

BUREAU OF LAW
MEMORANDUM*Unincorp. Bus. Tax
Determinations A-Z
Dorfman, Doris &
Hyman*

TO: State Tax Commission
FROM: Solomon Sies, Hearing Officer
SUBJECT: Hyman & Doris Dorfman

Petition for Redetermination of
Deficiency or Refund of Unincorporated
Business Taxes under Article 23 of the
Tax Law for the Year 1962

A hearing was held on the above matter in the New York City
Office on November 27, 1968.

The issue involved herein is whether the activities of a
multi-line salesman are subject to unincorporated business tax within
the intent and meaning of Section 703 of the Tax Law.

Hyman & Doris Dorfman filed a New York State resident re-
turn for the year 1962 in which the taxpayer, Hyman Dorfman, reported
business income as manufacturers' representative on Schedule "A" in
the amount of \$12,835.52. No unincorporated business tax returns
were filed for said year. On July 12, 1965 a statement of audit
changes was issued imposing additional unincorporated business tax
on the ground that the business activities of the taxpayer, Hyman
Dorfman, constitute the carrying on of unincorporated business subject
to unincorporated business tax and accordingly a notice of deficiency
was issued in the amount of \$201.78 plus interest of \$27.13 for a
total of \$228.91.

During the year 1962 and prior thereto the taxpayer was a
sales representative for Venice Knitting Mills, Inc., maintaining an
office and showroom at 1407 Broadway, New York City on a straight
commission basis. On July 28, 1960 the taxpayer entered into a letter
agreement with Venice Knitting Mills, Inc. whereby he was to repre-
sent said firm in the sale of ladies' sportswear covering Metropolitan,
New York, including New Jersey south to Trenton, and New York State up
to Kingston on a straight commission basis. Pursuant to said agreement
the taxpayer was not permitted to carry any other conflicting line.
During the year 1962 the taxpayer also represented Candy Jones Calif.,
Inc. of Los Angeles, California and Monique Inc. of Hialeah, Florida
in the sale of ladies' sportswear not conflicting with the line
carried by Venice Knitting Mills, Inc. His gross commission income
for 1962 was as follows: Venice Knitting Mills, Inc., \$17,835.42;
Monique, Inc., \$995.82, and Candy Jones Calif., Inc., \$362.99. The
taxpayer was not reimbursed for any of his expenses by any of the
principals. He conducted about three trade shows a year selling the

wares of the three principals. His territory for all of said principals was the same. He solicited specialty and department stores endeavoring to sell all of the products of the various principals.

On Schedule "C" of his Federal income tax return for the year in issue, the taxpayer deducted rent in the amount of \$860.00. This amount included \$560.00 for the rental of hotel rooms where he held his shows plus \$300.00 for the use of a portion of his home in the conduct of his sales activities.

None of the principals deducted withholding or social security taxes from the commission income paid the taxpayer. None of the principals exercised any control over the time spent by the taxpayer or the manner or means in which he was to effect sales on behalf of said principals.

Section 703(f) of the Tax Law provides that a sales representative who maintains an office or who employs assistants shall not be deemed engaged in an unincorporated business solely because he represents more than one principal.

In the case of Britten v. State Tax Commission, 22 A. D. 2d 987, aff'd 19 N. Y. 2d 613, assessments of unincorporated business taxes were issued against the taxpayer on earnings from sales commissions derived from activities as the exclusive manufacturer's representative of 11 noncompeting corporations within an assigned territory. The principals exercised no supervision or control in respect to the manner or means in which his sales endeavors were pursued requiring only successful results. None of the principals paid unemployment insurance or social security on his earnings or deducted withholding taxes therefrom. The taxpayer paid his own travel and incidental expenses for which he was not reimbursed. He deducted expenses incurred in the maintenance of an office in his home. The Court, sustaining the determination of the Tax Commission, held that the sole fact that a person is a multi-line salesman is an insufficient basis to deem him engaged in an unincorporated business; that to hold the salesman so engaged, it must be found that (a) he maintains an office, or (b) employs one or more assistants or (c) otherwise regularly carries on a business. Although this case was decided under Section 386, Article 16-A of the Tax Law, similar provisions are contained in Section 703, Article 23 of the Tax Law.

I am, therefore, of the opinion that the taxpayer's activities constitute that of an independent contractor and not an employee subject to unincorporated business tax within the intent and meaning of Section 703 of the Tax Law.

For the reasons stated, I recommend that the decision of the State Tax Commission in this matter be substantially in the form submitted herewith.

