

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Manny Sussman :
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 - 1975. :

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 Manny Sussman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Manny Sussman
3235 Emmons Avenue
Brooklyn, NY 11235

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 R. Haglund

J. Vredenburg

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

November 27, 1981

Manny Sussman
3235 Emmons Avenue
Brooklyn, NY 11235

Dear Mr. Sussman:

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
MANNY SUSSMAN
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, 1972 and 1973.

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DECISION

Petitioner, Manny Sussman, 3235 Emmons Avenue, Brooklyn, New York 11235, 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, 1972 and 1973 (File No. 22512).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1981 at 2:45 P.M. Petitioner Manny Sussman appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether commissions paid to petitioner by Folk Industries, Incorporated during 1971, 1972 and 1973, were subject to unincorporated business income tax.

FINDINGS OF FACT

1. Petitioner, Manny Sussman, timely filed New York State personal income tax returns for the years 1971 through 1973, on which he reported his occupation as being a commission salesman; however, he did not file unincorporated business tax returns for said years.

2. During March of 1977, the Audit Division issued a Statement of Audit Changes against petitioner, imposing additional personal income tax, based on Federal audit changes for 1972 and 1973. Said Statement also imposed unincorporated business tax on income reported as business income for the years 1971 through 1973, based on the Division's contention that petitioner's activities as a commission salesman constituted the carrying on of an unincorporated business. Accordingly, the Division issued a Notice of Deficiency on June 26, 1978 for \$867.28 in personal income tax and \$2,174.57 in unincorporated business tax, plus \$1,032.92 in penalty (pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law) and \$1,065.82 in interest for total due of \$5,140.59.

3. Petitioner did not contest the personal income tax portion of the Notice of Deficiency which is based on the Federal audit changes.

4. The petitioner operated as follows during the years at issue:

(a) Petitioner devoted his time and energies solely and exclusively to the business of Folk Industries, Incorporated. He sold gray goods for said corporation.

(b) Petitioner was the only salesman Folk Industries, Inc. had.

(c) Petitioner was provided with office space at the office of Folk Industries, Inc., 569 Broadway, New York, New York, at no cost to him.

(d) Petitioner was furnished with secretarial and/or stenographic services by and at the office Folk Industries, Inc. at no cost to him.

(e) Petitioner had fixed working hours, normally from 9:00 a.m. to 4:30 p.m., at the office of Folk Industries, Inc., except when he was away from the office for appointments relating to the business of Folk Industries, Inc.

(f) Petitioner reported on a daily basis to the office and was in telephone contact with Folk Industries, Inc. during his absences from the office.

(g) Petitioner filed a Schedule C with his Federal income tax returns on which he claimed various expense items.

(h) Petitioner was paid on a commission basis and no payroll taxes were withheld from his earnings.

(i) Because of the petitioner's many years and expertise in the business, the company did not exercise any control over his sales endeavors nor did they control or regulate the manner in which he attempted to solicit business.

(j) Petitioner paid his own Social Security. Folk Industries, Inc. had no pension plan.

(k) Petitioner used Folk Industries, Inc.'s samples and business cards.

(l) As the result of petitioner's activities Folk Industries, Inc. received orders from its customers. The orders were directly filled by Folk Industries, Inc. and customers paid the company directly.

(m) Petitioner's territory was the New York City garment district. He engaged no assistants in connection with his selling activities.

5. Petitioner's tax returns were prepared by a person other than himself.

At the hearing, when asked about the tax return petitioner had no knowledge and/or could not remember how the different amounts were arrived at. Upon examination of the returns and the testimony of the petitioner there are inconsistencies as follows:

(a) For 1971 and 1972 petitioner and his wife filed combined income tax returns, reporting that fifty percent of the net business income from Folk Industries, Inc. was earned by his wife. However he was the only salesman.

(b) The 1972 and 1973 tax returns reported commissions paid, however those amounts were disallowed in full by the Internal Revenue Service as he did not engage assistants.

(c) The 1972 and 1973 tax returns reported large promotion expenses, however this expense was drastically reduced by the Internal Revenue Service.

(d) The tax returns reported large travel expenses, however his territory was restricted to the New York City garment district.

CONCLUSIONS OF LAW

A. That the term employee is defined as an individual performing services for an employer under an employer-employee relationship. Generally, the rela-

tionship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished, but also as to the details and means by which that result is to be accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but as to how it shall be done [20 NYCRR 203.10(b)]. That in this instant case the petitioner's many years of experience and expertise in the sale of gray goods caused establishment of a working relationship between the petitioner and the company of that of an independent contractor. That petitioner's principal did not exercise sufficient direction and control over his activities so as to constitute a bona fide employer-employee relationship.

B. That petitioner Manny Sussman's activities constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law, and that the income derived therefrom is subject to the imposition of unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

C. That the petition of Manny Sussman is denied and the Notice of Deficiency dated June 26, 1978 is sustained together with such penalties and interest as may be lawfully owing.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER