

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Bernard H. Frishberg :

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 Year 1972. :

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 18th day of June, 1980, he served the within notice of Decision by certified mail upon Bernard H. Frishberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard H. Frishberg
1472 Sylvia Lane
E. Meadow, NY 11554

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
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

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

June 18, 1980

Bernard H. Frishberg
1472 Sylvia Lane
E. Meadow, NY 11554

Dear Mr. Frishberg:

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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BERNARD H. FRISHBERG	:	DECISION
	:	
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 Year 1972.	:	

Petitioner, Bernard H. Frishberg, 1472 Sylvia Lane, East Meadow, New York 11554, 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 year 1972 (File No. 15211).

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 November 27, 1979 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUES

I. Whether the sales activities of petitioner during the year 1972 constituted the carrying on of an unincorporated business of which the income derived therefrom is subject to the imposition of unincorporated business tax.

II. Whether petitioner is properly subject to penalties imposed for failure to file and pay unincorporated business tax.

III. Whether petitioner is properly entitled to a deduction for child care expenses.

IV. Whether petitioner is properly entitled to a deduction for "travel and entertainment expenses".

FINDINGS OF FACT

1. Petitioner, Bernard H. Frishberg, timely filed a New York State Income Tax Resident Return for the year 1972 wherein he listed his occupation as "Salesman on Wheels". He did not file an unincorporated business tax return for said year.

2. On April 11, 1974, as the result of an audit, the Income Tax Bureau issued a Statement of Audit Changes whereon child care expenses claimed in the amount of \$3,120.00 were disallowed in their entirety, and "travel and entertainment expenses" claimed in the aggregate amount of \$12,373.38, were allowed to the extent of \$7,592.18. Furthermore, a Statement of Audit Changes was also issued on April 10, 1974, imposing unincorporated business tax on the income derived from petitioner's selling activities. Additionally, penalties were imposed for failure to file and pay unincorporated business tax pursuant to section 722 of the Tax Law. Accordingly, a Notice of Deficiency was issued against the petitioner on September 30, 1974, asserting unincorporated business tax of \$658.93, additional personal income tax of \$580.45, penalties of \$217.88, and interest of \$135.74, for a total due of \$1,593.00.

3. Petitioner contended that the income derived from his sales activities is not subject to the imposition of unincorporated business tax since he rendered services solely for one principal and was prohibited from representing others.

4. During 1972, the year at issue herein, petitioner rendered services as a sales representative exclusively for Joshua Tree, a California based manufacturer of ladies' dresses and sportswear. Petitioner's assigned territory encompassed New York City, Long Island, and Westchester County. He was compensated on a straight commission basis and was not reimbursed for his ordinary and necessary business expenses incurred.

5. Petitioner submitted a weekly itinerary, which he personally prepared, to his immediate supervisor, who was located in the Los Angeles, California branch. He actually met with his supervisor approximately six times yearly and spoke to him via telephone on a weekly basis.

6. Petitioner, whose accounts were comprised of both company accounts and personally solicited accounts, attended four company-represented trade shows per year. Additionally, he set up a number of trade shows personally for which he paid the advertising costs incurred.

7. Since petitioner was not allotted office space by Joshua Tree, he operated out of his office established in his personal residence.

8. Petitioner, who reported his gross commissions as "other income", paid Social Security Self-Employment Tax and claimed a deduction for payments to a self-employed retirement plan.

9. Petitioner paid for his own samples, the costs of which were deducted from his gross commissions.

10. Petitioner was not required to work stated hours and received no paid vacation from his principal.

11. Joshua Tree did not withhold income or Social Security taxes from petitioner's compensation. Furthermore, it did not provide petitioner benefits for life and health insurance, pension, or workmen's compensation.

12. Petitioner, in an effort to have the penalties abated which were imposed against him for failure to file and pay the unincorporated business tax, submitted a statement from his tax preparer, an attorney at law, which stated that unincorporated business tax returns were not prepared based on his professional opinion that petitioner's income was not subject to said tax.

13. Petitioner claimed a deduction for child care expenses in the amount of \$3,120.00. Said expenses were incurred for the care and maintenance of his

two children, both of whom were under fifteen years of age during the year at issue herein.

14. Petitioner, whose wife died in 1969, contended that during 1972 he paid three individuals to care for his children so that he could continue being gainfully employed. He testified that he doesn't recall how much he paid them, but he believes it was either \$75.00 or \$90.00 per week. No documentation was submitted to evidence any payments.

15. Petitioner claimed the total of various business expenses, as an adjustment to income, in the amount of \$12,373.38. As the result of audit, petitioner was allowed \$7,592.18, which was substantiated by documentary evidence. Although petitioner contended that he is entitled to an additional allowance, he failed to produce any additional documentation in support of his contention.

CONCLUSIONS OF LAW

A. That the term employee means an individual performing services for an employer under an employer-employee relationship. Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished, but also as to the details and means by which that result is to be accomplished.

The degree of direction and control exercised by petitioner's principal over his activities was insufficient for the existence of a bona fide employer-employee relationship. Accordingly, petitioner is deemed to have been an independent contractor rather than an employee with respect to his relationship with Joshua Tree. As such, his sales activities during taxable year 1972 constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law and the income derived therefrom

was subject to the imposition of unincorporated business tax pursuant to section 701 of the Tax Law.

B. That the penalties imposed under section 722 of the Tax Law, for failure to file and pay unincorporated business tax, are hereby abated since petitioner has established a reasonable cause.

C. That petitioner has failed to sustain his burden of proof required under section 689(e) of the Tax Law to show that payments were made to certain individuals for the care and maintenance of his children. Accordingly, the adjustment to child care expenses claimed in the amount of \$3,120.00 is hereby sustained.

D. That petitioner has failed to sustain his burden of proof required under section 689(e) of the Tax Law to show that he is entitled to a greater deduction than allowed for "travel and entertainment expenses". Accordingly, the adjustment to this item is sustained.

E. That the petition of Bernard H. Frishberg is granted to the extent provided in Conclusion of Law "B" (supra) and that said petition, is in all other respects denied.


F. That the Audit Division is hereby directed to modify the Notice of Deficiency dated September 30, 1974 to be consistent with the determination rendered herein.

DATED: Albany, New York

JUN 18 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER