

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

HENRY WEISSER

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)~~ :
1967 through 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 5th day of April, 1978, he served the within
Notice of Decision by (certified) mail upon Henry Weisser
(~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Mr. Henry Weisser
1065 Park Avenue, Apt. 18-D
New York, New York 10028

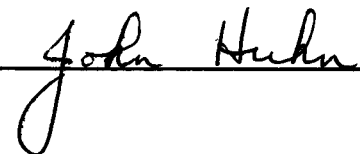
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

5th day of April, 1978.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

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HENRY WEISSER

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(s) ~~1967 through 1974~~ :
1967 through 1974.

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 5th day of April , 1978, ~~she~~ served the within
Notice of Decision by (certified) mail upon Samuel Speyer

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Samuel Speyer, CPA
Speyer and Baylor
22 East 40th Street
New York, New York 10016

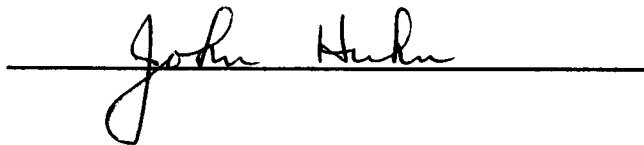
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

5th day of April , 1978







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 5, 1978

**Mr. Henry Weissner
1065 Park Avenue, Apt. 18-D
New York, New York 10028**

Dear Mr. Weissner:

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,

**Joseph Chyrywaty
Hearing Examiner**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
HENRY WEISSER : DECISION
for Redetermination of a Deficiency or :
for Refund of Unincorporated Business :
Tax under Article 23 of the Tax Law for :
the Years 1967 through 1974. :
:

Petitioner, Henry Weissner, 1065 Park Avenue, Apt. 18-D, New York, New York 10028, 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 1967 through 1974 (File Nos. 14019 and 14523).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 25, 1977 at 2:45 P.M. The petitioner appeared with Samuel Speyer, CPA. 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 salesman during the years 1967 through 1974 was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Henry Weissner, filed New York State income tax resident returns for the years 1967 through 1974. However, he did not file unincorporated business tax returns for said years.

2. On July 29, 1974 and February 24, 1976, the Income Tax Bureau issued notices of deficiency against petitioner, imposing unincorporated business taxes for the years 1967 through 1970 and 1971 through 1974, respectively. It did so on the grounds that the income petitioner received from his activities as a sales representative was subject to unincorporated business tax.

3. Petitioner was a salesman for Vogue Dolls, Inc. ("Vogue") during the years 1967 through 1974. He was paid on a commission basis by Vogue. This principal did not withhold payroll taxes from his income and he was not reimbursed for the selling expenses which he incurred. Petitioner claimed deductions for such selling expenses as gas and oil, auto rental, air, railroad and bus travel, hotels, telephone, stationary and postage, taxis, tolls and parking, food and entertainment, demonstrators, freight, catalogues, samples, displays and a "cooperative advertising expense". The cooperative advertising expense resulted from petitioner's sharing the cost of advertising with Vogue.

4. During the years in issue, petitioner reported commission income and selling expenses on Federal schedule "C". He paid self-employment taxes during said years.

5. Petitioner asserted that he was assigned a specific territory by Vogue and that his sales activities were subject to supervision and control by the firm's sales manager. He also asserted that he rendered other services to Vogue, such as assisting in the design, development and formulation of new lines. He was not, however, compensated for these other services. Vogue did not cover petitioner for such employee benefits as health insurance, group insurance, unemployment or disability insurance, paid vacation or a retirement plan.

6. Petitioner was permitted by Vogue to sell a noncompeting line for the firm "Tudor Metals", but he was not free to undertake other lines or represent other principals without the approval of Vogue. Petitioner's selling activities for Tudor Metals were performed simultaneously with his selling activities for Vogue, without a clear division of time and effort between said principals. His activities on behalf of Tudor Metals were not supervised or controlled by said firm.

7. Petitioner did not have a written employment contract with either of his principals during the years in issue.

8. Petitioner relied upon the advice of his representative, Samuel Speyer, CPA, that he was not required to file unincorporated business tax returns for the years 1967 through 1974.

CONCLUSIONS OF LAW

A. That the petitioner did not sustain the burden of proof required to establish that Vogue exercised sufficient direction and control over his sales activities during the years in issue to result in an employee-employer relationship in accordance with the meaning and intent of section 703(b) of the Tax Law, 20NYCRR 203.10(b) and its predecessor 20NYCRR 281.3.

B. That the activities of petitioner on behalf of Vogue and Tudor Metals during the years 1967 through 1974 constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law. His income derived therefrom was subject to unincorporated business tax in accordance with the meaning and intent of section 701 of the Tax Law.

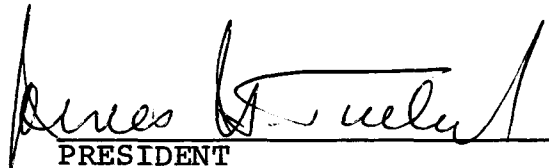
C. That the petitioner had reasonable cause for failing to file unincorporated business tax returns for the years 1967 through 1970 and, therefore, the penalties imposed in accordance with section 685(a) of the Tax Law for the years 1967 and 1968 and with sections 685(a)(1) and 685(a)(2) of the Tax Law for the years 1969 and 1970, are cancelled.

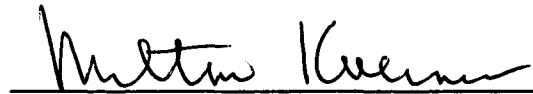
D. That the petition of Henry Weisser is granted to the extent shown in Conclusion of Law, "C", above; that the Income Tax Bureau is hereby directed to accordingly modify the Notice of Deficiency issued July 29, 1974 for the years 1967, 1968,

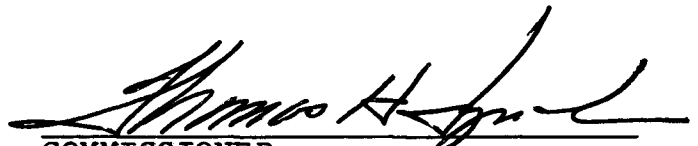
1969 and 1970; that the Notice of Deficiency issued February 24, 1976 for the years 1971, 1972, 1973 and 1974 is sustained, and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
April 5, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER