

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Max & Ida Silver :
: 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 1971 & 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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Max & Ida Silver, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

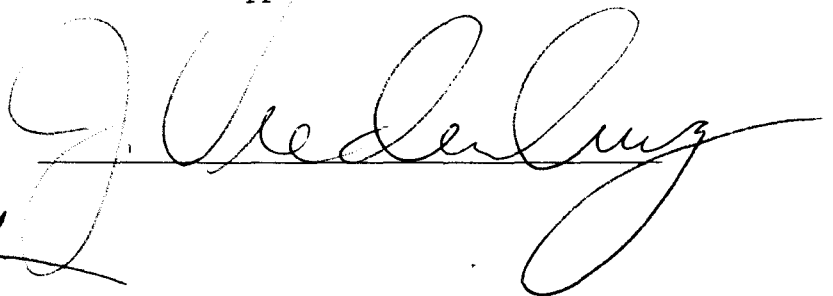
Max & Ida Silver
58 Ford Dr. W.
Massapequa, NY 11758

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
27th day of November, 1981.


Annie D. Haglund


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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Max & Ida Silver :

AFFIDAVIT OF MAILING

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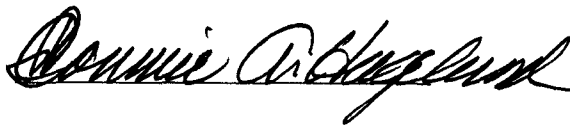
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Bertrand Leopold the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

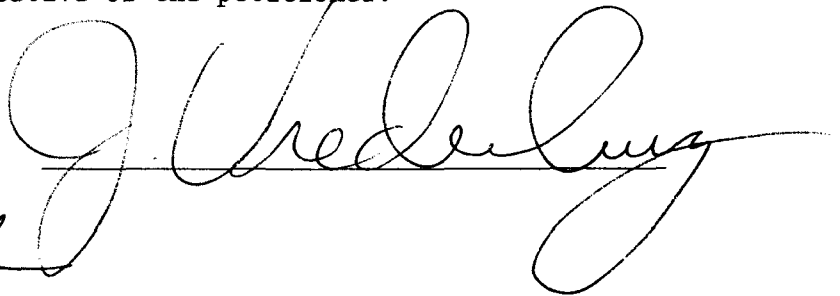
Bertrand Leopold
18 Joseph St.
New Hyde Park, NY

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
27th day of November, 1981.





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

November 27, 1981

Max & Ida Silver
58 Ford Dr. W.
Massapequa, NY 11758

Dear Mr. & Mrs. Silver:

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
Bertrand Leopold
18 Joseph St.
New Hyde Park, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MAX and IDA SILVER	:	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 1971 and 1972.	:	

Petitioners, Max and Ida Silver, 58 Ford Drive West, Massapequa, New York, 11758, 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 1971 and 1972 (File No. 11517).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on November 2, 1978 at 3:15 p.m. Petitioner appeared by Bertrand Leopold, and by Eisner, Levy, Steel & Bellman, P.C. (Arthur N. Read, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Robert N. Felix and Irving Atkins, Esqs., of counsel).

ISSUES

I. Whether petitioner Max Silver's sales activities during the years 1971 and 1972 were performed as an employee within the meaning of section 703(b) and (f) of the Tax Law, or, in the alternative, as an independent contractor subject to unincorporated business tax under Article 23 of the Tax Law.

II. Whether, in the event he is found subject to unincorporated business tax, petitioner Max Silver may be allowed a deduction against unincorporated business income for charitable contributions made by him in 1971 and 1972.

FINDINGS OF FACT

1. Petitioners, Max and Ida Silver, husband and wife, timely filed joint New York State Income Tax Resident Returns (Form IT-201) for the tax years 1971 and 1972. They did not file unincorporated business tax returns.

2. Petitioners were issued a Notice of Deficiency and Statement of Audit Changes on January 26, 1976, which asserted additional personal income tax of \$10.36 and unincorporated business tax of \$802.24 for 1971, and unincorporated business tax of \$789.84 for 1972, plus penalty and interest for each year. The explanation for these changes was that Max Silver's sales activities were considered to have been performed by him as an independent contractor and thus income from such activities was subject to New York State unincorporated business tax.

3. Petitioner Max Silver was a multi-line wholesale salesman of ladies' apparel during the period herein involved. In 1968, he was hired by Sidney Weinstein and Herman Youngman, the principals of Grace-Tone Fashions, Inc. (Grace-Tone). Under the terms of his engagement as a salesman for Grace-Tone, Mr. Silver was required to serve Grace-Tone's customers in the New York City Metropolitan area, and also to perform a variety of tasks which arose in the normal course of Grace-Tone's New York showroom business.

4. Grace-Tone manufactured half-sized women's dresses in a relatively high-priced line.

5. Petitioner Max Silver, during the period herein involved, was paid a commission by Grace-Tone on merchandise sold and shipped into the territory to which he was assigned. He could draw against such commissions to the extent of \$150.00 per week.

6. Grace-Tone withheld federal, state, and city income tax from Mr. Silver's commissions as well as social security and unemployment insurance taxes throughout the period herein involved.

7. Before being sent on the road to sell Grace-Tone's merchandise, Mr. Silver would receive general suggestions, at an informal sales meeting, as to which items and fabrics to push hardest, which buyers or potential buyers to sell to, and the most effective means to display merchandise for sale. When not working in Grace-Tone's showroom, he was required to give periodic progress reports by telephone.

8. Grace-Tone reserved the right to reject for credit or other business reasons any order Mr. Silver might procure. He was paid a commission only on merchandise actually shipped into his territory.

9. Petitioner Max Silver was the only regular sales representative engaged by Grace-Tone throughout the period herein involved.

10. In 1969, with the consent of the principals of Grace-Tone, Mr. Silver was permitted to become a salesman for two divisions of Country Club Casuals (Country Club). One division, "Prissy", was an inexpensive line of "junior" and "misses" summer dresses, and the other, "Carol G," was a line of sportswear separates. In his work for Country Club during the period herein involved, Mr. Silver reported to Country Club's New York sales manager, Murray Friedman.

11. The principals of Country Club and Grace-Tone discussed Mr. Silver's situation. Although Country Club understood that he was to spend the bulk of his time selling on Grace-Tone's behalf, no express time division agreement was ever worked out.

12. Petitioner Max Silver received a draw of \$100.00 per week against commissions from Country Club during the period herein involved. Country Club did not deduct income or social security taxes from his earnings.

13. Mr. Silver was able to earn more from Country Club than from Grace-Tone despite the fact that he devoted the majority of his time and efforts to selling Grace-Tone's lines. The bulk of his selling for Country Club was on behalf of its "Prissy" division which had a season from March to August, which period was, by contrast, the slow season for Grace-Tone. The "Prissy" and "Carol G" lines were non-conflicting as to each other and as to Grace-Tone.

14. Approximately 30 to 35% of Mr. Silver's Grace-Tone customers purchased Country Club merchandise from him and about 20% of his Country Club customers purchased Grace-Tone's merchandise during the period herein involved.

15. Neither Grace-Tone nor Country Club provided a pension or retirement plan for Mr. Silver during the period herein involved.

16. Petitioner Max Silver was charged for his merchandise samples only in the event that he failed to return them.

17. Mr. Silver was required to pay for travel, telephone, and other expenses incurred on behalf of his principals out of his own pocket without reimbursement.

18. Neither Grace-Tone nor Country Club asserted any right to specific control over the manner in which Mr. Silver's services were to be rendered. Both Grace-Tone and Country Club were concerned primarily with the results of Mr. Silver's sales activities and not the details and means by which he accomplished those results. The control exercised in this regard rose only to the level of suggestion and general instruction as to sales targets and techniques, coupled with a requirement of periodic progress reports.

19. Petitioner Max Silver claimed charitable contributions in the amount of \$700.00 as a deduction against income for each of the years 1971 and 1972. This figure was later reduced to \$333.00 for the year 1972 as a result of a federal audit of petitioners' return for that year. Mr. Silver asserts these contributions should be allowed as a deduction against unincorporated business income in the event he is found to be subject to unincorporated business tax. The record is silent as to any evidence that such contributions were in any way related to petitioner Max Silver's work as a salesman.

20. Petitioners do not contest the deficiency for personal income tax due for the year 1971.

21. All errors in the record noted by petitioners' counsel are deemed corrected as noted.

22. Petitioner Ida Silver was not involved in any activities which would constitute an unincorporated business during the period at issue.

CONCLUSIONS OF LAW

A. That "[i]t is the degree of control and direction exercised by the employer which determines whether the taxpayer is an employee or an independent contractor subject to the unincorporated business tax." Lieberman v. Gallman, 41 N.Y.2d 774, 396 N.Y.S.2d 159, (1977). Regulations adopted by the State Tax Commission after the period at issue herein, but evidencing the position of the Commission during the period at issue herein provide:

"[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case." 20 NYCRR 203.10(c), (adopted February 1, 1974)

B. That among the facts and circumstances to be examined are whether petitioner maintained an office, engaged assistants, incurred expenses without reimbursement, and was covered by a pension plan. Also whether the principal(s)

withheld state and federal taxes, social security, F.I.C.A. and other payments on behalf of petitioner, and the amount of control over petitioner's activities exercised by the principal(s). Raynor v. Tully, 60 A.D.2d 731, (1978), lv. to app. den. 44 N.Y.2d 643.

C. That section 703(f) of the Tax Law provides:

"Sales representative - an individual,..., shall not be deemed engaged in an unincorporated business solely by reason of selling goods, wares, merchandise or insurance for more than one enterprise." (emphasis added).

D. That petitioner Max Silver's principals, during the period herein involved, neither retained nor exercised sufficient direct and immediate control over his daily activities to classify him as an employee rather than as an independent contractor. Petitioner is therefore subject to the imposition of unincorporated business tax under Article 23 of the Tax Law for the years 1971 and 1972.

E. That petitioner Max Silver has failed to show that charitable contributions made by him during the years at issue herein were in any way connected with or incurred in the conduct of his work as a salesman, and thus such contributions may not be allowed as a deduction against unincorporated business income within the meaning and intent of section 706(1) of the Tax Law.

F. That petitioner Ida Silver is not liable for unincorporated business tax and the Audit Division is directed to remove her name from the Notice of Deficiency insofar as liability for such tax is concerned.

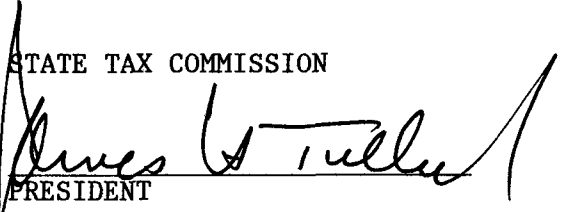
G. That except for the removal of petitioner Ida Silver's name from the Notice of Deficiency as directed above, the petition of Max and Ida Silver is

in all respects denied and the Notice of Deficiency including interest and penalty for each year is sustained.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER