

STATE OF NEW YORK
STATE TAX COMMISSION

Alan S. Dver
U.S.T. 10-23
(1971)

In the Matter of the Petition
of
ALAN S. DVER
For a Redetermination of a Deficiency or
a Refund of Unincorporated Business;
Taxes under Article(s) 23 of the
Tax Law for the (Year(s) 1965, 1966 and 1967.

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

Linda Wilson, 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 24th day of August, 1971, she served the within Notice of Decision (or Determination) by (certified) mail upon ALAN S. DVER (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid

wrapper addressed as follows: Alan S. Dver
42 Bogart Avenue
Port Washington, New York

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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

24th day of August, 1971.

Rae Zimmerman *Linda Wilson*

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ALAN S. DVER : DECISION
for Redetermination of Deficiency or :
for Refund of Unincorporated Business :
Tax under Article 23 of the Tax Law :
for the Years 1965, 1966 and 1967. :

Petitioner, Alan S. Dver, has filed a petition for redetermination of deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1965, 1966 and 1967. (File No. 74477271). A formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York on June 16, 1971, at 2:45 P.M. Petitioner appeared pro se. The Income Tax Bureau appeared by Edward H. Best, Esq., (Albert J. Rossi, Esq., of Counsel).

ISSUES

I. Did petitioner, Alan S. Dver's, selling activities during the years 1965, 1966 and 1967 constitute the carrying on of an unincorporated business?

II. Did petitioner, Alan S. Dver, have reasonable cause for failing to file unincorporated business tax returns for the years 1965, 1966 and 1967?

FINDINGS OF FACT

1. Petitioner, Alan S. Dver, and his wife filed New York State income tax resident returns for the years 1965, 1966 and 1967. He

did not file New York State unincorporated business tax returns for said years.

2. On May 26, 1969, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Alan S. Dver, imposing unincorporated business tax upon the income received by him from his activities as a salesman during the years 1965, 1966 and 1967. It also imposed a penalty of \$240.64 for failure to file unincorporated business tax returns for said years. In accordance with the aforesaid Statement of Audit Changes it issued a Notice of Deficiency in the sum of \$1,319.43.

3. During the years 1965, 1966 and 1967 petitioner, Alan S. Dver, was a gift item salesman. He represented two unaffiliated firms in the sale of various gift items. The products sold by him for each firm were noncompetitive.

4. During the years 1965, 1966 and 1967 the firms for whom petitioner, Alan S. Dver, sold gift items did not withhold Federal and New York State income taxes and social security tax from the commissions paid to him. He was not reimbursed for any of his business expenses. He deducted these business expenses on Schedule "C" of his federal income tax return. He maintained an office at home where he kept files, records, and samples and had the use of a telephone. The firms for whom he sold merchandise did not exercise any supervision or control over his sales activities or techniques, or to the time he devoted to sales except to limit the territory in which he could sell.

5. Petitioner, Alan S. Dver, was advised by his accountant that he was not required to file unincorporated business tax returns for the years 1965, 1966 and 1967.

CONCLUSIONS OF LAW

A. That the income received by petitioner, Alan S. Dver, from the firms he represented during the years 1965, 1966 and 1967 constituted income from his regular business of selling gift items and not compensation as an employee exempt from the imposition of unincorporated business tax in accordance with the meaning and intent of section 703(b) of the Tax Law.

B. That the aforesaid activities of petitioner, Alan S. Dver, during the years 1965, 1966 and 1967 constituted the carrying on of an unincorporated business and his income derived therefrom was subject to unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law.

C. That petitioner, Alan S. Dver, had reasonable cause for not filing unincorporated business tax returns for the years 1965, 1966 and 1967, and, therefore, the penalty assessed pursuant to section 685(a) of the Tax Law is waived.

D. That the petition of Alan S. Dver is granted to the extent of cancelling the penalty imposed pursuant to section 685(a) of the Tax Law for the years 1965, 1966 and 1967 and the Notice of Deficiency issued May 26, 1969, is reduced from \$1,319.43 to \$1,078.79 together with such interest as may be due from May 26, 1969, and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

August 24, 1971

STATE TAX COMMISSION

Thomas G. Ballman

COMMISSIONER

Charles M. Daley

COMMISSIONER

Matthew Koerner

COMMISSIONER

BUREAU OF LAW
MEMORANDUM

TO

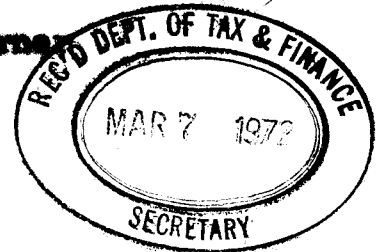
FROM :

Commissioners Gallman, Manley and Koerner

SUBJECT:

Saul Heckelman, Director

Alan S. Dyer v. State of New York



Attached is a copy of New York Supreme Court Justice Bruhn's February 25, 1972 opinion in the above case, confirming the Tax Commission's August 24, 1971 decision and dismissing the petitioner's petition. The petitioner claimed the commission's decision to have been arbitrary and capricious as he was an employee and thus not subject to the unincorporated business tax.

Justice Bruhn's opinion relies on two relatively recent Appellate Division cases (Frishman v. State Tax Commission, 33 AD2d 1071; Harvy v. Murphy, 29 AD2d 1038), and stands for the proposition that "salesmen are not employees where they are not subject to direction or control as to the manner in which they are to make sales, by the concerns whose products they sell".

As yet, we do not know whether the case will be appealed.

Director

JS:lk

Enc.

March 3, 1972

cc: John Donovan, Director
Edward Hook, Esq.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
ALAN S. DVER,

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules reversing
the determination of the New York State
Tax Commission

-against-

THE STATE OF NEW YORK,

Respondent.

(Supreme Court, Albany County Special Term, January 28, 1972)
(Calendar #22)

(JUSTICE LOUIS G. BRUHN PRESIDING)

APPEARANCES: Alan S. Dver, Pro Se, 42 Bogart Avenue,
Port Washington, New York

Louis J. Lefkowitz, Attorney General,
attorney for Respondent, The Capitol,
Albany, New York

BRUHN, J.

This is an Article 78 proceeding for judgment reversing
the determination of the New York State Tax Commission that the
Petitioner is subject to the New York State unincorporated bus-
iness tax.

On May 26, 1969 the Petitioner received an assessment of
\$1319.00 for such tax for the years 1965, 1966 and 1967.

The Petitioner claims that determination was arbitrary
and capricious because he is an employee and as such, not subject
to such business tax.

On June 16, 1971 a hearing was held and the Commission
affirmed the assessment finding.

✓
Mr. Molinsky

MAR 1 1972

SEARCHED
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As a result of the hearing it was found as a fact,
inter alia:

"3. During the years 1965, 1966 and 1967 petitioner, Alan S. Dver, was a gift item salesman. He represented two unaffiliated firms in the sale of various gift items. The products sold by him for each firm were noncompetitive.

4. During the years 1965, 1966 and 1967 the firms for whom petitioner, Alan S. Dver, sold gift items did not withhold Federal and New York State income taxes and social security tax from the commissions paid to him. He was not reimbursed for any of his business expenses. He deducted these business expenses on Schedule "C" of his federal income tax return. He maintained an office at home where he kept files, records, and samples and had the use of a telephone. The firms for whom he sold merchandise did not exercise any supervision or control over his sales activities or techniques, or to the time he devoted to sales except to limit the territory in which he could sell." (Underline Supplied)

Consistent with that and other findings, the Commission concluded, inter alia:

"A. That the income received by petitioner, Alan S. Dver, from the firms he represented during the years 1965, 1966 and 1967 constituted income from his regular business of selling gift items and not compensation as an employee exempt from the imposition of unincorporated business tax in accordance with the meaning and intent of section 703(b) of the Tax Law.

B. That the aforesaid activities of petitioner, Alan S. Dver, during the years 1965, 1966 and 1967 constituted the carrying on of an unincorporated business and his income derived therefrom was subject to unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law. " (Underline Supplied)

The resolve of the controversy turns on an interpretation of Section 703.

Such section provides, inter alia, and so far as pertinent:

"(a) General.-An unincorporated business means any trade, business or occupation conducted, engaged in * * * by an individual or unincorporated entity * * *.

(b) Services as employee, et cetera.-The performance of services by an individual as an employee * * * of a corporation, * * *, association, * * *, shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual.

* * *.

(f) Sales representative.-An individual, other than one who maintains an office or who employs one or more assistants or who otherwise regularly carries on a business, shall not be deemed engaged in an unincorporated business solely by reason of selling goods, wares, merchandise or insurance for more than one enterprise. For purposes of this subdivision, space utilized solely for the display of merchandise and/or for the maintenance and storage of records normally used in the course of business shall not be deemed an office * * *." (Underline Supplied)

Two recent cases in this Department spell doom for the Petitioner's success.

The case of Frishman v. New York State Tax Commission, 33 A D 2d 1071(9) seems especially devastating to the Petitioner since, at page 1072, the Court stated, inter alia:

"The petitioner maintained a showroom, but did not have an office or employ assistants during the years in question. He did, however, represent six principals as a salesman for their products. The petitioner has apparently been under the misconception that subdivision (f) of section 703 is an exemption from the unincorporated business tax (see brief, p. 12) when in fact this portion of article 23 merely limits the factors which may be relied upon to conclude that the individual is self employed as opposed to being a mere employee of his principals. (Cf. Tax Law, §§ 386, 703, subd. [b]; Matter of Hardy v. Murphy, 29 A D 2d 1038, 1039.) Upon the

present record the control and direction exercised by the alleged employers over the petitioner were not sufficient to require a finding of employee. For tax withholding purposes the petitioner was treated by his employers as self-employed and the petitioner himself reported his earnings as a self-employed person. The manner and method in which the petitioner conducted his sales activities indicate that he was an entrepreneur with the alleged employers as his clients and that so much of his subjection to their "beck and call" was merely for the purpose of retaining them as clients. Upon the record in its entirety, we cannot say that the respondent was bound to find the petitioner an employee as a matter of law." (Underline Supplied)

In the Matter of Hardy v. Murphy case, supra, at page 1039, the Court stated:

"In determining the issue of employer-employee relationship, it has been held that it is a question of control in the absence of which there can be no finding of employment. (Matter of Morton, 284 N. Y. 167; People ex rel. Feinberg v. Chapman, 274 App. Div. 715.) It has consistently been held that salesmen are not employees where they are not subject to direction or control as to the manner in which they are to make sales, by the concerns whose products they sell. (People ex rel. Wittich v. Browne, 270 App. Div. 774, affd. 296 N. Y. 720; People ex rel. Feinberg v. Chapman, supra.)

In the light of the foregoing and as a matter of law, the determination must be confirmed, without costs, and the petition dismissed.

Submit judgment.

Dated: Kingston, New York
February 25, 1972

All papers submitted on petition returned to Attorney General for submission of judgment.