~~SOLOMON SIES~~
~~Hearing Officer~~

SS:dv
Enc.
March 6, 1969

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION
OF
HYMAN DORFMAN
FOR A REDETERMINATION OF A DEFICIENCY OR
FOR REFUND OF UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW FOR
THE YEAR 1962

Hyman Dorfman having filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the year 1962 and a hearing having been held before Solomon Sico, Hearing Officer of the Department of Taxation and Finance, at 80 Centre Street, New York, New York on the 27th day of November, 1963 at which hearing the taxpayer appeared personally and was represented by Morris Gruber, CPA, and testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Hyman and Doris Dorfman filed a New York State income tax resident return for the year 1962 in which they reported Federal adjusted gross income in the amount of \$13,216.43; that on Schedule "A" of said return the taxpayer, Hyman Dorfman, reported gross business income in the amount of \$19,193.93 as a "manufacturers' representative" and net business income in the amount of \$12,895.52; that the taxpayer, Hyman Dorfman, did not file any unincorporated business tax return for the year 1962; that on July 12, 1963 the Department of Taxation and Finance issued a statement of audit changes against the taxpayer, Hyman Dorfman, for the year 1962 holding that the business activities

of the aforementioned taxpayer constituted the carrying on of an unincorporated business and that the income derived therefrom was subject to unincorporated business tax; that additional unincorporated business tax was imposed in the amount of \$201.78 together with interest of \$27.13 for a total of \$228.91 and a notice of deficiency was accordingly issued therefor.

(2) That during the year 1962 and prior thereto the taxpayer, Hyman Dorfman, was a sales representative for Venice Knitting Mills, Inc. which maintained a showroom and office at 1407 Broadway, New York City on a straight commission basis; that on July 28, 1960 the taxpayer entered into a letter agreement with Venice Knitting Mills, Inc. whereby it was agreed that said taxpayer was to act as sales representative for Venice Knitting Mills, Inc. covering the territory embracing Metropolitan, New York, New Jersey south to Trenton, and New York State up to Kingston on a straight commission basis; that it was agreed that the taxpayer would not carry or represent any other manufacturer carrying a conflicting line; that the taxpayer sold ladies' sportswear on behalf of said firm selling to specialty and department stores in the assigned territory; that pursuant to said agreement the taxpayer was not reimbursed for any of his expenses.

(3) That during the year 1962 the taxpayer also represented Candy Jones Calif., Inc. of Los Angeles, Calif. and Monique, Inc. of Hialeah, Fla. selling ladies' sportswear which did not conflict with the line carried by Venice Knitting Mills, Inc.; that the taxpayer covered the same territory for all three principals on a straight commission basis; that the taxpayer endeavored to sell all of the lines of the various principals to each of the prospective customers contacted by him; that the gross commissions received by the taxpayer from the three principals in 1962 was as follows: Venice Knitting Mills, Inc., \$17,835.42; Monique, Inc., \$996.82; Candy Jones Calif., Inc., \$362.99.

(4) That none of the principals deducted withholding or social security taxes from the commissions paid the taxpayer.

(5) That on Schedule "C" of the Federal income tax return for the year 1962 the taxpayer deducted the following expenses:

Depreciation	\$ 871.70
Rent on business property	850.00
Insurance	245.63
Legal and professional fees	50.00
Interest on business indebtedness	100.00
Dues Subscriptions	70.00
Printing	33.00
Licenses	22.00
Advertising	150.00
Window trimming	200.00
Telephone	60.00
Entertaining	321.36
Travel out of Town (Hotels & Meals)	1,950.00
Miscellaneous	74.00
Automobile Expense, gas maintenance, parking, tolls	<u>1,329.00</u>
TOTAL	\$6,339.71

(6) That the deduction of \$850.00 reported as rent included the rental of hotel rooms at which the taxpayer conducted trade shows on behalf of all the principals; that \$300.00 thereof represented the use of a portion of his home as an office in connection with his sales activities.

(7) That none of the principals exercised any control over the time spent or the manner or means in which the taxpayer affected sales on behalf of said principals.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DECIDES:

(A) That during the year 1962 the taxpayer was an independent contractor and not an employee; that his activities constituted the carrying on of an unincorporated business solely within the State of New York subject to unincorporated business tax within the intent and meaning of Section 703, Article 23 of the Tax Law.

(B) That accordingly the statement of audit changes and notices of deficiency imposing unincorporated business tax are correct and do not include any tax or other statutory charges which could not have been lawfully demanded; that the taxpayer's petition for redetermination or for refund of unincorporated business tax filed with respect thereto be and the same is hereby denied.

Dated: Albany, New York this 12th day of March , 1969.

STATE TAX COMMISSION

/s/

Joseph H. Murphy
President

/s/

A. Bruce Manley
Commissioner

/s/

Milton Koerner
Commissioner