

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JERRY BANDER

DECISION

for Redetermination of a Deficiency or
for Refund of Unincorporated Business
Taxes under Article 23 of the Tax Law
for the Years 1965 through 1973.

Petitioner, Jerry Bander, of 232 Martin Drive, Syosset,
New York 11791, has filed a petition for redetermination of a
deficiency or for refund of unincorporated business taxes under
Article 23 of the Tax Law for the years 1965 through 1973.

(File No. 00616). A formal hearing was held before Edward L.
Johnson, Hearing Officer, at the offices of the State Tax
Commission, Two World Trade Center, New York, New York, on
June 16, 1976, at 10:45 A.M. Petitioner appeared pro se. The
Income Tax Bureau appeared by Peter Crotty, Esq., (Arthur Rosen,
Esq. of counsel).

ISSUES

I. Whether the business activities of Jerry Bander as a
multi-line outside salesman during the years 1965 through 1973
constituted the conduct of an unincorporated business under
section 703 of the Tax Law.

II. Whether the petitioner, Jerry Bander, was subject to penalties under section 685(a) of the Tax Law for failure to file unincorporated business income tax returns for the years 1965 through 1967.

FINDINGS OF FACT

1. Petitioner, Jerry Bander, timely filed New York State resident income tax returns jointly with his wife in each of the years 1965 through 1973. He did not file unincorporated business tax returns for these years.

2. A Notice of Deficiency for unincorporated business tax was issued on February 17, 1969, against petitioner, Jerry Bander, for the years 1965, 1966 and 1967 setting forth a tax due of \$1,378.99 plus penalty of \$344.75 and interest of \$172.97 for a total of \$1,896.71. A Notice of Deficiency for unincorporated business tax was issued on November 25, 1974, against petitioner, Jerry Bander, for the years 1968 through 1973 detailing business tax owing of \$6,529.30 plus interest of \$1,256.63 for a total due of \$7,785.93.

3. The Income Tax Bureau determined that the activities of petitioner, Jerry Bander, as an independent salesman constituted the carrying on of a business subject to the unincorporated business tax in the years 1965 through 1973.

4. Petitioner, Jerry Bander, timely filed petitions for redetermination of business tax for the years 1965 through 1973, and for redetermination of the penalty for the years 1965, 1966 and 1967.

5. Petitioner, Jerry Bander, was a salesman carrying several lines of women's apparel. While he was under a written contract to a manufacturer of fall, fake-fur coats, Russel Taylor, Inc., he also represented makers of spring coats, and a suit manufacturer. Petitioner, Jerry Bander, was paid a commission based on sales made on the road and to those customers within his assigned territory to whom he personally made sales in the New York City showroom. He had no regular showroom duties. Petitioner, Jerry Bander, was not reimbursed for business expenses incurred while doing outside selling for his several principals.

6. Petitioner, Jerry Bander, maintained a room at his home where he kept his samples, order books and business papers. A deduction of one-seventh of the operating expense of the house was taken by petitioner, Jerry Bander, as a business expense on the Schedule C "Profit (or loss) From Business or Profession" attached to the Federal income tax return, Form 1040. In the said Schedule C, petitioner, Jerry Bander, itemized other business expenses including auto expenses, gratuities, entertainment expense and telephone.

7. Throughout the years in question, petitioner devoted the major portion of his selling time to Russel Taylor, Inc., manufacturers of fur-like coats. He also carried the lines of several subsidiary firms of Taylor making various articles of apparel. From time to time, petitioner, Jerry Bander, was simultaneously under contract as an outside salesman to Terina, Inc., Jill, Jr. Fashions Coat Corp., Suitmaster Classics, Inc. and House of Erdick Fashions, Inc. Each principal was informed of his carrying every line by petitioner, Jerry Bander. Each paid a specified commission on sales, with no additional compensation paid petitioner, Jerry Bander, for work the principal might require in the showroom. Russel Taylor, Inc. covered petitioner, Jerry Bander, in its Blue Cross and Blue Shield hospital and medical plans. It did not deduct social security tax nor withhold New York State or Federal income taxes.

8. Russel Taylor, Inc. demanded and received first call on the services of petitioner, Jerry Bander. The firm required regular and frequent reports of the activities of the petitioner, Jerry Bander. Direction was given to him to call on some accounts, and not to sell other accounts. Instructions were given as to how order blanks were to be filled out and signed. Credit approval was reserved to the officers of Russel Taylor. The technique of his selling activities was left entirely to the petitioner. Petitioner juggled his time and efforts for the several principals whose lines he sold so as to obtain maximum total sales upon which he could earn commissions.

9. Petitioner, Jerry Bander, was advised by the accountant for his major principal, Russel Taylor, Inc., that petitioner was an employee and therefore not required to file unincorporated business tax returns.

CONCLUSIONS OF LAW

A. That petitioner, Jerry Bander, was not an employee of Russel Taylor, Inc., nor of the other firms he represented as a commission salesman in the years 1965 through 1973 in accordance with the meaning and intent of section 703(b) of the Tax Law. Petitioner, Jerry Bander, was an independent contractor selling the products of non-competing firms in the coat and suit industry. None of the principals for whom petitioner sold exercised that degree of control and direction requisite to warrant petitioner's being considered an employee within the purview of the Tax Law. Matter of Britton v. State Tax Commission, 22 A.D. 2d 987 aff'd N.Y. 2d 613.

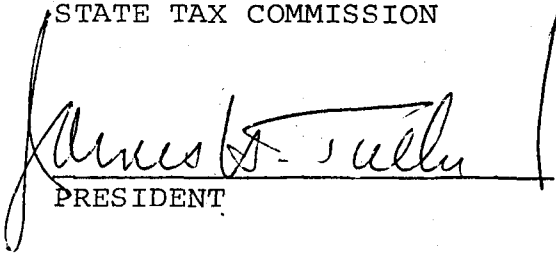
B. That petitioner, Jerry Bander, was not exempt from unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law. Section 703(f) which related to outside salesmen, is not an exemption but merely limits the factors which may be relied upon to conclude that an individual is self-employed as opposed to being a mere employee of his principal.

C. That the petitioner, Jerry Bander, relied upon what he had reasonable grounds to believe was the competent advice of a Certified Public Accountant, that he, Jerry Bander, was an employee of Russel Taylor, Inc. and was not required to file an unincorporated business tax return. The penalties on the Notice of Deficiency dated July 28, 1969, for taxable years 1965, 1966 and 1967 are cancelled.

D. That the petition of Jerry Bander is granted to the extent that the penalties under section 685(a) for the years 1965, 1966 and 1967 are cancelled and the Income Tax Bureau is directed to modify the Notice of Deficiency issued July 28, 1969, in accordance with this decision. That, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
November 18, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER