

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Irving Beck :
and Geraldine Beck : 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 1972 & 1973. :

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 9th day of November, 1982, he served the within notice of Decision by certified mail upon Irving Beck and Geraldine Beck, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Irving Beck
and Geraldine Beck
1010 Fifth Ave.
New York, NY 10028


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
9th day of November, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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of	:	
Irving Beck	:	
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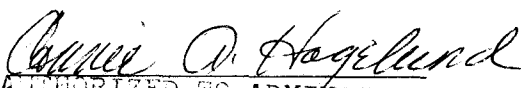
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of November, 1982, he served the within notice of Decision by certified mail upon Bernard Rappaport the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

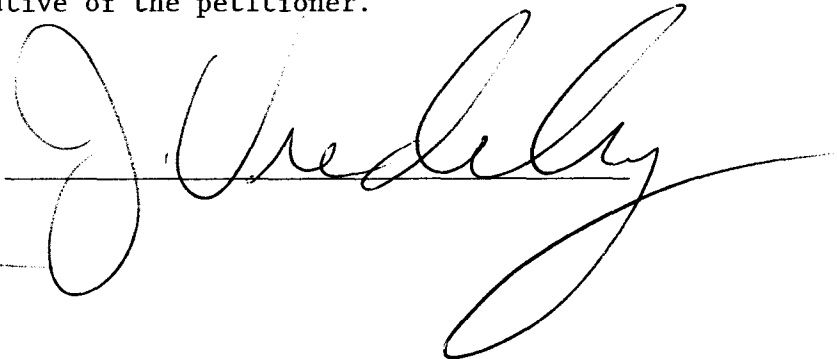
Bernard Rappaport
Seymour, Schneidman & Associates
405 Park Ave.
New York, NY 10022

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
9th day of November, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

November 9, 1982

Irving Beck
and Geraldine Beck
1010 Fifth Ave.
New York, NY 10028

Dear Mr. & Mrs. Beck:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Bernard Rappaport
Seymour, Schneidman & Associates
405 Park Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 29, 1981 at 9:15 A.M. Petitioners appeared with Bernard Rappaport, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner Irving Beck's activities as an outside salesman constitutes the carrying on of an unincorporated business, the income from which is subject to the imposition of unincorporated business tax.

II. Whether petitioner Irving Beck's failure to file unincorporated business tax returns for 1972 and 1973 was due to reasonable cause.

FINDINGS OF FACT

1. Petitioner Irving Beck filed a single New York State income tax resident return for 1972 and a joint New York State income tax resident return,

with petitioner Geraldine Beck, for 1973. Petitioner Irving Beck did not file unincorporated business tax returns for 1972 and 1973.

2. On February 10, 1979, the Audit Division issued a Statement of Audit Changes against petitioners covering the above years. For 1972, personal income tax of \$185.00 was proposed, together with unincorporated business tax of \$2,237.11 plus penalties pursuant to section 685 subsections (a)(1) and (a)(2) of the Tax Law and interest. For 1973, unincorporated business tax of \$2,151.49 was proposed, less a personal income tax credit of \$92.15, plus penalties pursuant to section 685 subsections (a)(1) and (a)(2) of the Tax Law and interest. The Statement of Audit Changes was issued on the bases that petitioners failed to report changes made to their income by the Internal Revenue Service and that petitioner Irving Beck's activity, as an outside salesman, was subject to the unincorporated business tax.

Based on said Statement of Audit Changes, the Audit Division issued, under date of March 30, 1979, a separate Notice of Deficiency for each of the years in issue. However, the notices of deficiency were incorrect since the deficiencies were reversed. The 1972 tax liability was shown on the 1973 Notice of Deficiency; the 1973 tax liability was shown on the 1972 Notice of Deficiency. In addition, the Audit Division failed to credit the personal income tax overpayment of \$92.15 due petitioners against the unincorporated business tax due for 1973.

3. At the hearing, the petitioners stipulated that they agreed to the audit adjustments as such related to personal income tax.

4. Petitioner Irving Beck began his employment with Cotler's Slacks and Jeans (hereinafter Cotlers) as an office boy. Sometime thereafter, Cotlers began training him as a salesman. Upon completion of his training, he was assigned to service accounts located in the metropolitan area. Subsequently,

he was assigned to service a few out of state clients. In addition, if sales generated by petitioner were falling and/or if payments from his customers were lagging, Cotlers' sales manager would accompany petitioner to the problem customer in an attempt to rectify the situation.

5. Cotlers periodically required petitioner Irving Beck to attend to its customers needs at its showroom, main store and trade shows.

6. Petitioner Irving Beck was under the supervision of his sales manager who continually instructed him as to the details and means by which merchandise was to be presented to Cotlers' customers. In addition, his schedule of appointments was subject to change and/or approval of Cotlers' sales manager whom he was required to contact several times a day.

7. Petitioner Irving Beck received a fixed weekly salary in addition to a sales override.

8. Petitioner Irving Beck required Cotlers' approval as to when he could take his paid vacation.

9. Petitioner Irving Beck was prohibited by Cotlers from taking on any other lines and/or representing any other principals for the subject years.

10. Petitioner Irving Beck was not reimbursed for any selling expense incurred by him on behalf of his activities.

11. Petitioner Irving Beck, for 1972, filed with the Internal Revenue Service a Schedule C, Form 1040, for the income derived from sales, claiming various business expenses incurred in connection with his selling activities.

12. Cotlers paid unemployment insurance, disability insurance and workmen's compensation for petitioner Irving Beck. However, there was no provision for the withholding of State and Federal taxes from petitioner's income.

CONCLUSIONS OF LAW

A. That petitioner Irving Beck's selling activities were guided by and under the supervision of Cotlers' sales manager who was concerned both with the results obtained by petitioner, and that the means used by him in obtaining said results complied with Cotlers' policies and requirements. That the extent of dominion and control exercised by Cotlers over petitioner Irving Beck's activities established an employer-employee relationship within the meaning and intent of section 703(b) of the Tax Law. Therefore, the income earned by petitioner Irving Beck from Cotler's Slacks and Jeans for the subject years was derived as an employee and is not subject to unincorporated business tax.

B. That the issue of penalties based on petitioner's failure to file unincorporated business tax returns for subject years is rendered moot per Conclusion of Law "A", supra.

C. That the Audit Division is hereby directed to modify the notices of deficiency dated March 30, 1979, to be consistent with the decision determined herein; and that the notices of deficiency, as modified, are sustained, together with such interest as may be lawfully due.

DATED: Albany, New York

NOV 09 1982

STATE TAX COMMISSION

Robert W. Kouchard
ACTING PRESIDENT

Frank R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER