

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
EDWARD BIRNBAUM

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)~~ :
1967 through 1973

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 24th day of January, 1979, she served the within
Notice of Decision by (certified) mail upon Edward Birnbaum

~~representative of~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Edward Birnbaum
110-12 Queens Blvd.
Forest Hills, NY 11375

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 January, 1979

Marilyn J. Papineau

John Huhn



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

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

January 24, 1979

Mr. Edward Birnbaum
110-12 Queens Blvd.
Forest Hills, New York 11375


Dear Mr. Birnbaum:

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,


Joseph Chyrywat
Hearing Examiner

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
EDWARD BIRNBAUM : 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 1973. :
:

Petitioner, Edward Birnbaum, 110-12 Queens Boulevard, Forest Hills, New York 11375, 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 1973 (File Nos. 13917, 13918 and 13919).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 18, 1978 at 2:45 P.M. Petitioner appeared pro se and by Irving Hiller, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner's sales activities during the years 1967 through 1973 constituted the carrying on of an unincorporated business, within the meaning and intent of section 703(a) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Edward Birnbaum, timely filed New York State personal income tax returns for the years 1967 through 1973. He did not file unincorporated business tax returns for said years.

2. The Income Tax Bureau contended that petitioner was engaged in an unincorporated business and that the income derived therefrom was subject to unincorporated business tax. Accordingly, it issued a Notice of Deficiency against petitioner for 1967, 1968 and 1969 on May 22, 1972 for \$2,576.52 in unincorporated business tax, plus \$747.63 in penalty and \$460.48 in interest, for a total of \$3,784.63. A Notice of Deficiency for 1970 was issued on September 30, 1974 for \$1,206.87 in unincorporated business tax, plus \$524.99 in penalty and \$177.97 in interest, for a total of \$1,909.83. A Notice of Deficiency for 1971 was issued on September 30, 1974 for \$1,063.88 in unincorporated business tax, plus \$398.95 in penalty and \$156.88 in interest, for a total of \$1,619.71. Finally, a Notice of Deficiency for 1972 and 1973 was issued on June 30, 1975 for \$2,542.85 in unincorporated business tax, plus \$292.64 in interest, for a total of \$2,835.49.

3. From 1954 to July of 1974 (at which time he was discharged), petitioner performed selling services for Northwick Mills, Inc. and its subsidiary, Concord Mills, Inc. Both corporations were located in the same office at 295 Fifth Avenue, New York, New York. Both utilized the same clerical staff and had the same telephone numbers. During the years at issue, petitioner was provided with office space and the use of office facilities, as well as clerical help, at no cost to himself.

4. From 1954 through 1966, petitioner performed selling services as an outside salesman on a salary-draw-against-commission basis. He was issued withholding tax statements and income taxes and social security were withheld from his

compensation. Petitioner contended that the corporations' "principal" requested that he assume the title of manufacturer's representative, receive a greater rate of commission and pay his own expenses. This would enhance his personal position with customers, as well as increase his productivity and net earnings in his territory and, thus, be more economical for his principal. Petitioner agreed to this arrangement. In 1967 his principal stopped withholding income taxes and social security from his compensation, but continued to provide major medical and life insurance coverage to petitioner at no cost to him. Petitioner filed Federal Schedule "C" in order to claim deductions for outside salesman's expenses which he incurred. He received Federal Form 1099 (rather than a wage and tax statement) and paid self-employment tax. Except for these changes, he continued to perform the same services in the same manner and under the same conditions as he did prior to 1967.

5. Petitioner, Edward Birnbaum, contended that when he first received correspondence from the Income Tax Bureau in 1971, he approached his principal and requested that he be put on the same basis as the one used prior to 1967. His principal agreed. Thereafter (starting in 1972), petitioner was again issued wage and tax statements which showed income taxes and social security withheld. Petitioner further contended that his former accountant erroneously entered his occupation as that of "self-employed" or "manufacturer's representative" on five of the seven income tax returns filed for the years at issue.

6. During the years at issue, petitioner traveled twenty to thirty weeks each year. He reported by telephone to his principal each day. He sold rugs for Northwick Mills, Inc. and bedspreads for Concord Mills, Inc. He was told which accounts to call on and was instructed to pick up new accounts in his territory which consisted of Baltimore, Washington, upstate New York and the New York

metropolitan area. When not traveling, petitioner would sell at the New York office of his principal. He was supervised by a sales manager and also by the owners of the corporations. Petitioner was required to report on all customers called on and also to advise his principal as to general business conditions and problems within his territory. He was not permitted to sell for any other principal.

7. Petitioner was required to attend sales meetings, at which he was instructed on how he should present items to customers. Petitioner has no letter-heads or business cards of his own. He was given company order forms and also business cards which contained the principal's and petitioner's names. The cards did not have petitioner's title imprinted on them.

8. Petitioner did not guarantee accounts, nor did he hire assistants. He had no office of his own and never held himself out to the public as being in business for himself.

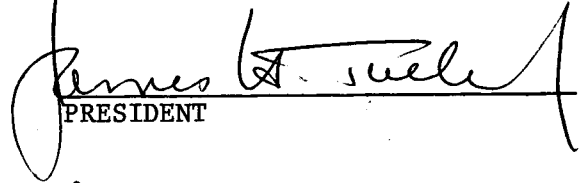
CONCLUSIONS OF LAW

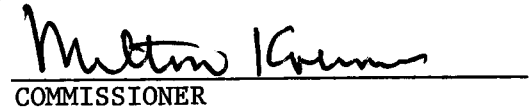
A. That petitioner, Edward Birnbaum's sales activities during the years 1967 through 1973 did not constituted the carrying on of an unincorporated business, in accordance with the meaning and intent of section 703(a) of the Tax Law. Rather, said activities constituted the performance of services as an employee, in accordance with section 703(b) of the Tax Law.

B. That the petition of Edward Birnbaum is granted and the notices of deficiency issued May 22, 1972, September 30, 1974, and June 30, 1975 are hereby cancelled.

DATED: Albany, New York
January 24, 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER