,855.64, plus penalty and interest of \$1,722.91, for the years 1971, 1972 and 1973. The other Notice of Deficiency asserted unincorporated business tax of \$5,414.62, plus penalty and interest of \$1,302.75, for the years 1974, 1975 and 1976.

3. For 1971 through 1976, petitioner, Peter S. Raynor, was employed on a fixed salary plus commission as a salesman for Werthley, Inc. Payroll and social security taxes were withheld by Werthley, Inc. He was purportedly required to work 18 hours a week selling women's costume jewelry.

4. For 1971 and part of 1972, petitioner also worked for Pyramid Leather Goods Company, Inc. Petitioner, at the hearing, conceded that the income from this entity was subject to unincorporated business tax. In November of 1972, after leaving Pyramid Leather Goods Company, petitioner became a part-time employee of Sirco International Corporation (hereinafter "Sirco"). Petitioner's contract with Sirco stated that he would work 18 hours a week. He sold women's handbags and leather accessories for both of these companies. From November of 1972 through 1976, petitioner was employed on a fixed salary plus commission as a salesman for Sirco. Sirco also withheld payroll and social security taxes.

1 Raynor v. Tully (60 AD2d 731 [to review a determination of the State Tax Commission which sustained a deficiency against **the petitioner for** unincorporated business taxes imposed under Article 23 of the Tax Law for the years 1968 through 1970]).

5. Werthley, Inc. and Sirco each knew of petitioner's employment relationship with the other, and each gave petitioner permission to sell for the other. Petitioner was prohibited by his contract with Sirco from selling any other items, whether or not in competition with his principal's product without its permission. Petitioner submitted no evidence of a contract with Werthley, Inc. which prohibited him from representing any other companies.

6. Both Werthley, Inc. and Sirco covered the petitioner under worker's compensation and disability insurance. He was further covered under their health insurance plans.

7. Petitioner was not included in his principals' pension plans.

8. Petitioner was assigned a specific territory and specific accounts. These were subject to change at the sole discretion of his principals. While on the road, he visited stores which were purportedly specified by his principals. It was alleged that he was required to report by telephone and was frequently instructed to change his itinerary and visit other specific accounts.

9. When not traveling, petitioner was required to work in the principals' showrooms or places of business. In the showrooms, petitioner was required to sell and service customers including those not within his assigned territory. He received commissions only from those customers located within his assigned territory. The time allocated to each principal **was** purportedly determined by oral or written contract.

10. Petitioner was required to take his vacations with pay during approved periods.

11. The principals, Werthley, Inc. and Sirco, furnished petitioner all samples, sample bags, hangers, cases and other paraphernalia necessary to his

employment. Petitioner was provided with price lists, order forms, and business cards. All sales were subject to the approval of the principals.

12. Petitioner was required to pay, without reimbursement, all selling expenses. These included, in part, travel, lodging, telephone and entertainment expenses, since the principals felt that the salary paid was to cover such expenses.

13. During the years 1975 and 1976 petitioner contributed to a self-retirement plan (Keogh Plan).

14. Petitioner testified that his activities for Werthley, Inc. during the years at issue were the same as for the years 1968 through 1970.

15. Petitioner maintained that he acted on the advice of his accountant and, therefore, the penalty should be waived.

CONCLUSIONS OF LAW

A. That the activities performed by petitioner, Peter S. Raynor, for his principals constituted the carrying on of an unincorporated business within the meaning and intent of section 703 of the Tax Law during the years at issue. Therefore, the income derived therefrom is subject to unincorporated business tax (Raynor v. Tully, 60 AD2d 731).

B. That relief from the penalty imposed pursuant to section 685(c) of the Tax Law is obtained through section 685(d). There is no provision under section 685(d) for cancellation of the penalty based on reasonable cause. Since petitioner did not file a declaration of estimated unincorporated business tax, the section 685(c) penalty was properly asserted.

C. That the petition of Peter S. Raynor is denied, and the notices of deficiency issued February 7, 1979 are sustained.

DATED: Albany, New York

SEP 24 1987


ADMINISTRATIVE LAW JUDGE

