

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
JOSEPH DI MAGGIO

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, 1970 & 1971

State of New York
County of Albany

John Huhn , 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 1 day of September , 1978, she served the within
Notice of Decision by (certified) mail upon Joseph Di Maggio

~~(representative of)~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Joseph Di Maggio
2845 Bellmore Avenue
Bellmore, New York 11710

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)~~
~~XXXXXX~~ 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

1 day of September , 1978.

John Huhn

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION

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JOSEPH DI MAGGIO

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article (a) 23 of the :
Tax Law for the Year(s) or Period(s) :
1969, 1970 & 1971

State of New York
County of Albany

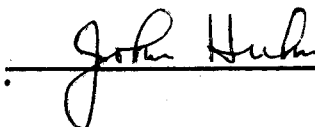
John Huhn , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 1 day of September , 1978, she served the within
Notice of Decision by (certified) mail upon Bertrand Leopld, PA
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Bertrand Leopold, PA
18 Joseph St.
New Hyde Park, NY
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

1 day of September , 1978.







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

September 1, 1978

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

**Joseph Di Maggio
2845 Bellmore Avenue
Bellmore, New York 11710**

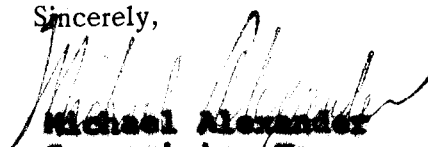
Dear Mr. Di Maggio:

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(s) **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,


**Michael Alexander
Supervising Tax
Hearing Officer**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOSEPH DI MAGGIO	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1969, 1970 and 1971.	:	

Petitioner, Joseph Di Maggio, 2845 Bellmore Avenue, Bellmore, New York 11710, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1969, 1970 and 1971 (File No. 00210).

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 July 13, 1977 at 9:15 A.M. Petitioner appeared by Bertrand Leopold, Public Accountant. The Income Tax Bureau appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether the income derived from petitioner's activities as a sales representative was income earned as an employee, or whether it was income earned as an independent contractor and thus subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Joseph Di Maggio, filed personal income tax returns for the years 1969, 1970 and 1971, but did not file unincorporated business tax returns for said years.

2. On November 7, 1973, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Joseph Di Maggio, imposing unincorporated business tax on income received by him from his activities as a salesman during the years 1969, 1970 and 1971. Accordingly, the Income Tax Bureau issued a Notice of Deficiency against him on March 25, 1974 in the amount of \$2,546.44, plus interest of \$443.37, for a total due of \$2,989.81.

3. During the years in issue, petitioner was a salesman of men's and boys' pants as well as girls' wear for two unaffiliated firms, Trifine Trouser Company (a division or subsidiary of N & M Kneepants Company) and Sharon Jay Togs, respectively. The products of each firm were noncompetitive. His sales territory for both firms was limited to New York City and Westchester County.

4. At the time it employed the petitioner, Trifine Trouser Company ("Trifine") placed the following conditions on his employment:

- 1) that petitioner was required to devote eighty percent of his working day to Trifine,

- 2) that petitioner was prohibited from representing more than two principals simultaneously, and
- 3) that Trifine would become petitioner's sole principal once his earnings from said firm substantially increased.

Sharon Jay Togs did not object to these conditions and accepted the fact that petitioner would endeavor to sell the various products of both principals to the same customers.

5. Petitioner was paid by his principals on a straight line commission basis, on orders accepted and shipped by them. He alone was also liable for covering all expenses which he incurred. However, he was partially reimbursed by Trifine for his expenses in the following manner: one percent of petitioner's commissions were set aside to cover his overall business expenses; he was also paid nominal amounts to help pay for expenses attributable to Trifine's trade shows, for which his attendance and assistance were required.

6. During the years in issue, petitioner's proportionate annual gross commission income attributable to Trifine increased by approximately twelve percent annually, while his proportionate annual gross commission income attributable to Sharon Jay Togs decreased by approximately twelve percent annually, as shown by the following table:

ANNUAL GROSS COMMISSION INCOME

<u>Company</u>	<u>1969</u>	<u>1970</u>	<u>1971</u>
Trifine	\$21,604.39	\$28,742.62	\$33,065.57
(as a percentage)	63.3	76.0	87.5
Sharon Jay Togs	\$12,542.14	\$ 9,077.08	\$ 4,710.25
(as a percentage)	36.7	24.0	12.5
Totals	\$34,145.53	\$37,319.70	\$37,775.82
Proportion (Trifine/Sharon Jay Togs)	5:3	6:2	7:1

7. Neither firm withheld Federal or New York State income taxes or social security taxes, nor did they cover him for workmen's compensation, disability, or unemployment insurance. Neither of said firms provide petitioner with fringe benefits such as a pension, group life insurance, or profit sharing. He did not receive vacation pay. At least one of the firms had a group health insurance plan which covered petitioner, but at petitioner's expense. Petitioner did not have a Keogh plan.

8. On his 1969 Federal Schedule "C", petitioner deducted business expenses of \$10,443.32, which included \$1,296.00 for depreciation and \$270.72 for purchases of samples directly from Trifine. For 1970 he deducted business expenses of \$11,369.31, which included \$1,296.00 for depreciation, \$400.00 for business rent for the office in his home and \$395.17 for samples. Similarly,

for 1971, petitioner deducted business expenses of \$11,889.16, which included \$1,296.00 for depreciation, \$400.00 for business rent for the office in his home and \$922.00 for samples. Furthermore, petitioner occasionally hired assistants to help him run shows he was required to attend and to assist him on behalf of Trifine.

9. Petitioner was required to attend Trifine's weekly sales meetings in order to receive sales projections for the week, information as to which merchandise lines were being added or withdrawn, which merchandise lines Trifine was "stuck with" (and for which sales quotas were assigned) and instructions on how to display samples. He was required to come into the warehouse during the busy season in order to help ship out orders. He was required to go and collect monies from past due accounts. The petitioner was also required to wait on customers other than his own in Trifine's showroom when there were too many customers in the showroom. He was not paid for waiting on these accounts. However, he was also expected to bring in additional accounts in the course of the year.

10. It was within the power of Trifine's owner, Max Finkle, to set prices for the merchandise sold by its sales representatives, to approve or reject sales made by its sales representatives and to resolve customer complaints.

11. Neither Trifine nor Sharon Jay Togs exercised any substantial supervision or control over his sales activities or techniques, or over the time he devoted to sales.

CONCLUSIONS OF LAW

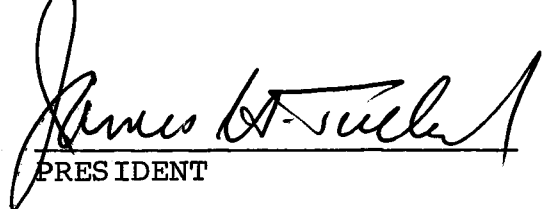
A. That the income received by petitioner, Joseph Di Maggio, from the firms he represented during 1969, 1970 and 1971 constituted income from his regular business of selling men's and boys' pants and girls' wear and not compensation as an employee exempt from the imposition of unincorporated business tax, in accordance with the meaning and intent of section 703(b) of the Tax Law.

B. That the aforementioned activities of petitioner, Joseph Di Maggio, during 1969, 1970 and 1971 constituted the carrying on of an unincorporated business; thus, 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 the petition of Joseph Di Maggio is denied and the Notice of Deficiency issued on March 25, 1974 (with respect to the years 1969 to 1971, inclusive) is sustained, together with such additional interest as may be lawfully due.

DATED: Albany, New York
September 1, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER