

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition  
of

Edward Wineapple

:

:

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, 1975 & 1976.

---

State of New York  
County of Albany

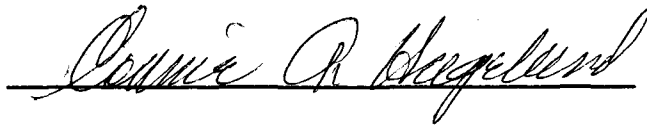
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of June, 1983, she served the within notice of Decision by certified mail upon Edward Wineapple, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

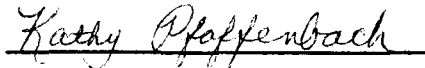
Edward Wineapple  
960 Park Avenue  
New York, NY 10028

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  
29th day of June, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of

Edward Wineapple : 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, 1975 & 1976.

---

State of New York  
County of Albany

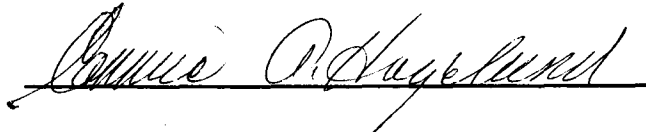
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of June, 1983, she served the within notice of Decision by certified mail upon Seymour Gross the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Seymour Gross  
450 Seventh Avenue  
New York, NY 10123

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  
29th day of June, 1983.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

June 29, 1983

Edward Wineapple  
960 Park Avenue  
New York, NY 10028

Dear Mr. Wineapple:

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 Law 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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Seymour Gross  
450 Seventh Avenue  
New York, NY 10123  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition  
of  
EDWARD WINEAPPLE  
for Redetermination of Deficiencies or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Years 1972,  
1973, 1975 and 1976.

---

DECISION

Petitioner, Edward Wineapple, 960 Park Avenue, New York, New York 10028, filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1972, 1973, 1975 and 1976 (File Nos. 18874 and 25587).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 25, 1981 at 1:15 P.M. Petitioner appeared with Seymour Gross, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether the tax year 1974 may be made part of the proceedings herein where a waiver of restrictions on assessment has been executed by petitioner pursuant to section 681(f) of the Tax Law.

II. Whether petitioner's sales activities during the years in issue constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Edward Wineapple (hereinafter petitioner) filed a New York State Combined Income Tax Return with his wife for each of the years 1972 through

1975, whereon he reported business income from his activities described as "sales representative". For 1976 petitioner filed a New York State Income Tax Resident Return (with New York City Personal Income Tax) with his wife, whereon he also reported business income from said activities. Petitioner did not file a New York State unincorporated business tax return for any of said years at issue.

2. On February 28, 1977 the Audit Division issued a Statement of Audit Changes to petitioner wherein the income derived from his aforestated activities for 1972 and 1973 was held subject to the imposition of unincorporated business tax. Additionally, an adjustment was made increasing petitioner's income for both personal and unincorporated business tax purposes by \$10,546.00, said amount representing applicable unreported Federal audit changes. Since petitioner did not contest this adjustment, it is therefore not at issue herein. Accordingly, a Notice of Deficiency was issued against petitioner for said years under the same date asserting unincorporated business tax of \$3,188.68, personal income tax of \$1,581.90, penalties of \$1,578.45 pursuant to sections 685(c), 685(a)(1) and 685(a)(2) of the Tax Law for underestimation of tax, failure to file unincorporated business tax returns and failure to pay the tax determined to be due respectively, plus interest of \$1,111.74, for a total due of \$7,460.77.

3. On March 8, 1977 the Audit Division issued a Statement of Audit Changes to petitioner wherein it held the income derived from his aforestated activities subject to the unincorporated business tax for 1974. Per said statement, penalties were asserted pursuant to sections 685(a)(1), 685(a)(2) and 685(c) of the Tax Law. No corresponding Notice of Deficiency was issued for said year since on April 4, 1977 petitioner had signed a "Consent to Findings" wherein, by so doing, he has waived the restrictions provided in

section 681(c) of the Tax Law and has consented to the assessment and collection of the deficiency as set forth in the Statement of Audit Changes. A partial payment of \$250.00 was made at that time. Petitioner did not file a petition for 1974.

4. On March 14, 1978 the Audit Division issued a Statement of Audit Changes to petitioner wherein it held the income derived from his aforesated activities subject to the unincorporated business tax for the years 1975 and 1976. Accordingly, a Notice of Deficiency was issued against petitioner on December 15, 1978 asserting unincorporated business tax of \$4,084.08, plus penalties pursuant to sections 685(a)(1), 685(a)(2) and 685(c) of the Tax Law and interest totaling \$2,755.09, for a total due of \$6,839.17.

5. During the years at issue petitioner was engaged in activities as a salesman exclusively for Russ Togs, Inc. He was paid on a 5 percent commission basis and was not reimbursed for his ordinary and necessary business expenses incurred.

6. Russ Togs, Inc. provided petitioner with an office and telephone and covered him for Blue Cross, Blue Shield and Major Medical health insurance.

7. Russ Togs, Inc. did not withhold personal income or social security taxes from petitioner's compensation.

8. Petitioner, who contended that he was an employee of Russ Togs, Inc. during the years at issue herein, reported his compensation on a Federal Schedule C (Profit (or Loss) From Business or Profession).

9. Contradictions and inconsistencies were noted between petitioner's grounds for relief per his petition filed on April 9, 1979 and his testimony rendered at the hearing held herein as follows:

- (a) In the petition it is stated that petitioner "was assigned a designated territory to cover". During the

hearing petitioner testified that he did not want a territory assigned so "they made up certain accounts for him".

- (b) In the petition it was stated that petitioner "was required to spend two days weekly in such territory and the remaining three days at the office of his employer". During the hearing petitioner testified that he "was at the showroom every day and only went on the road an infinitesimal number of times". Also that "the few times he went out he had to call in". And that "all his selling was from the showroom; everything was over the phone".

10. Petitioner claimed extensive business expenses each year at issue which included deductions of several thousand dollars for such items as auto rentals, entertainment, travel, advertising and mark downs.

11. Although petitioner contended that Russ Togs, Inc. fully directed and controlled his activities, no credible evidence was introduced during the hearing to support such contention.

12. Petitioner offered no testimony or evidence regarding the consent which he signed for taxable year 1974.

#### CONCLUSIONS OF LAW

A. That section 601.3(a) of the State Tax Commission Rules of Practice and Procedure provides, in pertinent part, as follows:

"All proceedings before the Commission must be commenced by the filing of a petition with the operating bureau involved in the controversy..."

B. That petitioner did not file a petition with respect to 1974 but chose instead to waive his right to deficiency proceedings with respect to the tax and penalty asserted for 1974 by signing a waiver of restriction on assessment pursuant to section 681(f) of the Tax Law. Once such waiver is executed, it is binding upon petitioner. Therefore, this Commission does not have jurisdiction

to include 1974 as a part of the proceedings herein. Accordingly, no decision concerning 1974 is rendered. It should be noted however, that petitioner may, upon paying the amount due for 1974, preserve his right to file a petition for refund if a claim is filed pursuant to section 687 of the Tax Law.

C. That petitioner, Edward Wineapple, has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that Russ Rogs, Inc. exerted a sufficient degree of direction and control over his activities so as to construe their relationship as that of employer-employee. Accordingly, petitioner is deemed not to have been an employee of Russ Togs, Inc. during the years 1972, 1973, 1975 and 1976 within the meaning and intent of section 703(b) of the Tax Law.

D. That petitioner's sales activities engaged in during the years in issue constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701 of the Tax Law.

E. That the petition of Edward Wineapple is denied and the notices of deficiency dated February 28, 1977 and December 15, 1978 are hereby sustained, together with such additional penalties and interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 29 1983

Rodney G. Cline  
PRESIDENT

Frank R. Koenig  
COMMISSIONER

[Signature]  
COMMISSIONER