

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Herbert Sussman & Patricia Sussman :  
for Redetermination of a Deficiency or for Refund :  
of New York State Personal Income and Unincorporated :  
Business Taxes under Articles 22 and 23 of the Tax :  
Law and New York City Nonresident Earnings Tax under :  
Chapter 46, Title U of the Administrative Code of :  
the City of New York for the Years 1977 and 1978. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of April, 1985, he served the within notice of Decision by certified mail upon Herbert & Patricia Sussman, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert & Patricia Sussman  
162 Old Farm Rd.  
Pleasantville, NY 10570

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 April, 1985.

David Parchuck

Annice A. Hargrave

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Herbert Sussman & Patricia Sussman  
for Redetermination of a Deficiency or for Refund  
of New York State Personal Income and Unincorporated  
Business Taxes under Articles 22 and 23 of the Tax  
Law and New York City Nonresident Earnings Tax under  
Chapter 46, Title U of the Administrative Code of  
the City of New York for the Years 1977 and 1978.

AFFIDAVIT OF MAILING

State of New York :  
County of Albany : ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of April, 1985, he served the within notice of Decision by certified mail upon Roy J. Macchiarola, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Roy J. Macchiarola  
60 East 42nd Street  
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 April, 1985.

David Parshuck

Bonnie A. Haglund  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

April 29, 1985

Herbert & Patricia Sussman  
162 Old Farm Rd.  
Pleasantville, NY 10570

Dear Mr. & Mrs. 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 & 1312 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Roy J. Macchiarola  
60 East 42nd Street  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
HERBERT SUSSMAN AND PATRICIA SUSSMAN	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income and	:	
Unincorporated Business Taxes under Articles	:	
22 and 23 of the Tax Law and New York City	:	
Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Years 1977 and 1978.	:	

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Petitioners, Herbert Sussman and Patricia Sussman, 162 Old Farm Road, Pleasantville, New York 10570, filed a petition for redetermination of a deficiency or for refund of New York State personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1977 and 1978 (File Nos. 35914, 36047 and 36048).

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 May 10, 1984 at 2:45 P.M., with all briefs to be submitted by June 30, 1984. Petitioners appeared by Roy J. Macchiarola, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUES

I. Whether adjustments attributing additional unreported income to petitioner Herbert Sussman for the years 1977 and 1978 were proper.

II. Whether petitioner Herbert Sussman's activities as a sales representative constituted the carrying on of an unincorporated business.

III. Whether the penalties asserted should be abated.

FINDINGS OF FACT

1. Petitioners, Herbert Sussman and Patricia Sussman, filed a joint New York State Income Tax Resident Return for each of the years 1977 and 1978 whereon Herbert Sussman (hereinafter "petitioner") reported business income of \$10,326.00 (1977) and \$10,970.00 (1978) derived from his activities as a "sales rep". Both of said returns reported no New York State or City tax liability after reduction of reported income by the applicable amounts for deductions and exemptions. Petitioner did not file an unincorporated business tax return for either year at issue.

2. On June 15, 1981, the Audit Division issued a Statement of Personal Income Tax Audit Changes to petitioner and his wife wherein, based on a field audit, adjustments were made for additional unreported income of \$13,921.89 (1977) and \$14,665.40 (1978). Said statement also contained other adjustments; however, petitioner conceded such other adjustments at the hearing held herein. The Audit Division also issued a Statement of Unincorporated Business Tax Audit Changes to petitioner under the same date. This statement held petitioner's reported business income, plus the aforestated adjustment for additional unreported income for each year at issue, subject to unincorporated business tax.

3. On September 10, 1981, the Audit Division issued three (3) notices of deficiency against petitioner for 1977 and 1978 based on the aforestated statements of audit changes. One such notice asserted New York State personal income tax of \$1,079.07, penalties of \$96.23, plus interest of \$257.97, for a total due of \$1,433.27. Said penalties were asserted for negligence and for failure to timely file the 1977 return, pursuant to sections 685(b) and 685(a)(1)

of the Tax Law, respectively. The second Notice of Deficiency asserted New York City nonresident earnings tax of \$311.24, penalties of \$30.66, plus interest of \$76.89, for a total due of \$418.79. Said penalties were asserted for negligence and for failure to timely file the 1977 return, pursuant to sections U46-35.0(b) and U46-35.0(a) of the Administrative Code of the City of New York, respectively. The third Notice of Deficiency asserted unincorporated business tax of \$1,573.68, penalties of \$629.78, plus interest of \$391.48, for a total due of \$2,594.94. Said penalties were asserted for failure to file unincorporated business tax returns and for failure to pay the tax determined to be due, pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law, respectively, as incorporated into Article 23 of the Tax Law by section 722(a).

4. On February 3, 1981, petitioner and his wife executed a consent form fixing the period of limitation upon assessment of personal income and unincorporated business taxes for the taxable year ended December 31, 1977 to any time on or before April 15, 1982. Accordingly, the aforesaid notices of deficiency were timely issued.

5. The aforestated adjustments for additional unreported income were computed using the source and application of funds method of income reconstruction wherein a cost of living analysis was incorporated.

6. The cost of living analysis, which was prepared by the Audit Division and used in computing the deficiency herein, was as follows:

<u>ITEM</u>	<u>1977</u>	<u>1978</u>
Food	\$ 4,160.00	\$ 4,160.00
Clothing	750.00	750.00
Barber & Beauty Shop	300.00	300.00
Laundry	100.00	100.00
Life Insurance	500.00	500.00
Mortgage Amortization	955.68	1,014.62
Mortgage Interest	1,441.00	1,382.00
Electric & Gas	800.00	850.00

Telephone	600.00	600.00
Water	50.00	50.00
Home Insurance	420.00	420.00
Home Repairs	2,000.00	-0-
Gasoline, Oil & Grease	1,100.00	1,100.00
Auto Insurance	328.00	328.00
Auto Payments	2,316.00	2,316.00
Medical	8,071.00	6,864.40
Real Estate Taxes	2,376.00	2,509.56
State & Local Taxes	577.00	862.00
Gasoline Taxes	210.00	230.00
Sales Tax	177.00	135.00
Contributions	407.00	276.00
Credit Charges	-0-	598.00
IRS	816.00	888.57
Total	<u>\$28,454.68</u>	<u>\$26,234.15</u>

7. The amounts assigned to the various items in the cost of living analysis were either estimates based on the auditor's interview of petitioner and/or his wife, or specific amounts as reported on petitioner's returns for the years at issue.

8. Petitioner alleged that although he was aware that the years at issue during the audit were 1977 and 1978, his and/or his wife's responses during the audit interview, with respect to the above scheduled living expenses, were inadvertently made with respect to their expenses incurred during 1981, the year the audit was conducted, rather than to the years at issue herein.

9. Petitioner alleged that during the years at issue he was experiencing severe financial difficulties. In support of this allegation, he submitted evidence establishing that such difficulties lead to his application and subsequent receipt of Food Stamps during the period March 1, 1979 through May 31, 1979.

10. Petitioner prepared and submitted a cost of living analysis using his estimates for the various expense items listed thereon. Based on his testimony, food, clothing and home repairs expenses are found to be as follows:

	<u>1977</u>	<u>1978</u>
Food	\$3,120.00	\$3,120.00
Clothing	600.00	600.00
Home Repairs	1,000.00	150.00

11. The amounts assigned for medical expenses were those as reported on petitioner's returns. During the hearing, petitioner claimed that such amounts should have been properly reduced by health insurance reimbursements received. Although reduction of the medical expenses reported by the applicable reimbursements would have no effect on the personal income tax liability since it would result in both a reduction of the medical expense deduction and a corresponding reduction to the adjustment for additional unreported income, it would, however, result in a reduced tax liability for unincorporated business tax purposes. Although petitioner contended that he received health insurance reimbursements of \$2,935.00 in 1977 and \$2,664.00 in 1978, no evidence was submitted to verify this claim.

12. Petitioner alleged that his sources of income should properly be increased by loans received from family members during the years at issue. He claimed that he received a loan of \$2,000.00 from his brother-in-law during 1977; loans of \$2,500.00 and \$2,000.00 from his mother during 1977 and 1978, respectively; and loans of \$1,500.00 and \$1,000.00 from his brother during 1977 and 1978, respectively. The only evidence submitted in support of petitioner's receipt of such loans was a handwritten letter from his brother dated December, 1983, wherein it was stated that:

"This letter is to certify that during the years of 1976 to 1979 I have lent Herbert Sussman (Brother) a total sum of \$4,000. In the years that followed I have been paid in full."

13. In computing petitioner's sources of funds for 1977, the Audit Division used petitioner's reported total New York income of \$10,019.00 as a source



although said amount was comprised, inter alia, of a reported capital loss of \$1,000.00.

14. During the years 1977 and 1978, petitioner was engaged in activities as a sales representative for "Island Knitwear", a company based in California. Petitioner alleged that he was an employee of Island Knitwear during said years.

15. Petitioner's sales activities were carried on, for the most part, at Island Knitwear's showroom located at 1410 Broadway, New York City. Petitioner was the only individual assigned to said showroom.

16. Petitioner's activities consisted of the sale of Island Knitwear's product line both in the showroom and at the premises of retail stores in the immediate area.

17. Petitioner was not required to attend sales meetings or report to his principal on a regular basis. He was not required to meet a sales quota.

18. When questioned as to the direction and control exercised by his principal over his day-to-day activities, petitioner responded that the control was that his principal could fire him. He further stated that his principal was only interested in how much business he brought in.

19. Petitioner prepared his own tax returns and filed a Federal Schedule C for each year at issue. On said schedules petitioner reported fairly substantial deductions for advertising and promotion, travel and entertainment, auto expenses, telephone expenses, office supplies and showroom expenses.

20. Petitioner submitted a statement from his principal, dated June 2, 1982, wherein it was stated that:

"Herbert Sussman was an independent contractor for Island Knitwear during the years 1977-1978, and worked out of the showroom in 1410 Broadway, New York, N.Y. The lease and rent was assumed by Island Knitwear on March 1st., 1977 and continued until the end of 1978.

Mr. Sussman working as a salesman for Island Knitwear, was in charge of the New York showroom and was given a monthly salary. He then received a year end bonus if his business warranted it. Mr. Sussman had to pay his own expenses and had to make every effort to sell Island Knitwear products, for his income depended on increased business.

With the main office being in California, we were not involved in withholding New York taxes and worked with a 1099 form only."

21. Petitioner's principal did not withhold social security taxes from his compensation during the years at issue herein.

22. Petitioner contested all penalties asserted. He claimed that such penalties should be abated since the law applicable to the issues herein is not clear.

#### CONCLUSIONS OF LAW

A. That the following items incorporated into the cost of living analysis are to be adjusted from the amounts estimated by the Audit Division to the amounts as follows (see Finding of Fact "10", supra):

	<u>1977</u>	<u>1978</u>
Food	\$3,120.00	\$3,120.00
Clothing	600.00	600.00
Home Repairs	1,000.00	150.00

The balance of the cost of living analysis as prepared by the Audit Division is sustained.

B. That the total sources of funds determined by the Audit Division for the year 1977 is to be increased by \$1,000.00 (see Finding of Fact "13", supra).

C. That it 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 (Matter of Liberman v. Gallman, 41 N.Y.2d 774). Furthermore, "[w]hether there is sufficient direction

and control which results in the relationship of employer and employee will be determined upon examination of all pertinent facts and circumstances of each case." 20 NYCRR 203.10(c).

D. That the degree of direction and control exercised by Island Knitwear over petitioner's day-to-day activities was insufficient for the existence of a relationship of employer-employee. Accordingly, petitioner's sales activities did not constitute services rendered as an employee of Island Knitwear within the meaning and intent of section 703(b) of the Tax Law.

E. That petitioner's sales activities 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 unincorporated business tax pursuant to section 701(a) of the Tax Law.

F. That the penalties asserted pursuant to sections 685(a)(1), 685(a)(2) and 685(b) of the Tax Law and sections U46-35.0(a) and U46-35.0(b) of the Administrative Code of the City of New York are hereby sustained.

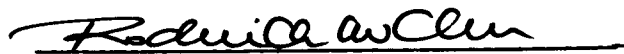

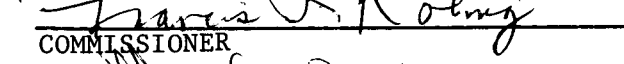
G. That the petition of Herbert Sussman and Patricia Sussman is granted to the extent provided in Conclusions of Law "A" and "B", supra, and except as so granted, said petition is, in all other respects, denied.

H. That the Audit Division is hereby directed to modify the three (3) notices of deficiency dated September 10, 1981 to be consistent with the decision rendered herein.

DATED: Albany, New York

APR 29 1985

STATE TAX COMMISSION

  
PRESIDENT  
  
COMMISSIONER  
  
COMMISSIONER