

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

DANIEL BERMAN

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

For a Redetermination of a Deficiency or
a Refund of Unincorporated Business:
Taxes under Article ~~(3)~~ 23 of the
Tax Law for the Year(s) 1963 through 1969

State of New York
County of Albany

Janet Mack, 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 4th day of November, 1974, she served the within
Notice of Decision (or Determination) by (certified) mail upon Daniel Berman

~~(representative of)~~ the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Mr. Daniel Berman

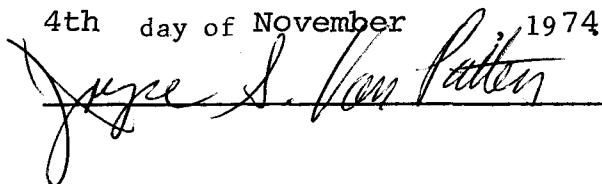
179-49 Tudor Road
Queens, New York 11432

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.

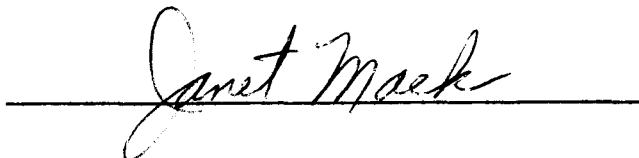
That deponent further says that the said addressee is the ~~(representative of)~~
~~the~~ petitioner herein and that the address set forth on said wrapper is the last
known address of the ~~(representative of the)~~ petitioner.

Sworn to before me this

4th day of November 1974



Judge S. Van Patten



Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

DANIEL BERMAN

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

For a Redetermination of a Deficiency or
a Refund of Unincorporated Business :
Taxes under Article (39) 23 of the
Tax Law for the Year(s) 1963 through 1969.

State of New York
County of Albany

Janet Mack , 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 4th day of November , 1974, she served the within
Notice of Decision (or Determination) by (certified) mail upon LeRoy A. Kramer,
C.P.A.

(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: LeRoy A. Kramer, C.P.A.

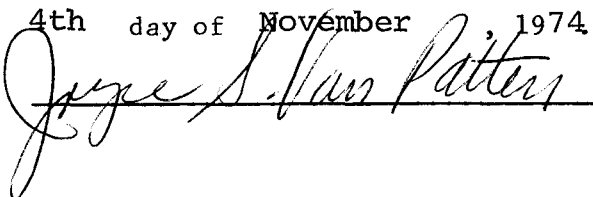
369 Lexington Avenue
New York, New York 10019

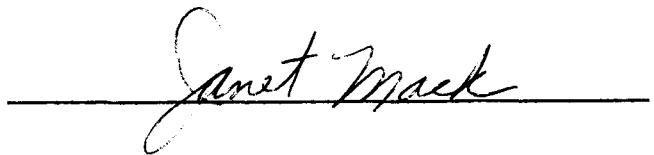
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Post Office Department within the State of New York.

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

4th day of November , 1974





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

DANIEL BERMAN

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

For a Redetermination of a Deficiency or
a Refund of Unincorporated Business
Taxes under Article (23) of the
Tax Law for the Year(s) 1963 through 1969

State of New York
County of Albany

Janet Mack, 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 4th day of November, 1974, she served the within
Notice of Decision (or Determination) by (certified) mail upon Morris M. Karp, Esq.

(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Morris M. Karp, Esq.

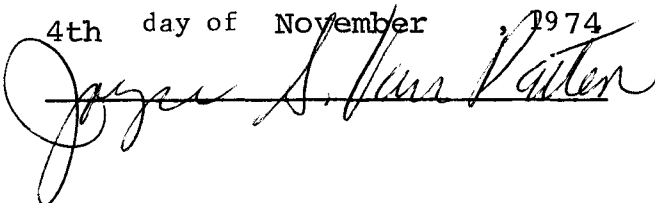
488 Madison Avenue
New York, New York 10022

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

4th day of November, 1974







STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

MARIO A. PROCACCINO, PRESIDENT
A. BRUCE MANLEY
MILTON KOERNER

BUILDING 9, ROOM 214-A
STATE CAMPUS
ALBANY, N.Y. 12227

AREA CODE 518

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

MR. WRIGHT 457-2655
MR. LEISNER 457-2657
MR. COBURN 457-2896

DATED: Albany, New York
November 4, 1974

Mr. Daniel Derman
179-49 Tudor Road
Queens, New York 11432

Dear Mr. Derman:

Please take notice of the **DECISION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section (8) **732** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Any inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned.
These will be referred to the proper party for
reply.

Very truly yours,


Nigel G. Wright
HEARING OFFICER

Enc.

cc: Petitioner's Representative
Law Bureau

AD-1.12 (8/73)

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petitions :
of :
DANIEL BERMAN : DECISION
for a Redetermination of a Deficiency :
or for Refund of Unincorporated :
Business Taxes under Article 23 of :
the Tax Law for the Years 1963 :
through 1969. :

Petitioner, Daniel Berman, has filed two petitions for a redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1963 through 1966 and for 1967 through 1969. (File Nos. 6-66035658 and 9-38621796).

A formal hearing was held before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, 2 World Trade Center, New York, New York, on Tuesday, May 21, 1974, at 1:10 P.M. Petitioner appeared by Morris M. Karp, Esq. and Leroy A. Kramer, C.P.A. The Income Tax Bureau appeared by Saul Heckelman, Esq., (Solomon Sies, Esq., of counsel).

ISSUE

Did the selling activities of petitioner, Daniel Berman, during the years 1963 through 1969 constitute the carrying on of an unincorporated business?

FINDINGS OF FACT

1. Petitioner, Daniel Berman, filed New York State income tax resident returns for the years 1963 through 1969. He did not file unincorporated business tax returns for said years.

2. On April 26, 1971, the Income Tax Bureau issued two statements of audit changes against petitioner, Daniel Berman, imposing

unincorporated business tax upon the income received by him from his activities as a salesman during the years 1963 through 1966 and for 1967 through 1969. In accordance with the aforesaid statements, it issued two notices of deficiency in the total sum of \$13,050.54.

3. During the years 1963 through 1969, petitioner, Daniel Berman, sold automotive parts and accessories. He represented between ten and fifteen firms in the sale of these items. The products sold by him for each firm were noncompetitive. His territory included the Metropolitan New York area, northern New Jersey and Puerto Rico.

4. Petitioner, Daniel Berman, conducted his selling activities from the basement of his home. The basement measured 10 x 15 and was furnished with shelving to display various items which he carried, a desk, a two-drawer filing cabinet, a typewriter, chair and some benches. Petitioner used this basement area as a showroom for displaying sample merchandise. In addition to having customers visit his home to see his merchandise, petitioner, Daniel Berman, traveled to various automotive outlets to secure business.

5. Petitioner, Daniel Berman, did not have any regular clerical or secretarial help. He did 90% of the clerical work himself and, on occasion, received help from his wife and two children, to whom he paid compensation. At different times during the period in question, petitioner did enter into an association with other sales representatives to cover the areas which he could not cover adequately himself. The manufacturers whom petitioner represented sent him a check. He, in turn, forwarded the other sales representatives their respective commissions. About the middle of 1968, petitioner entered into an agreement with the other sales representatives that he would retain a small percentage of their commissions to cover the costs of the clerical help involved in keeping the records straight.

6. Petitioner, Daniel Berman, was paid on a commission basis by the firms whom he represented. They did not withhold Federal or state income or social security tax from the compensation paid to him. They did not reimburse him for any of his expenses in connection with his sales activities, which he deducted on Schedule "C" of his Federal returns. Petitioner was not subject to any control as to the manner or means of effecting sales or as to the amount of time which he devoted to selling. Petitioner concedes that he is self-employed and is not an employee.

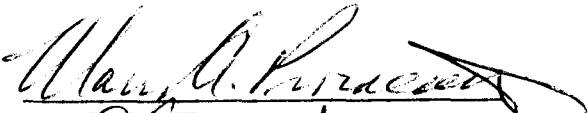
CONCLUSIONS OF LAW

A. That the selling activities of petitioner, Daniel Berman, during the years 1963 through 1969, constituted the carrying on of an unincorporated business, and the income derived therefrom was subject to the unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law. This result is in fact mandated by petitioner's concession that he is not an employee but is self-employed. The language of Tax Law section 703(f) does not create an exception. The fact that petitioner's principals have no legal right to control the details of his work bring him within the scope of the tax, any language in Button v. STC, 22 AD2d 987 to the contrary notwithstanding Frishman v. STC, 30 AD2d 1071.

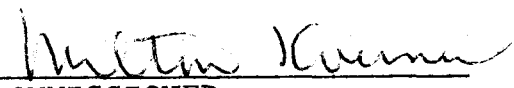
B. That the petitions of Daniel Berman are denied and the notices of deficiency issued April 26, 1971 are sustained.

DATED: Albany, New York
November 4, 1974

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER