

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
WALTER J. BEAR

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or  
a Revision of a Determination or a Refund  
of Personal Income & Unincorporated Business  
Taxes under Article(s) 22 & 23 of the  
Tax Law for the Year(s) ~~or Period(s)~~  
1970 through 1974

State of New York  
County of Albany

John Huhn, being duly sworn, deposes and says that

He is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 29th day of September, 1977, he served the within

Notice of Decision by (certified) mail upon Walter J. Bear

~~representative of~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Walter J. Bear  
2 Cleveland Place  
Yonkers, New York 10710

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~~  
~~petitioner~~ petitioner herein and that the address set forth on said wrapper is the  
last known address of the ~~representative of~~ petitioner.

Sworn to before me this

29th day of September, 1977

Janet Mack

John Huhn



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
WALTER J. BEAR : DECISION  
for Redetermination of a Deficiency or :  
for Refund of Personal Income and Unin- :  
corporated Business Taxes under Articles :  
22 and 23 of the Tax Law for the Years :  
1970 through 1974. :

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Petitioner, Walter J. Bear, residing at 2 Cleveland Place, Yonkers, New York 10710, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1970 through 1974. (File No. 15479)

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 23, 1977 at 1:15 P.M. The petitioner appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

#### ISSUES

I. Whether petitioner's activities constituted the practice of a profession exempt from unincorporated business tax.

II. Whether the income from the petitioner's activities is subject to unincorporated business tax.

ISSUES

III. Whether the percentage allowed to be deducted under a self-employed retirement plan (Keogh Plan) is to be applied to the gross business income or to net business income of the petitioner, Walter J. Bear.

FINDINGS OF FACT

1. Petitioner, Walter J. Bear, contended that the law allows him to deduct a certain percentage of his earned income as a contribution to a self-employed retirement plan, and that the "earned income" in this case was the gross commissions earned from his sales activities as a packaging salesman or broker.

2. Petitioner was a packaging salesman who sold cartons and packaging products for Gordon Cartons, Inc. ("Gordon"), a corporation located in Baltimore, Maryland. Petitioner did not have a written employment contract with said principal. Although petitioner listed his occupation as "salesman" on the New York State income tax returns filed for 1970, 1972, 1973 and 1974, he listed the type of business income he received as "packaging broker commissions". (The 1971 return was apparently destroyed).

3. Petitioner was paid on a commission basis. Payroll taxes were not withheld from his compensation. Gordon did not cover him for disability or unemployment insurance. He was not reimbursed for business expenses. He reported his commission income and business expenses on Schedule "C" of the Federal income tax returns filed for the years in question.

4. Petitioner contended that Gordon did not want to maintain an office in New York State or to keep special payroll records for an employee outside the

State of Maryland. He accepted terms of employment under which no payroll taxes would be withheld from his commission income, nor would he be covered for such employee benefits as disability or unemployment insurance coverage. Petitioner further contended that the 5% commission he received on sales was meant to reimburse him for his selling expenses and any other business expenses he incurred.

5. Petitioner maintained an office in his home from which he conducted his business activities. He had a telephone answering service and a post office box.

6. Gordon restricted the petitioner's territory to the City of New York and the New York metropolitan area. Gordon also provided him with price quotations, office supplies, samples and leads for new accounts.

7. Petitioner contended that he was required to periodically attend sales meetings and to maintain daily communications with Gordon by telephone or by mail.

8. Petitioner was not restricted by Gordon as to the amount of time and effort expended by him in the conduct of his sales activities. Petitioner was free to develop new accounts on his own.

#### CONCLUSIONS OF LAW

A. That petitioner's business activities do not constitute the practice of a profession within the meaning and intent of section 703(c) of the Tax Law and 20 NYCRR 203.11.

B. That petitioner has not established that Gordon exercised sufficient direction and control over his activities to result in an employee-employer relationship within the meaning and intent of section 703(b) of the Tax Law.

C. That petitioner's activities as a salesman or packaging broker constituted the carrying on of an unincorporated business within the meaning and intent of section 703 of the Tax Law and his income derived therefrom is subject to unincorporated business tax.

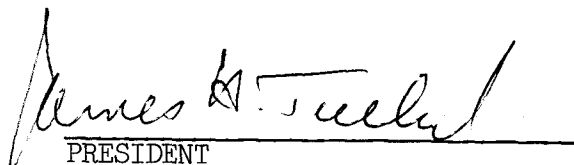
D. That petitioner's earned income as defined by sections 401(c)(2) and 1402(a) of the Internal Revenue Code is net income, after the deduction of business expenses.

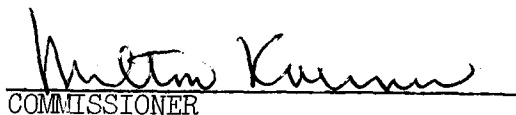
E. That petition of Walter J. Bear is denied and the Notice of Deficiency issued on March 29, 1976 for \$2,564.77 is sustained, along with such additional interest as may be lawfully owing.

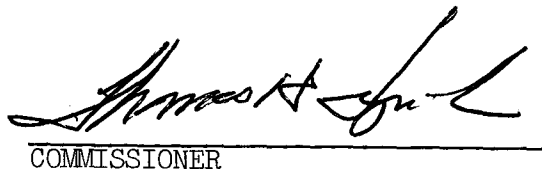
DATED: Albany, New York

September 29, 1977

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER