

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Herman Ratner
and Renee Ratner

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 - 1976.

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 23rd day of April, 1982, he served the within notice of Decision by certified mail upon Herman Ratner, and Renee Ratner the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

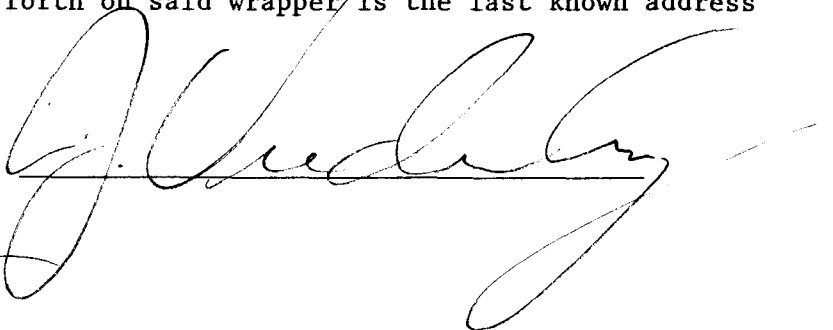
Herman Ratner
and Renee Ratner
124 Bayberry La.
New Rochelle, NY 10804

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
23rd day of April, 1982.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herman Ratner :
and Renee Ratner :

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 - 1976.

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 23rd day of April, 1982, he served the within notice of Decision by certified mail upon Nathan Bley the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nathan Bley
J. H. Cohn & Co.
400 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
23rd day of April, 1982.

Amie A. Duglund

J. Vredenburg

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

April 23, 1982

Herman Ratner
and Renee Ratner
124 Bayberry La.
New Rochelle, NY 10804

Dear Mr. & Mrs. Ratner:

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
Nathan Bley
J. H. Cohn & Co.
400 Park Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	DECISION
HERMAN RATNER and RENEE RATNER	:	
	:	
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 through 1976.	:	

Petitioners, Herman Ratner and Renee Ratner, 124 Bayberry Lane, New Rochelle, New York 10804, 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 through 1976 (File Nos. 22311 and 24779).

A formal hearing was held before Irving Atkins, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 18, 1981, at 2:45 P.M. Petitioners appeared by Nathan Bley, CPA, of J.H. Cohn & Co. The Audit Division appeared by Ralph J. Vecchio Esq. (Barry M. Bresler, Esq., of Counsel).

ISSUE

Whether services rendered by petitioner, Herman Ratner, as sales representative of a number of manufacturing concerns during the years 1971 through 1976, constituted the carrying on of an unincorporated business subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Herman Ratner and Renee Ratner, husband and wife, timely filed New York State income tax resident returns for each of the tax years 1971

through 1976. Petitioners did not file unincorporated business tax returns for any of those years.

2. The Audit Division issued a Statement of Audit Changes to petitioner Herman Ratner dated January 28, 1977, advising him that the income from his activities as a sales representative was subject to unincorporated business tax for the years 1971 (\$707.56); 1972 (\$454.56); and 1973 (\$739.95), for a total tax of \$1,902.07, plus accrued interest.

3. A Notice of Deficiency was issued to Mr. Ratner for the aforesaid tax asserted to be due and owing, plus interest accrued to March 27, 1978, the date of the issuance of the Notice.

4. On February 14, 1978, the Audit Division issued a Statement of Audit Changes to both petitioners for the years 1974, 1975 and 1976. This Statement was grounded on a field audit report asserting additional personal income tax due in the amount of \$472.21, as well as unincorporated business tax for the years 1974 (\$1,316.59); 1975 (\$2,342.89); and 1976 (\$3,580.39), for a total tax of \$7,712.08 plus penalties and accrued interest.

5. A Notice of Deficiency was issued to petitioner Herman Ratner on August 10, 1978 for unincorporated business tax and personal income tax due in the amount of \$7,712.08 plus penalties and accrued interest.

6. Petitioner Herman Ratner worked during the period at issue herein as a salesman for various companies involved in the manufacture and sale of vinyl plastics.

7. Mr. Ratner has worked in the plastics industry for over thirty five (35) years, and as a result of his experience and acquired knowledge was assigned certain specific accounts and specific territories in which to work.

Mr. Ratner was paid solely on a commission basis and although he could have received a draw against his commissions, he never elected to do so.

8. Mr. Ratner's major principal for 1971 through 1973 was Continental Plastics Company and for 1974 through 1976 his major principal was Gibraltar Plastics Company. Petitioner did not show where the activities carried on for Continental were different than those carried on for Gibraltar. In addition to working with these two companies, he worked with a number of different minor principals during the years 1971 through 1976. As long as he met his sales quotas Mr. Ratner could allocate his working time among the various companies as he deemed proper under the circumstances.

9. None of the companies for whom Mr. Ratner worked withheld any taxes on his behalf, nor did they reimburse him for any of his expenses such as travel and entertainment, telephone or business gifts. When travelling, Mr. Ratner would call in periodically to whichever company he was representing at the time. Returns filed for the period at issue herein and submitted in evidence show that petitioner deducted these unreimbursed expenses on Federal Schedule "C" (Profit or (Loss) From Business or Profession) rather than on Federal Form 2106 (Employee Business Expenses).

10. Mr. Ratner claimed at the hearing that the above arrangement concerning withholding of taxes and his manner of deducting expenses was to enable him to maintain his own tax deferred ("Keogh") retirement plan, a benefit not provided by any of the companies for whom he worked. Petitioner did make payments to said retirement plan. Mr. Ratner was covered under workers compensation insurance by one or more of the companies.

11. Petitioner Herman Ratner filed Federal Schedule SE, "Computation of Social Security Self-Employment Tax", which is required to be filed by all self-employed persons.

12. Petitioner Herman Ratner contends that he was under the direction and control of an officer of whichever principal company he was representing at any given time, and that such officer exercised the same degree of control over him as over the company's salaried sales employees.

13. Mr. Ratner further asserts that a breakdown of the amounts of income received from each of the various companies for whom he worked supports the contention that he was an employee of one major principal company and also worked in a non-conflicting manner for several minor principals.

14. In the course of auditing Mr. Ratner's personal income tax returns for the years 1971 through 1973, the Audit Division, by a letter dated December 7, 1976, requested of Mr. Ratner information concerning his business activities, including copies of his Federal Schedule "C" detailing his expenses and an explanation of the extent of control and supervision over his activities exercised by his principals.

15. Mr. Ratner responded to the above request by a letter dated December 14, 1976 in which he asserted:

"I am a self-employed sales representative, working only on a commission basis, for various plastic companies,...

The only controls exercised by my companies are: setting of commission rates, selling prices, credit approval of orders. I schedule my own delivery dates for shipments and I am responsible for collections of accounts receivables. I make periodic visits to my principals to keep up to date on new products and check on deliveries of orders.

My time is my own, and there is no arrangement as to how much time I am to spend on each line. However since I am a commisison man, I favor those company lines from which I can

earn maximum income, and change companies as needed to maintain maximum results.

I pay all my own necessary business expenses in connection with my sales as shown on Schedule C. There is no reimbursement from any of my companies for these expenses."

The letterhead on which the above was written indicated that he was a "Manufacturers Representative for Vinyl Plastic Products".

16. At the hearing Mr. Ratner disavowed the above letter, stating he had been ill advised in writing it, and wished it to be superceded by a letter dated August 23, 1977 claiming he was an employee working for a number of companies and not an independent contractor.

17. Petitioner Renee Ratner was not involved in any activities which would constitute an unincorporated business during the period at issue herein. Although her name appears on the statement of audit changes, she was neither named on nor issued a notice of deficiency, and accordingly is not liable for the unincorporated business tax at issue herein.

18. Petitioners did not contest the additional personal income tax asserted as due.

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, (1977). Regulations adopted by the State Tax 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, 401 N.Y.S.2d 329, (1977), lv. to app. den. 44 N.Y.2d 643 (1978).

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 Herman Ratner's principals, during the period herein involved, neither retained nor exercised sufficient direction 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 through 1976.

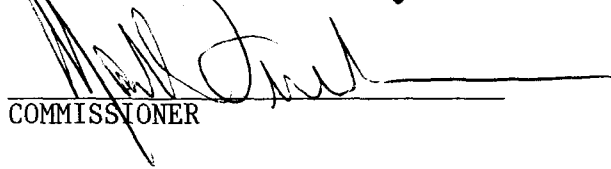
E. That the petition of Herman Ratner and Renee Ratner is denied in all respects and the notices of deficiency are sustained.

DATED: Albany, New York
APR 23 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER