

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

AFFIDAVIT OF MAILING

STEPHEN BERKLEY and MARLENE BERKLEY
For a Redetermination of a Deficiency or
a Revision of a Determination or a Refund
of Unincorporated Business
Taxes under Article ~~(XX)~~ 23 of the
Tax Law for the Year(s) ~~xxx-xxxx(s)~~
1969 and 1971.

State of New York
County of Albany

Catherine Steele, 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 10th day of September, 1976, she served the within Notice of Decision by (certified) mail upon Stephen Berkley and Marlene Berkley (~~representative of~~) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Mr. & Mrs. Stephen Berkley
2 Meadow Lane
Roslyn Heights, New York 11577
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 ~~representative~~ ~~xxx-xxx~~ 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

10th day of September, 1976.

Catherine Steele

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
STEPHEN BERKLEY and MARLENE BERKLEY : AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article (x) 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1969 and 1971.

State of New York
County of Albany

Catherine Steele, 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 10th day of September, 1976, she served the within Notice of Decision by (certified) mail upon Seymour Greenbaum, CPA (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Seymour Greenbaum, CPA
Greenbaum & Gillman
66 North Broadway
Hicksville, New York 11801
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 (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

10th day of September, 1976

Janet Mack

Catherine Steele



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

ADDRESS YOUR REPLY TO

September 10, 1976

TELEPHONE: (518) 437-3850

Mr. & Mrs. Stephen Berkley
2 Meadow Lane
Roslyn Heights, New York 11577

Dear Mr. & Mrs. Berkley:

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

Please take further notice that pursuant to
Section **722** 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.

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. They
will be referred to the proper party for reply.

Very truly yours,

Paul E. Coburn
Supervising Tax
Hearing Officer

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
STEPHEN BERKLEY and MARLENE BERKLEY	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Taxes under Article 23 of the Tax Law for	:	
the Years 1969 and 1971.	:	

Petitioners, Stephen Berkley and Marlene Berkley, of 2 Meadow Lane, Roslyn Heights, New York 11577, have filed petitions for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1969 and 1971. (File No. 0-0001029). 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 April 2, 1976 at 10:30 A.M. Petitioners appeared by Seymour Greenbaum, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUES

I. Whether the business activities of Stephen Berkley as a multi-line outside salesman during the years 1969 and 1971 constituted the conduct of an unincorporated business under section 703 of the Tax Law.

II. Whether the petitioner, Stephen Berkley, was subject to penalties under sections 685(a)(1) and 685(a)(2) for failure to

file unincorporated business tax returns and pay unincorporated business tax for the year 1971.

FINDINGS OF FACT

1. Petitioners, Stephen Berkley and Marlene Berkley, timely filed joint income tax returns in 1969 and 1971, but did not file unincorporated business tax returns for those years.

2. A Notice of Deficiency for unincorporated business tax was issued on January 31, 1972 for the year 1969 setting forth a tax due of \$1,057.28 plus interest of \$113.80 for a total due of \$1,171.08. A similar Notice of Deficiency for unincorporated business tax for 1971 was issued on June 24, 1974 showing tax owing in the amount of \$1,061.17 plus interest of \$139.51. To this 1971 deficiency the Income Tax Bureau added a penalty under sections 685(a)(1) and (2) of \$139.51.

3. The Income Tax Bureau determined that petitioner Stephen Berkley's activities as an independent salesman constituted the carrying on of a business subject to the unincorporated business tax in 1969 and 1971. The income tax return filed for 1971 was adjusted to reduce the deduction for business expense to the amount substantiated.

4. Petitioners, Stephen Berkley and Marlene Berkley, timely filed petitions for redetermination of unincorporated business tax for 1969 and 1971 and for redetermination of the penalty assessed for 1971.

5. Petitioner Marlene Berkley did not take part in any unincorporated business in 1969 and 1971.

6. Petitioner, Stephen Berkley, was a salesman carrying several lines of women's dresses. He was paid a commission 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 was required to serve any other customers from any part of the country who visited the showroom of each of his several principals. For sales made to these buyers, or for the time spent in the showroom, the petitioner, Stephen Berkley, was paid neither a commission nor other remuneration. Petitioner was reimbursed for expenses incurred in entertaining "house accounts" or showroom visiting buyers.

7. Petitioner, Stephen Berkley, was required to go on road trips on itineraries outlined in broad perspective by each principal. Such trips were made when each principal's particular new line was ready to be shown. Expenses incurred by the petitioner on the road were borne by him without reimbursement from his principals. At trade shows where he put up displays of the new line of a given principal for the ensuing season, petitioner, Stephen Berkley, often hired a girl to assist him. He paid such labor costs out of his own pocket.

8. Petitioner, Stephen Berkley, maintained a room at his home where samples were kept, where he had a separate telephone for business, and kept his order books and records. A deduction for office expense was taken by the petitioner on Schedule C of the Federal income tax Form 1040 for each of the taxable years in question. On the said Schedule C, "Profit (or loss) from Business

or Profession," petitioner itemized business and selling expenses not reimbursed, including auto expenses, gratuities, entertainment expenses and telephone.

9. In 1969 and 1971, the petitioner, Stephen Berkley, worked principally for Schwartz & Lieberman as an outside salesman for their children's wear. He also carried the children's accessory line of Crystal Sunflowers, Inc. as a commission salesman. Both firms required the petitioner to service "house" accounts without commissions or other compensation, and to provide selling services to any customers who visited the firm's showrooms. In 1971, the petitioner also carried the line of S & B Headwear, Inc. on a straight commission basis. At various times, petitioner carried Gino Paoli, Werthley and Merrymites also. Schwartz & Lieberman, and S & B Headwear, Inc. withheld both New York State and Federal income taxes and deducted social security taxes from the compensation paid to the petitioner, Stephen Berkley. Both firms issued annual wage and tax statements, Form W-2 for 1971.

10. There was no written contract between the petitioner, Stephen Berkley, and any of the several children's wear manufacturers for whom he was an outside salesman at various times in 1969 and 1971. Each concern designated a particular territory in which the petitioner could sell. Each concern had to give petitioner the right to carry every other non-competing line of merchandise. Each concern had the right to demand that the petitioner take that firm's line on the road when that firm had it ready. Regular reports had to be made to each firm by the petitioner as to what

customers he visited, and he was required to transmit orders taken on a daily basis. None of the firms exercised control over the working hours of the petitioner. His own expertise as a salesman alone determined how he attained the maximum amount of sales for each of the several lines of merchandise he was offering at various times in 1969 and 1971. Petitioner juggled his time and efforts for the several non-competing principals so as to obtain maximum total sales upon which he could earn commissions.

11. Petitioner, Stephen Berkley, was advised by his accountant that he was not required to file unincorporated business tax returns for the years 1969 and 1971.

CONCLUSIONS OF LAW

A. That no unincorporated business tax liability has been determined against Marlene Berkley. She has no liability for unincorporated business tax or penalty. The Notice of Deficiency dated June 24, 1974 is cancelled against petitioner, Marlene Berkley.

B. That petitioner, Stephen Berkley, was not an employee in 1969 and 1971 of Schwartz & Lieberman, Werthley, Merrymites or S & B Headwear, Inc. in accordance with the meaning and intent of Section 703(b) of the Tax Law even though some of these manufacturers withheld New York State and Federal income taxes and deducted social security tax. Petitioner was an independent contractor selling the products of non-competing firms. None of the principals for whom petitioner sold exercised that degree of control and, direction requisite to warrant petitioner's being considered an employee. Matter of Britton v. State Tax Commission, 22 A.D. 2d 987 aff'd 19 N.Y. 2d 613.

C. That petitioner, Stephen Berkley, was not exempt from unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law. Tax Law, section 703(f) which relates to outside salesmen, is not an exemption but 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 principal.

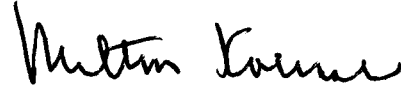
D. That the petitioner, Stephen Berkley, relied upon what he had reasonable grounds to believe was the competent advice of a Certified Public Accountant that he, Stephen Berkley, was an employee of Schwartz & Lieberman and was not required to file an unincorporated business tax return. The penalty for 1971 on the Notice of Deficiency dated June 24, 1974 under sections 685(a)(1) and (2) is cancelled.


E. That the petitions of Stephen Berkley and Marlene Berkley are granted to the extent that the penalty under sections 685(a)(1) and (2) for the year 1971 is cancelled and the Income Tax Bureau is directed to modify the Notice of Deficiency issued June 24, 1974 in accordance with this decision, and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York
September 10, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER