

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Thomas P. O'Connor :

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 1969, 1970, 1971. :

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 13th day of February, 1980, he served the within notice of Decision by certified mail upon Thomas P. O'Connor, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

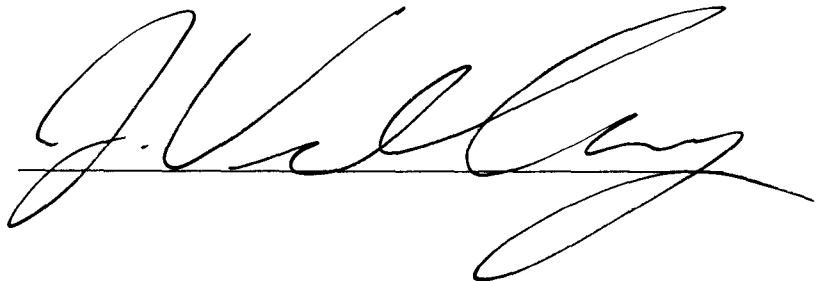
Thomas P. O'Connor
26 Biltmore Ave.
Yonkers, NY 10710

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

Sworn to before me this
13th day of February, 1980.

Joanne Knapp



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

February 13, 1980

Thomas P. O'Connor
26 Biltmore Ave.
Yonkers, NY 10710

Dear Mr. O'Connor:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
THOMAS P. O'CONNOR : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income and Unincorpor- :
ated Business Taxes under Articles 22 and :
23 of the Tax Law for the Years 1969, 1970 :
and 1971. :

Petitioner, Thomas P. O'Connor, 26 Biltmore Avenue, 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 1969, 1970 and 1971 (File No. 16721).

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 May 22, 1979 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioner's activities as a salesman were subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Thomas P. O'Connor, and Kathleen C. O'Connor, his wife, timely filed joint New York State income tax resident returns for 1969, 1970 and 1971. Petitioner did not file unincorporated business tax returns for said years.

2. On June 28, 1976, the Audit Division issued a Notice of Deficiency against petitioner for 1969, 1970 and 1971 on which the Division held that petitioner's income from his activities as a salesman was subject to unincorporated business tax. In addition, penalties were imposed pursuant to sections 685(a)(1), 685(a)(2) and 685(c) of the Tax Law. The penalty imposed under section 685(c) of the Tax Law was imposed for underpayment of estimated personal income and unincorporated business taxes.

3. Petitioner was a salesman for Josten's, Inc. ("Josten's"), a corporation organized under the laws of the State of Minnesota with branch offices in the State of New York. Josten's was a firm which sold school products, such as class rings, awards, announcements, yearbooks and diplomas.

4. Petitioner was a sales agent for Josten's during 1969, 1970 and 1971 under a written contract which provided in part that:

- (a) petitioner was limited to a specific territory or specific schools assigned by Josten's. Josten's reserved "the right at any time to change the schools assigned hereunder";
- (b) petitioner was supplied with samples and price lists which remained the property of Josten's;
- (c) petitioner was compensated on a commission basis and was advanced a weekly draw which was charged to his commission account;
- (d) Josten's would not furnish petitioner office space, clerical help, telephone, travel expenses or advertising material;
- (e) petitioner was required to devote his full time and effort in selling for Josten's;

- (f) petitioner was required "to furnish reports on solicitations, sales and territory potentials";
- (g) petitioner was required to instruct customers to remit payments for merchandise directly to Josten's;

5. Petitioner was supervised by a sales manager in the New York branch office of Josten's, who would periodically accompany petitioner when he visited schools. In addition, vacations and other "time off," was subject to the approval of the sales manager.

6. Petitioner was required to meet production quotas and to attend sales meetings. Annual meetings conducted by Josten's instructed its salesmen on methods of approaching clients and on the methods of presenting Josten's product.

7. Petitioner made his own appointments and arranged his own daily itinerary, but was required to report such plans to the sales manager by telephone on a daily basis.

8. Petitioner was not reimbursed by Josten's for any selling expenses incurred which included the maintenance of an office in his personal residence.

9. Payroll taxes were not withheld by Josten's on the commission income earned by petitioner. However, self-employment taxes were paid by petitioner.

10. Petitioner did not sell for, or represent, any other company during 1969, 1970 and 1971.

11. The penalty imposed pursuant to section 685(c) of the Tax Law was not challenged or contested by petitioner.

CONCLUSIONS OF LAW

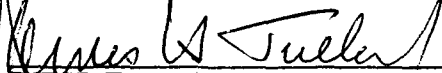
A. That sufficient direction and control was exercised over petitioner's activities by Josten's, Inc. so as to create an employer-employee relationship within the meaning and intent of section 703(b) of the Tax Law. Therefore, commission income derived from services he rendered as an employee during 1969, 1970 and 1971 was not subject to unincorporated business tax.

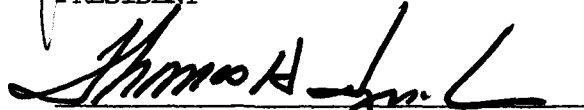
B. That the Audit Division is hereby directed to modify the Notice of Deficiency issued on June 28, 1976 to the extent shown in Conclusion of Law "A" supra, including the related penalties; and that, except as so granted, the petitioner is in all other respects denied.

DATED: Albany, New York

FEB 13 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER