

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Jerry D. & Faye G. Berkwitt :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income & UBT :
under Article 22 & 23 of the Tax Law
for the Years 1968 - 1972. :

State of New York
County of Albany

Jay Vredenburg, 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 18th day of July, 1980, he served the within notice of Decision by certified mail upon Jerry D. & Faye G. Berkwitt, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jerry D. & Faye G. Berkwitt
3777 Independence Ave.
Riverdale, NY 10463

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
18th day of July, 1980.

Robert A. Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
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Personal Income & UBT :
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State of New York
County of Albany

Jay Vredenburg, 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 18th day of July, 1980, he served the within notice of Decision by certified mail upon Bruc S. Leffler the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Bruc S. Leffler
Goidel, Goidel & Helfenstein, P.C.
127 John St.
New York, NY 10038

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
18th day of July, 1980.

Rebecca A. Bruck

J. Vredenburg

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

July 18, 1980

Jerry D. & Faye G. Berkwitt
3777 Independence Ave.
Riverdale, NY 10463

Dear Mr. & Mrs. Berkwitt:

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 Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Bruc S. Leffler
Goidel, Goidel & Helfenstein, P.C.
127 John St.
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :

of :

JERRY D. BERKWITT and FAYE G. BERKWITT :

DECISION

for Redetermination of Deficiencies or for :
Refund of Personal Income and Unincorporated :
Business Taxes under Articles 22 and 23 of :
the Tax Law for the Years 1968 through 1972.

Petitioner Jerry D. Berkowitz, 3777 Independence Avenue, Riverdale, New York 10463, filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1968, 1969 and 1970 (File No. 14345); said petitioner filed a separate petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1971 and 1972 (File No. 14347); and petitioners, Jerry D. Berkowitz and Faye G. Berkowitz, filed a separate petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1971 and 1972 (File No. 14346).

A consolidated formal hearing was commenced before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 20, 1978 at 10:45 A.M. and was continued to conclusion at the same location on September 25, 1978 at 2:45 P.M. Petitioners appeared by Goidel, Goidel & Helfenstein, P.C. (Bruce S. Leffler, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether the business activities of petitioner Jerry D. Berkowitz, as a manufacturer's representative or salesman for 1968 through 1972, constituted

the carrying on of an unincorporated business, thereby subjecting said petitioner to unincorporated business tax.

II. Whether the purported salary income of petitioner Faye G. Berkwitt reported for 1971 and 1972 was an improper splitting of income between husband and wife, thereby being properly included in the business income of petitioner Jerry D. Berkwitt.

FINDINGS OF FACT

1. Petitioners, Jerry D. Berkwitt and Faye G. Berkwitt, timely filed New York State income tax resident returns for 1968 and 1969, and New York State combined income tax returns for 1970, 1971 and 1972, in each instance listing their address as 3777 Independence Avenue, Riverdale, New York. Said petitioners did not file unincorporated business tax returns for those years.

2. On January 29, 1973, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against petitioner Jerry D. Berkwitt revising an earlier Statement of Audit Changes dated November 3, 1971 and asserting additional unincorporated business tax for 1968, 1969 and 1970 of \$2,891.46, plus interest of \$479.31, making a total of \$3,370.77, on the ground that income received in said years as a manufacturer's representative was subject to unincorporated business tax.

3. On October 28, 1974, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against petitioner Jerry D. Berkwitt, asserting unincorporated business tax for 1971 and 1972 of \$2,920.04, plus interest of \$378.69, making a total of \$3,298.73, on the grounds that income received in each year as a manufacturer's representative was subject to unincorporated business tax and increasing said petitioner's business income in each year by the amount shown as wages paid to his wife, as an improper business deduction.

4. Petitioner Jerry D. Berkowitz timely filed petitions for redetermination of the deficiency or for refund of unincorporated business taxes, with respect to each of the aforesaid notices of deficiency, challenging the constitutionality of the application of the Tax Law and claiming an exemption as a sales representative under section 703(f) of the Tax Law.

5. On January 29, 1973, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against petitioners, Jerry D. Berkowitz and Faye G. Berkowitz, revising an earlier Statement of Audit Changes dated November 3, 1971 and imposing additional income tax for 1970 of \$517.95, plus interest of \$55.58, making a total of \$573.53, on the ground that splitting of income between a husband and wife was not authorized for New York State tax purposes.

6. Petitioners, Jerry D. Berkowitz and Faye G. Berkowitz, did not file a petition for redetermination of the aforesaid Notice of Deficiency dated January 29, 1973, electing instead, to make payment in full to the Income Tax Bureau of the amount due and owing for 1970 with respect to splitting of income. Accordingly, there is no issue to be determined with respect to income splitting for 1970.

7. On October 28, 1974, the Income Tax Bureau issued a Statement of Audit Changes and Notice of Deficiency against petitioners, Jerry D. Berkowitz and Faye G. Berkowitz, imposing additional income tax for 1971 and 1972 of \$1,994.19, plus interest of \$251.48, making a total of \$2,245.67, on the ground that splitting of income between a husband and wife was not authorized for New York State tax purposes.

8. Petitioners, Jerry D. Berkowitz and Faye G. Berkowitz, timely filed a petition for redetermination of the deficiency of the Notice of Deficiency dated October 28, 1974, claiming that petitioner Faye G. Berkowitz earned income from the business of her husband, Jerry D. Berkowitz, for services rendered to him as a sales representative of furniture manufacturers and as a

bookkeeper.

During the September 25, 1978 hearing, said petitioners' representative withdrew the petition filed with respect to the October 28, 1974 Notice of Deficiency (File No. 14346) and stated that said petitioners did not contest the additional tax imposed by the Income Tax Bureau by reason of the unauthorized splitting of income between said petitioners.

9. During 1968 and 1969, petitioner Jerry D. Berkwitt listed his occupation on his New York State income tax returns as manufacturer's representative and that of petitioner Faye G. Berkwitt as housewife. Income in both years was reported solely for petitioner Jerry D. Berkwitt, but no wage and tax statements were offered with respect to the principals for whom said petitioner received payment for his services in 1968 and 1969.

Thereafter, for 1970 through 1972, said petitioners' occupations were listed as "sales" with each of them reporting income for those years. Although said petitioners' New York State income tax returns disclosed substantial income from their performance of services in such occupations for 1970 through 1972, no wage and tax statements were offered with respect to the principals from whom said petitioners received payment for such services, except that in 1971 and 1972, such wage and tax statements were produced showing that petitioner Faye G. Berkwitt earned \$9,000.00 and \$20,400.00, respectively, as an employee of her husband, Jerry D. Berkwitt. No withholding taxes or FICA contributions were deducted from her "salary" in either year.

10. During the years in question, petitioner Jerry D. Berkwitt received compensation in the form of commissions for services which he rendered as a sales or manufacturer's representative without written contract for United Manufacturing Company, Jasper, Indiana (hereinafter "United"), Phillip Reinisch Company, Chicago, Illinois (hereinafter "Reinisch") and, to a much lesser degree, David Fitchman and Associates, Chicago, Illinois. Said petitioner

also performed similiar services for Clearing Sales Corporation, Chicago, Illinois, but did not receive any compensation from Clearing Sales Corporation as he was unsuccessful in selling its line.

11. Petitioner Jerry D. Berkwitt earned approximately 75 percent of his total income from United, and the balance, substantially by reason of the services he performed, on behalf of Reinisch and other lesser principals, all with respect to the sale of occasional furniture, i.e., desks, bookcases, living room tables and the like.

12. While petitioner Jerry D. Berkwitt was subject to some degree of control and direction in the performance of his duties as a sales or manufacturer's representative (primarily with respect to cost controls, internal procedures of the company, attendance at market shows three or four times annually, submission of monthly sales reports, attendance in United's showroom every Friday and the territory and accounts which he could or could not service, for credit or other reasons), the preponderance of credible evidence establishes that said petitioner performed services for two or more principals with their knowledge and consent but without agreement between such principals for the division of his time and efforts; said petitioner failed to demonstrate a clear division of his time and efforts between such principals; said petitioner was not subject to the control and direction of any principal in the manner in which he approached customers and persuaded them to make purchases (said petitioner was unable to submit any documents to support his claim to the contrary, testifying that he destroyed all instruction and other documentary material one year after receiving same from his principals); said petitioner was not subject to the will and control of any superior to whom he reported

with respect to the means and methods of obtaining a particular result; said petitioner basically arranged his own appointments; said petitioner set his own daily work schedule; said petitioner bore the cost and expense of his duties as a sales or manufacturer's representative, including a home office, office furniture and equipment, telephone, and pro rata rent for such office, all without reimbursement from any principal; said petitioner deducted all such expenses on his Federal income tax return as either ordinary business expense or depreciation; said petitioner was paid on a straight commission basis by all of his principals; said petitioner's business card bears his name and that of United and Reinisch (his home and business address and telephone as shown thereon being one and the same). Notwithstanding said petitioner's claim that he hired no employees or assistants in 1970, 1971 and 1972, petitioner Faye G. Berkwitt reported income as a sales representative from the conduct of her husband's business, and wage statements were filed, at least for 1971 and 1972, to support such income. Said petitioner maintains no office, desk space or telephone at the place of business of any principal; said petitioner was not provided with vacation, workmen's compensation, disability, unemployment insurance, health or hospitalization benefits by any of his principals (while there was some evidence that said petitioner contributed to and was covered by Reinisch's Blue Cross/Blue Shield medical plan, said petitioner failed to establish that he did not bear the full cost of the premium for such coverage); said petitioner did not have withholding or social security taxes deducted from his income by any principal.

CONCLUSIONS OF LAW

A. That the constitutionality of the laws of the State of New York are presumed at the administrative level and the New York State Tax Commission does not have jurisdiction to declare such laws unconstitutional. Accordingly, the unincorporated business tax, generally, and the application of section 703 of the Tax Law, particularly, is constitutional to the extent that income tax

liability is sought to be imposed on petitioner Jerry D. Berkwitt.

B. That, pursuant to section 701(a) of the Tax Law, the State of New York imposes a tax on the income of every unincorporated business wholly or partially carried on within the State.

C. That, pursuant to section 703(a) of the Tax Law, an unincorporated business is defined as any trade, business or occupation engaged in by an individual or unincorporated entity.

D. That, pursuant to section 703(b) of the Tax Law, the "performance of services by an individual as an employee...of a corporation...shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by each individual".

E. That the employer-employee relationship exists where the principal has the right to control and direct the individual performing services, not only as to the end result to be accomplished, but also as to the means and details to be employed. See Matter of Liberman v. Gallman, 41 N.Y.2d 774, 778 (1977).

F. That "(f)rom the nature of the problem the degree of control which must be reserved by the employer in order to create the employer-employee relationship cannot be stated in terms of mathematical precision, and various aspects of the relationship may be considered in arriving at the conclusion in a particular case". Matter of Liberman v. Gallman, Id. at 778.

G. That a sales representative cannot be deemed an "employee" where the principal does not exercise control and direction over the manner in which customers are approached and persuaded to make sales or otherwise supervise and control the sales routine. Matter of Liberman v. Gallman, Id. at 779.

H. That, pursuant to sections 722 and 689(e) of the Tax Law, petitioner Jerry D. Berkwitt bears the burden of proof to establish that the compensation

received during the years in question for his performance of services as a manufacturer's or sales representative was for services rendered as an employee rather than as an independent contractor or agent carrying on an unincorporated business. Matter of Naroff v. Tully, 55 A.D.2d 755, 389 N.Y.S.2d 453 (3rd Dept. 1976). See also Matter of Liberman v. Gallman, Supra at 777.

I. That petitioner Jerry D. Berkwitt failed to sustain his burden of establishing that he was an "employee" within the meaning and intent of section 703(b) of the Tax Law. Moreover, section 703(f) of the Tax Law has no application here.

Said petitioner demonstrated the indicia of an independent agent or contractor rather than an employee. Matter of Seifer v. State Tax Commission, 58 A.D.2d 726, 396 N.Y.S. 2d 493 (3rd Dept. 1977). Matter of Liberman v. Gallman, Supra at 779. Accordingly, the income received by said petitioner for his services as an independent sales or manufacturer's representative for the years 1968 through 1972 is subject to unincorporated business tax.

J. That the petitions of Jerry D. Berkwitt are denied and the notices of deficiency issued against said petitioner on January 29, 1973 and October 28, 1974 are sustained. The petition of Jerry D. Berkwitt and Faye G. Berkwitt is hereby deemed withdrawn and the Notice of Deficiency issued against said petitioners on October 28, 1974 is sustained.

DATED: Albany, New York

JUL 18 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER