

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nathan & Gladys Ludacer :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax & UBT under Article 22 & 23 of the Tax Law for :
the Years 1965 - 1968.

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 14th day of August, 1981, he served the within notice of Decision by certified mail upon Nathan & Gladys Ludacer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nathan & Gladys Ludacer
397 Terhune Dr.
Wayne, NJ

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
14th day of August, 1981.

Carrie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION.

In the Matter of the Petition :
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Tax & UBT under Article 22 & 23 of the Tax Law for
the Years 1965 - 1968. :

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 14th day of August, 1981, he served the within notice of Decision by certified mail upon Menachem David the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Menachem David
David & Gelman
381 Sunrise Hwy.
Lynnbrook, NY 11563

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
14th day of August, 1981.

Carrie A. Hegland

J. Vredenburg

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

August 14, 1980

Nathan & Gladys Ludacer
397 Terhune Dr.
Wayne, NJ

Dear Mr. & Mrs. Ludacer:

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
Menachem David
David & Gelman
381 Sunrise Hwy.
Lynbrook, NY 11563
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

NATHAN LUDACER and GLADYS LUDACER

DECISION

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 1965 through 1968.

Petitioner, Nathan Ludacer, 397 Terhune Drive, Wayne, New Jersey 07470, filed a petition on behalf of himself and his wife, Gladys Ludacer, for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1965 through 1968, and for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the year 1968 (File No. 13285).

A formal hearing was commenced before David Evans, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 19, 1979 at 9:20 A.M. and was continued to conclusion at the same location before Frank A. Romano, Hearing Officer, on February 21, 1980 at 9:00 A.M. Petitioners appeared by David & Gelman (Menachem David, CPA). The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

1. Whether the business activities of petitioner Nathan Ludacer as a manufacturer's representative or salesman during the years 1965 through 1968 constituted the carrying on of an unincorporated business, thereby subjecting said petitioner to the unincorporated business tax of this State.

II. Whether petitioner Nathan Ludacer is entitled to an allocation of his income for the year 1968 to sources outside New York State by reason of services rendered at and in connection with an office maintained in his home in the State of New Jersey.

FINDINGS OF FACT

1. Petitioners, Nathan Ludacer and Gladys Ludacer, timely filed New York State combined income tax resident returns for 1965, 1966, and 1967, in each instance listing their address as New York, New York. Said petitioners did not file unincorporated business tax returns for those years.

2. Petitioners, Nathan Ludacer and Gladys Ludacer, timely filed a New York State combined income tax nonresident return for 1968, listing their address as Claridge House, Claridge Street, Verona, New Jersey. Said petitioners did not file an unincorporated business tax return for 1968.

3. On April 14, 1972, the Income Tax Bureau issued a Statment of Audit Changes and a Notice of Deficiency against petitioners, Nathan Ludacer and Gladys Ludacer (revising an earlier Statement of Audit Changes issued against petitioner Nathan Ludacer on November 18, 1968), asserting (i) unincorporated business tax due for the years 1965 through 1968 in the amount of \$2,624.52 on the ground that the income received in said years as a sales or manufacturer's representative constituted the carrying-on of a business subject to the unincorporated business tax of this State; (ii) additional personal income tax due for 1968 in the amount of \$3,909.50, on the ground that no allocation of business income was allowable to petitioners as nonresidents because they did not maintain a bona fide office outside the State of New York in that year; and (iii) interest in the amount of \$1,313.57, making a total of \$7,849.59.

4. Petitioners, Nathan Ludacer and Gladys Ludacer, timely filed a petition for redetermination of deficiency or for refund of personal income tax or unincorporated business tax for the years in question, challenging the aforesaid Notice of Deficiency and Statement of Audit Changes on the following grounds:

- a. With respect to the unincorporated business tax, claiming an exemption for petitioner Nathan Ludacer as a sales representative under section 703(f) of the Tax Law; and
- b. With respect to the personal income tax, claiming that the maintaining of an office in the New Jersey residence was a necessary requirement of employment.

5. For 1965 through 1967, petitioners, Nathan Ludacer and Gladys Ludacer, did not list their occupations on their New York State income tax returns but on the Schedule C attached to petitioners' Federal income tax returns for those years, petitioner Nathan Ludacer listed his principal business activity as "commission broker" under the business name of "Nathan Ludacer." Income in those years was reported by both petitioners, but no wage and tax statements were offered with respect to the principals from whom said petitioners received compensation, except that such wage and tax statements were produced showing that petitioner Gladys Ludacer earned the sums of \$6,508.00, \$6,399.00, and \$3,662.00 in 1965, 1966 and 1967 respectively, from Palmer Millinery Co., Inc., located in the City and State of New York. Withholding taxes and FICA contributions were deducted from her compensation for each of those years.

6. Thereafter, for 1968, said petitioners each listed their occupation on their New York State income tax return as manufacturer's representatives, with each of them reporting income for those years. Although said petitioners' New York State income tax return for 1968 disclosed substantial income from their performance of services in such occupation, no wage and tax statements were

offered with respect to the principals from whom said petitioners received payment for such services, except that a wage and tax statement was produced showing that petitioner Gladys Ludacer earned \$650.00 from Nat Ludacer Associates, located at 112 West 34th Street, New York, New York, out of which withholding taxes and FICA contributions were deducted.

7. Nat Ludacer Associates was either a partnership formed and operated by petitioner Nathan Ludacer with his wife or a sole proprietorship operated solely by said petitioner. In any event, petitioner Gladys Ludacer performed services of a clerical nature to assist her husband, for which she apparently received some compensation. Petitioner Gladys Ludacer is now deceased.

8. During the years in question, petitioner Nathan Ludacer received compensation in the form of commissions for services which he rendered as a sales or manufacturer's representative without written contract for Jayvee Brand, Inc. and its subsidiaries, Jay-Too, Inc. and Tre-Jay, Inc., all of which are corporations organized and located in the State of Oregon, maintaining an office and showroom at 112 West 34th Street, New York, New York. During the years in question, petitioner Nathan Ludacer earned substantially all of his total income from the above three corporations by reason of the services which he performed with respect to the sale of infants' wear.

9. While petitioner Nathan Ludacer 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, certain internal procedures of the principals, attendance at national sales meetings at least once a year, submission of regular sales reports, 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; that said petitioner failed to demonstrate a clear division of his time and efforts between such principals; that 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; that 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; that said petitioner arranged his own sales activities; that said petitioner bore the cost and expense of his duties as a sales or manufacturer's representative, including a home office, telephone, stationery, printing, trucking and delivery, travel and entertainment, and automobile, all without reimbursement from any principal; that said petitioner deducted all such expenses on his Federal income tax return; that said petitioner was paid on a straight commission basis by all of his principals; that said petitioner hired one or more assistants and bore the entire cost and expense of payroll and payroll taxes; that said petitioner was not provided with vacation, workmen's compensation, disability insurance, unemployment insurance, health or hospitalization benefits by any of his principals (except that said petitioner contributed in full and was covered by a principal's Blue Cross/Blue Shield medical plan); and that said petitioner did not have withholding or social security taxes deducted from his income by any principal.

CONCLUSIONS OF LAW

A. 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.

B. 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.

C. 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 such individual."

D. 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).

E. 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.

F. 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.

G. That, pursuant to sections 722 and 689(e) of the Tax Law, petitioner Nathan Ludacer 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.

H. That petitioner Nathan Ludacer failed to sustain his burden of establishing that he was an employee within the meaning of section 703(b) of the Tax Law and, within the meaning and intent of sections 703(b) and (f) of the Tax Law, said petitioner demonstrated the indica 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 799. Accordingly, the income received by said petitioner for his services as an independent sales or manufacturer's representative for the years 1965 through 1968 is subject to the unincorporated business tax of this State.

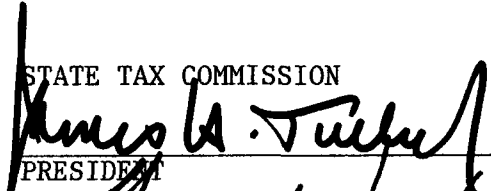
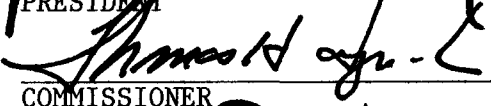

I. That petitioner Nathan Ludacer did not sustain his burden of proof imposed by sections 722 and 689(e) of the Tax Law, to show that he maintained a bona fide office which was systematically and regularly used without the State (Tax Law section 707(a), see also 20 NYCRR 207.2).

J. Since petitioner did not maintain a bona fide place of business without the State, all of such business gross income and deductions shall be allocated to this state (707(a) of the Tax Law).

K. That the petition of Nathan Ludacer and Gladys Ludacer is denied and the Notice of Deficiency issued against said petitioners on April 14, 1972 is sustained.

DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER