

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

William Horowitz :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Year 1967 - 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 26th day of March, 1982, he served the within notice of Decision by certified mail upon William Horowitz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Horowitz
2465 Haring St.
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
26th day of March, 1982.

Annie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
William Horowitz :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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Business Tax under Article 23 of the Tax Law for :
the Year 1967 - 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 26th day of March, 1982, he served the within notice of Decision by certified mail upon Alvin I. Goidel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alvin I. Goidel
127 John St.
New York, NY 10038

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
26th day of March, 1982.

Alvin I. Goidel

Jay Vredenburg

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

March 26, 1982

William Horowitz
2465 Haring St.
Brooklyn, NY 11235

Dear Mr. Horowitz:

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) 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
Alvin I. Goidel
127 John St.
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
WILLIAM HOROWITZ	:	DECISION
for Redetermination of Deficiencies or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1967	:	
through 1973.	:	

Petitioner, William Horowitz, 2465 Haring Street, Brooklyn, New York 11235, filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1967 through 1973 (File Nos. 14351, 14352 and 14353).

A formal hearing was held before Edward Goodell, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 22, 1978 at 10:45 A.M. Petitioner appeared by Goidel, Goidel & Helfenstein, PC (Bruce S. Leffler, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether petitioner, as a sales representative of noncompeting manufacturers during the years at issue, was an independent contractor subject to unincorporated business tax, or whether he was an employee and, therefore, not subject to unincorporated business tax. --

FINDINGS OF FACT

1. Petitioner, William Horowitz, and his wife, Sylvia Horowitz, filed New York State income tax returns for the years 1967 through 1973, but did not file unincorporated business tax returns for any of said years.

2. On April 13, 1973, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against petitioner, William Horowitz, asserting unincorporated business tax for 1967, 1968 and 1969 of \$3,355.91, plus penalty and interest. This was done on the grounds that "Business income is considered subject to unincorporated business tax pursuant to Article 23 of the Tax Law."

3. The Income Tax Bureau issued a Statement of Audit Changes to petitioner on April 2, 1973 for 1970, which stated that "The income from your activities as Manufacturers Representative is subject to the unincorporated business tax," indicating a tax of \$1,460.75, plus penalty and interest.

4. On December 23, 1974, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against petitioner for 1971, 1972 and 1973 in the amount of \$4,752.40 in unincorporated business tax, plus interest. This was done on the grounds that petitioner's "activities constitute the carrying on of an unincorporated business and business income derived from such activity is subject to the unincorporated business tax under Article 23 of the Tax Law."

5. (a) During the period at issue, petitioner acted as sales representative for the companies hereafter mentioned, all but one of which were engaged in the manufacture and sales of ladies' handbags.

(b) All of the companies that were engaged in the manufacture and sale of ladies handbags were noncompetitive in the sense that each used different kinds of materials for the manufacture of the merchandise which they sold.

(c) Petitioner contends that he was an employee of each of said companies; however, the Income Tax Bureau claims that he was an independent contractor for each company.

6. Two of the companies for which petitioner acted as sales representative during the years 1967 through 1970 and during the early part of 1971 were Juness Bags, Inc., ("Juness") and its subsidiary, Accessories by Orloff, Inc. ("Orloff").

During said period, Juness was engaged in the manufacture and sale of ladies' handbags; only Orloff, was engaged in the manufacture and sale of ladies' belts.

7. (a) In addition to acting as a sales representative for Juness and Orloff, petitioner acted in the same capacity for Lou Taylor, Inc. and Bags By Ande, Inc. during 1967, each of which was engaged in the manufacture and sale of ladies' handbags.

(b) During 1968 petitioner also acted in the same capacity for Lou Taylor, Inc. and Pam Specialties, Inc., each of which was engaged in the manufacture and sale of ladies' handbags.

(c) During 1969 and 1970, petitioner acted in the same capacity for Bags By Ande, Inc., which also manufactured ladies' handbags.

8. During the years 1967 through 1970, it was necessary for petitioner to obtain the permission of Juness to carry the lines of other manufacturers.

9. Because of financial difficulties, Juness became bankrupt early in 1971. As a consequence of the bankruptcy of Juness, petitioner "carried numerous lines" during the balance of that year including Bags By Ande, Inc., while trying to find a replacement for Juness as a source of income.

10. Towards the end of 1971, petitioner became a sales representative for Latisse Division - W. R. Grace & Co. ("Latisse"), which company was engaged in the manufacture and sale of ladies' handbags.

11. In addition to Latisse, petitioner acted as sales representative for Bags By Ande, Inc., during the first three months of 1972; thereafter, during the balance of 1972 and all of 1973, petitioner acted as sales representative solely for Latisse.

12. In or about April of 1972, petitioner became the sales manager of Latisse and continued to act as such during the balance of 1972 and for all of 1973.

13. (a) During the years 1967 through 1970, petitioner was compensated on a commission basis for the services which he rendered as sales representative for Juness, Orloff, Bags By Ande, Inc., Lou Taylor Inc., and Pam Specialties, Inc. Said commissions were determined by the orders accepted and shipped by said manufacturers.

(b) During 1972 and 1973, petitioner was compensated by Latisse for the services which he rendered as sales representative and sales manager partly by wages and partly by commissions.

14. During the years at issue, the area of petitioner's activities was limited by the manufacturers to the five boroughs of New York City, and the State of New Jersey and the cities of Philadelphia, Baltimore and Washington.

15. During the years at issue, petitioner was not permitted by these manufacturers to call on, to sell to or to earn commissions from sales made to jobbers, wholesalers, chain stores (such as Sears Roebuck, J.C. Penney and

Montgomery Ward) or to discount stores (such as Korvette, May and Klein), although they were located in the area described in Findings of Fact 14.

16. Petitioner was required by these manufacturers to visit or not to visit customers as directed by them, to attend trade shows on behalf of each of them, to attend fashion shows at department stores located in his sales territory, and to present the merchandise of said manufacturers at these fashion shows. He was to conduct seminars for the sales girls of the manufacturers' retail customers concerning the merchandise manufactured by them, to attend shows in New York City at the start of each season in the showrooms of said manufacturers, and to serve customers attending such shows from areas other than his sales area, without receiving commissions on sales made to such customers. Petitioner was required to make daily reports by telephone to said manufacturers concerning his sales activities on their behalf while visiting customers in his sales territory. At the end of each season (normally twice a year), petitioner was required by each of said manufacturers (except Bags By Ande, Inc.) to engage in special promotions or special sales to dispose of excess merchandise.

17. (a) During the period at issue, both Juness and Latisse required petitioner to be present at meetings prior to each market week, and to assist in the acceptance or rejection of handbags for the sample line.

(b) In the case of Latisse, petitioner was required to be at its factory in Reading, Pennsylvania, from six to eight times a year.

18. (a) During the years 1967 through 1970, petitioner, as sales representative for the aforementioned manufacturers, maintained an office at his expense, in his home. There he kept records, papers and schedules of his

appointments and itineraries, and from which he received telephone calls from customers.

(b) From the latter part of 1971 to and including 1973, petitioner's office was located in the office of Latisse at 330 Fifth Avenue, New York, New York, the expenses of which (including stenographic help and telephone service) were paid by Latisse.

19. (a) During the years at issue, petitioner paid, without reimbursement (except as hereafter noted) all expenses incurred by him in relation to his efforts to sell the manufacturers' merchandise to customers in his sales territory, including hotels, lunches and dinners with customers, entertainment, gifts, telephone calls and automobile use.

(b) Petitioner shared advertising expenses with said manufacturers during this period.

(c) For the last nine months of 1972 and all of 1973, Latisse paid the expenses of petitioner's trips to its factory in Reading, Pennsylvania.

20. (a) In connection with his Federal income tax return for 1969, petitioner filed Schedule C (Form 1040) entitled, "Profit (or Loss) From Business or Profession." On it he stated that his "Principal business activity" was that of "Manufacturers Representative" and set forth the amounts of "Gross receipts or gross sales," his "Gross profits" and his "other business expenses" of \$10,038.46 (including among others, "Shared Advertising Deducted From Commission Checks, Telephone Charges Deducted from Commission Checks, Hotels & Motels, Business Breakfasts and Lunches, Business Dinners and Car Expenses,") and his "Net Profit" for said year from said business.

(b) In connection with his Federal income tax return for 1973, petitioner filed a "Statement of Business Expenses." On it he stated that his "Occupation" was "Outside Salesman," that his "Employer" was Latisse Division - W. R. Grace & Co., that the "Total Charges by Employer" for "Shared Advertising Expense, Handbags for Buyers and Samples" were \$4,107.70, and that his "Other Expenses" (totaling \$11,398.56) included "Hotels", "Lunches and Dinners with Customers", "Entertainment and Miscellaneous Gifts", "Christmas Expense" and "Telephone Expense."

21. (a) The manufacturers did not at any time during the years 1967 through 1969 deduct either withholding or social security taxes from the commissions paid by them to petitioner. Petitioner was not included by any of them in their medical or Blue Cross plans.

(b) During 1972 and 1973, while petitioner rendered services exclusively to Latisse, withholding and social security taxes were deducted from compensation paid to him by Latisse as follows:

	Federal Income Tax Withheld	Wages Paid Subject to Withholding	F.I.C.A. Tax Withheld	State Income Tax Withheld
1972	<u>1,021.60</u>	<u>8,000.00</u>	<u>416.00</u>	<u>184.02</u>
1973	1,532.40	12,000.00	631.00	405.60

In addition to said compensation subject to withholding, Latisse paid commissions to petitioner in 1972 of \$40,157.34 and of \$57,515.58 in 1973.

During 1972 and 1973, petitioner was included in the Latisse medical plan, the cost of which was paid in part by petitioner and in part by Latisse.

22. During the years 1967 through 1970, petitioner was covered by a Keogh Plan.

23. (a) There was no agreement, oral or written, between or among the manufacturers with respect to the allocation of time to be given to each of them by petitioner, in the rendition of his services during the years 1967 through 1970 either in their respective offices and showrooms, or while petitioner was selling to customers in his sales territory.

(b) None of the manufacturers entered into an agreement, oral or written, with petitioner, fixing the amount or percentage of time that he was required to devote to each of them in the rendition of his services during the period from 1967 to and including 1970, either in their respective offices or showrooms, or while petitioner was selling in his sales territory.

24. (a) Petitioner's principal source of income during 1967, 1968, 1969 and 1970 was from Juness: 90 percent for 1967; 75 percent for 1968; 81 percent for 1969; and 79 percent for 1970.

(b) During the years 1967 through 1970, petitioner, allocated more time to Juness than to the other manufacturers in his own discretion, in selling merchandise manufactured by them and in attending their respective showrooms. This was for the reason that Juness was the principal source of petitioner's income during said years.

(c) Except for the first three months of 1972, petitioner was required by Latisse to devote all of his time to its business during 1972 and 1973.

25. Petitioner was not subject to the control of any of the manufacturers which he represented concerning the manner or method by which he was to make sales, at any time during the period at issue.

CONCLUSIONS OF LAW

A. That during 1968, 1969, 1970, 1971 and the first three months of 1972, petitioner, William Horowitz, in his capacity as a sales representative of Bags By Ande, Inc., Lou Taylor, Inc. and Pam Specialties, Inc., acted as an independent contractor with respect to each of them, and not as an employee of any of them.

B. That during the years 1967 through 1970 and during the early part of 1971, petitioner, in his capacity as a sales representative of Juness Bags, Inc. and Accessories by Orloff, Inc., acted as an independent contractor with respect to both of them, and not as an employee of either of them.

C. That during the last nine months of 1972 and for all of 1973, petitioner, in his capacity as sales representative and sales manager of Latisse Division - W. R. Grace & Co., acted as its employee.

Accordingly, the Income Tax Bureau is directed to modify the Notice of Deficiency dated December 23, 1974, by cancelling that part of the deficiency covering the last nine months of 1972 and all of 1973.

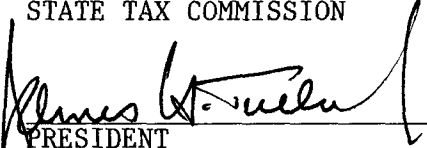
D. That the petition of William Horowitz dated February 10, 1975 is granted to the extent specified in Conclusion of Law "C," and that except as so granted, the petitions dated June 4, 1973, July 16, 1973 and February 10, 1975

are in all other respects denied. The Notice of Deficiency dated April 13, 1973 and the Notice of Deficiency dated December 23, 1974 (except as provided in Conclusion of Law "C") are sustained. Since it appears that no Notice of Deficiency was issued for 1970, the petition dated July 16, 1973 is premature.


DATED: Albany, New York

MAR 26 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER