

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

ROBERT S. CIMINO

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 ~~(x)~~ 1973.:  
~~(x)~~

State of New York  
County of Albany

John Huhn, being duly sworn, deposes and says that  
~~x~~he is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 24th day of April, 1978, ~~x~~he served the within  
Notice of Decision by (certified) mail upon Robert S. Cimino

(~~representative of~~) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Mr. Robert S. Cimino  
143 Corwin Road  
Rochester, New York 14610

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~~  
~~x~~~~x~~~~x~~) petitioner herein and that the address set forth on said wrapper is the  
last known address of the (~~representative of~~) petitioner.

Sworn to before me this

24th day of April, 1978

*Walker*

*John Huhn*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

ROBERT S. CIMINO

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Unincorporated Business :  
Taxes under Article ~~(s)~~ 23 of the :  
Tax Law for the Year ~~(s) or Period (s)~~ 1973:

State of New York  
County of Albany

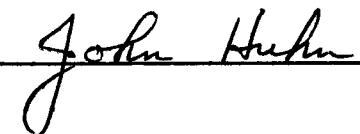
John Huhn, being duly sworn, deposes and says that  
~~she~~ he is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 24th day of April, 1978, ~~she~~ he served the within  
Notice of Decision by (certified) mail upon Robert Gitlin  
(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Robert Gitlin, Esq.  
240 Reynolds Arcade Building  
Rochester, New York 14614  
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

24th day of April, 1978

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STATE OF NEW YORK  
STATE TAX COMMISSION  
TAX APPEALS BUREAU  
ALBANY, NEW YORK 12227

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

**April 24, 1978**

**Mr. Robert S. Cimino  
143 Corwin Road  
Rochester, New York 14610**

**Dear Mr. Cimino:**

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

You have now exhausted your right of review at the administrative level. Pursuant to section **722** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within **4 months** from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

  
**Joseph Chyrywaty  
Hearing Examiner**

cc: Petitioner's Representative  
  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
ROBERT S. CIMINO	:	DECISION
for Redetermination of a Deficiency	:	
or for Refund of Unincorporated	:	
Business Tax under Article 23 of the	:	
Tax Law for the Year 1973.	:	
	:	

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Petitioner, Robert S. Cimino, 143 Corwin Road, Rochester, New York 14610, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1973 (File No. 14274).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on August 11, 1977 at 2:45 P.M. Petitioner appeared by Robert Gitlin, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUE

Whether petitioner's activities during 1973 constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Petitioner timely filed a New York State personal income tax return for the year 1973, but he did not file an unincorporated business tax return for said year.

2. The Income Tax Bureau contended that petitioner was engaged in an unincorporated business; therefore, it issued, a Notice of Deficiency on January 26, 1976 for \$414.91 in unincorporated business tax, plus \$138.99 in penalty and \$55.50 in interest, for a total due of \$609.40.

3. Petitioner was a resident of Rochester, New York, in the year 1973. He was a sales representative for Bowman Distribution, Barnes Group, Inc. of Cleveland, Ohio, and was assigned a specific territory near his Rochester, New York, home. He worked under a written salesman's agreement which designated petitioner's status to be that of an independent contractor.

4. Petitioner was paid on a semi-monthly and commission basis. Social security and disability were withheld from his compensation and he was provided with life insurance at no cost to him. A company pension plan was also available. Petitioner was required to furnish weekly written reports to his principal, in which he detailed his daily activities. His selling activities were controlled by a sales manual which outlined the nature of his duties. Despite a provision in the salesman's agreement permitting petitioner to sell noncompetitive lines, he was not permitted to do so by his principal for any other company. If he did, he would be discharged. He was required to attend meetings where he was instructed in selling techniques and promotional procedures. If petitioner was absent from or late for said meetings, a fine would be levied against him and deducted from his compensation.

5. Petitioner had space in his home for storing books and records and for writing to the main office. He did not employ assistants or have a business telephone listing. He was instructed as to which expenses he would bear himself and which would be borne by his principal. Petitioner's principal provided customer

samples at no cost to himself. Petitioner was permitted to schedule his vacation after informing his principal and was also required to use his principal's letterhead and order forms.

6. When petitioner was first accepted as a sales representative by his principal, he was given an available territory, together with established accounts for him to service. He was given a presentation book and price list from which he could not deviate. Petitioner did not attend trade shows or exhibitions, but was given new customer leads acquired at these functions. Petitioner was permitted to acquire new accounts in his own territory and was required to assume a partial liability if his account failed to pay its bill.

7. Petitioner sold obsolete items for his principal for which he received no compensation.

#### CONCLUSIONS OF LAW

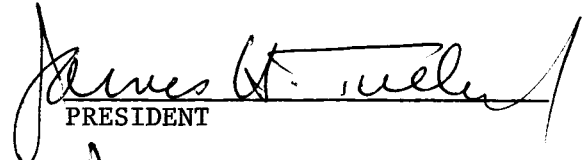
A. That petitioner's designation as an independent contractor by his employer was not determinative. The degree of direction and control exerted over him was sufficient to establish that an employer-employee relationship existed within the meaning and intent of section 703(b) of the Tax Law. Therefore, the income derived from petitioner's activities as a sales representative during the year 1973 was not subject to unincorporated business tax.

B. That the petition of Robert S. Cimino is granted and the Notice of Deficiency issued January 26, 1976 is cancelled.

DATED: Albany, New York

April 24, 1978

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER