

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

BERNARD ROTHBERGER

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 (XXXX Period) 1974 :

State of New York  
County of Albany

John Huhn

, being duly sworn, deposes and says that

He is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 13th day of September, 1978, He served the within  
Notice of Decision by (certified) mail upon Bernard Rothberger

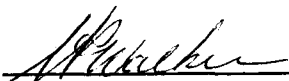
~~XXXXXXXXXXXXXXXXXXXX~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Bernard Rothberger  
150-08 78th Avenue  
Flushing, New York 11367

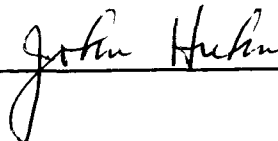
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

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

Sworn to before me this

13th day of September, 1978.





STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
BERNARD ROTHBERGER

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Unincorporated Business :  
Taxes under Article ~~(§)~~ 23 of the :  
Tax Law for the Year ~~(§§§§§§§§§§)~~ 1974 :

State of New York  
County of Albany

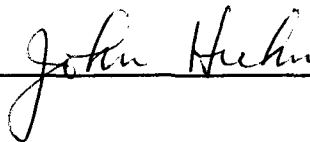
John Huhn , being duly sworn, deposes and says that  
~~He~~ is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 13th day of September , 19 78, ~~He~~ served the within  
Notice of Decision by (certified) mail upon Bertrand Leopold  
(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Bertrand Leopold  
18 Joseph Street  
New Hyde Park, New York  
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

13th day of September , 19 78.







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

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

**September 13, 1978**

**Bernard Rothberger  
150-08 78th Avenue  
Flushing, New York 11367**

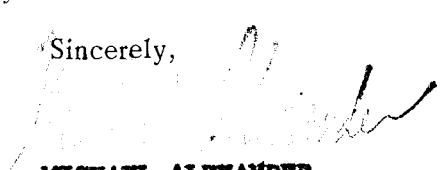
**Dear Mr. Rothberger:**

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 **(a) 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

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In the Matter of the Petition :  
of :  
BERNARD ROTHBERGER : DECISION  
for Redetermination of a Deficiency or :  
for Refund of Unincorporated Business :  
Tax under Article 23 of the Tax Law for :  
the Year 1974. :

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Petitioner, Bernard Rothberger, 150-08 78th Avenue, Flushing, New York 11367, 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 1974 (File No. 14012).

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 10:45 A.M. Petitioner appeared by Bertrand Leopold, tax consultant. The Income Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioner's selling activities during 1974 constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Petitioner, Bernard Rothberger, and his wife filed a New York State combined income tax return (Form IT-208) for the year 1974, but he did not file a New York unincorporated business tax return for 1974.

2. On January 26, 1976, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Bernard Rothberger, imposing unincorporated business tax on the total business income reported by petitioner, as derived from his activities as an "outside salesman" during 1974. The Income Tax Bureau showed the computation of unincorporated business tax alleged to be due. The Statement of Audit Changes stated that:

"Based on the decision of the State Tax Commission dated May 28, 1975 for the tax year 1970, your business activities reported are held to constitute the carrying on of an unincorporated business and income derived is subject to the unincorporated business tax."

In accordance with the Statement of Audit Changes, the Income Tax Bureau issued a Notice of Deficiency dated January 26, 1976 in the amount of \$713.24, plus interest of \$47.50, for a total allegedly due of \$760.74.

3. During 1974 petitioner Bernard Rothberger was a commission traveling salesman of women's sweaters, scarves and accessories. He represented Sally Gee, Inc., an unaffiliated firm, Sheridan and a subsidiary of Sheridan called Checkmate. The products sold by petitioner, Bernard Rothberger, for the several firms were generally non-competitive items. However, Sally Gee developed a line of sweaters which the firm deemed to be in competition with Sheridan. Sally Gee then required petitioner, Bernard Rothberger, to drop the Sheridan line if he wished to continue to represent Sally Gee. Sally Gee was considered by petitioner to be his main source of income, so he dropped the Sheridan line. The lines were sold to substantially the same customers.

4. Sally Gee paid petitioner, Bernard Rothberger, on a straight commission basis with a guaranteed draw of \$150.00 per week. Federal and New York State income taxes, social security and disability insurance were withheld from the draw. Sally Gee covered petitioner, Bernard Rothberger, for unemployment, workmen's compensation and health insurance. The other two firms which petitioner represented withheld no taxes and did not cover Bernard Rothberger for the above-mentioned types of insurance.

None of the three firms reimbursed petitioner, Bernard Rothberger, for his business expenses incurred in selling their respective products. Each required that petitioner, Bernard Rothberger, service 'house accounts' (for which no commission was paid) and spend designated time on showroom duties, usually a day a week or a day every other week.

5. Petitioner, Bernard Rothberger, had no employees in 1974. He maintained an office in the basement of his home. Business expenses were deducted from gross commissions on the Federal income tax return of petitioner, Bernard Rothberger, for 1974. Petitioner did not file a Schedule "C" with his Federal tax return on the Form 1040 for 1974.

6. Petitioner, Bernard Rothberger, allocated his time and selling efforts to the three lines, and then to two when he dropped one, in accordance with his own determination of how to achieve optimum sales results. The principal firms restricted the territory in which he could solicit business to the New York

metropolitan area. Each firm had final say on credit and what items to push, but otherwise exercised only general supervision over the selling activities of petitioner, Bernard Rothberger. About sixty-five per cent of petitioner's efforts were devoted to Sally Gee in 1974.

#### CONCLUSIONS OF LAW

A. That the income received by petitioner, Bernard Rothberger, from the firms that he represented during 1974 constituted income from his regular business of selling ladies' sportswear 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.

In citing with approval the Matter of Britton v. State Tax Commission, 22 A.D. 2d 987, aff'd 19 N.Y. 2d 613, the Court of Appeals in Liberman v. Gallman, 41 N.Y. 2d. 774, 779 stated: "It has consistently been held that salesmen are not employees where they are not subject to direction or control as to the manner in which they are to make sales, by the concerns whose products they sell." (Matter of Hardy v. Murphy, 29 A.D. 2d. 1038, 1039, 20 NYCRR 203.10)

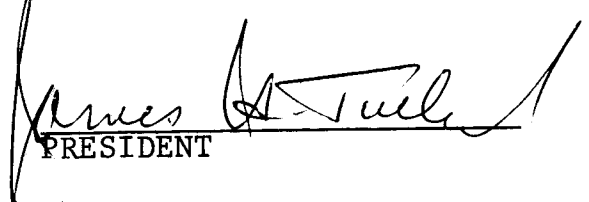
B. That petitioner failed to carry the burden of proof required to show that he is under the direction and control of his principal, so as to be an employee rather than an independent contractor.

C. That the activities of petitioner, Bernard Rothberger, during 1974 constituted the carrying on of an unincorporated business and that his income derived therefrom was subject to unincorporated business tax in accordance with the meaning and intent of sections 701 and 703 of the Tax Law.

D. That the petition of Bernard Rothberger is denied and the Notice of Deficiency issued January 26, 1976 is in all respects sustained.

DATED: Albany, New York  
September 13, 1978

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER