

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Paul Levine :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Unincorporated Business Tax :

under Article 23 of the Tax Law

for the Years 1967 - 1969. :

State of New York

County of Albany

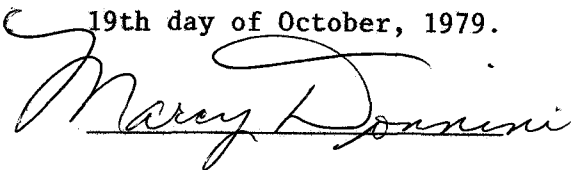
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of October, 1979, he served the within notice of Decision by certified mail upon Irwin Gedinsky the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

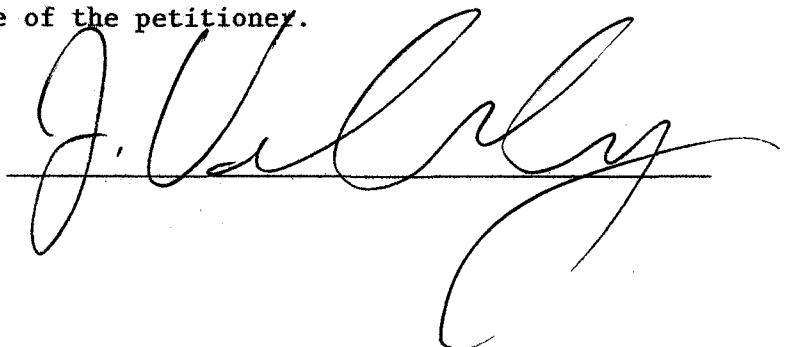
Mr. Irwin Gedinsky
1605 Vauxhall Rd.
Union, NJ

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
19th day of October, 1979.


Mary Donneni


J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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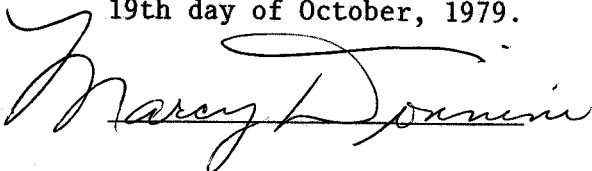
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of October, 1979, he served the within notice of Decision by certified mail upon Paul Levine, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

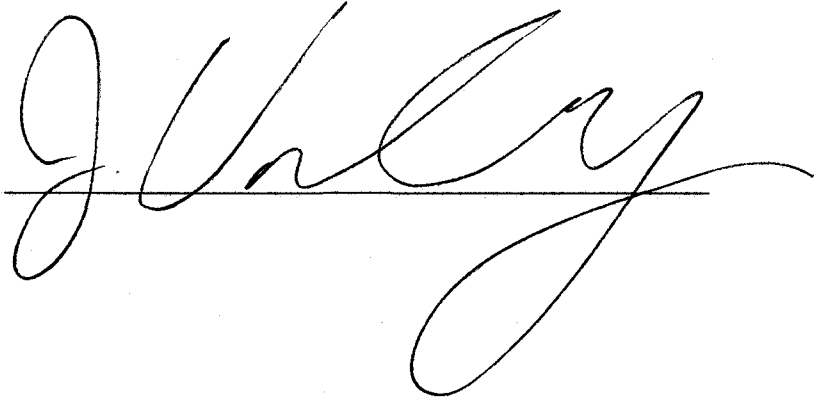
Paul Levine
315 E. 68th St.
New York, NY

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
19th day of October, 1979.





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

October 19, 1979

Paul Levine
315 E. 68th St.
New York, NY

Dear Mr. Levine:

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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Irwin Gedinsky
1605 Vauxhall Rd.
Union, NJ
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
PAUL LEVINE
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax
under Article 23 of the Tax Law for the
Years 1967, 1968 and 1969.

DECISION

Petitioner, Paul Levine, 315 East 68th Street, New York, New York, 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, 1968 and 1969 (File No. 13831).

A formal hearing was held before Neil Fabricant, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 24, 1977 at 3:15 P.M. Petitioner appeared by Irwin Gedinsky, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Louis Senft, Esq., of counsel).

ISSUE

Whether commissions paid to petitioner by Lexington International Incorporated during 1967, 1968 and 1969, were subject to unincorporated business income tax.

FINDINGS OF FACT

1. Petitioner, Paul Levine, timely filed New York State unincorporated business income tax returns for 1967, 1968 and 1969.

2. On August 12, 1970, petitioner applied for a refund of unincorporated business taxes paid for 1967, 1968 and 1969. He contended that the taxes which were paid related to compensation which he earned as an employee, rather than income derived from the carrying on of an unincorporated business.

3. On December 15, 1970, the Income Tax Bureau mailed petitioner a Waiver of Statutory Notification of Claim Disallowance, which he did not sign. Petitioner filed a timely petition.

4. Subsequently, a formal Notice of Disallowance was mailed to petitioner, since he did not respond within the time provided. The uncontroverted evidence provided by the testimony of petitioner and his representative, Mr. Gedinsky, was as follows:

- (a) Petitioner devoted his time and energies solely and exclusively to the business of Lexington International Incorporated.
- (b) Petitioner was vice-president of Lexington International, Incorporated.
- (c) Petitioner was provided with office space at the offices of Lexington International Incorporated, 655 Madison Avenue, New York, New York, at no cost to him.
- (d) Petitioner was furnished with secretarial and/or stenographic services by and at the offices of Lexington International, Incorporated at no cost to him.
- (e) Petitioner had fixed working hours, normally from 9:00 A.M. to 5:00 P.M. (or longer), at the offices of Lexington International, Incorporated, except when he was away from the office for appointments relating to the business of Lexington International, Incorporated.
- (f) Petitioner was in telephone contact with the offices of Lexington International, Incorporated, specifically with its president, Herbert Golden, on a daily basis during his absences from the office.
- (g) Petitioner's vacation schedule was fixed.
- (h) All business dealings pursued or concluded by petitioner were carried on under the constant and direct supervision, and with the participation of Mr. Golden, whether such dealings were suggested and/or initiated by petitioner.
- (i) Petitioner was subject to termination of his association with Lexington International, Incorporated by Mr. Golden at any time.
- (j) Petitioner filed a Schedule C with his Federal income tax returns and his unincorporated business tax returns, on which he claimed various expense items.
- (k) Petitioner also received reimbursements from Lexington International, Incorporated for some expenses.
- (l) As the result of petitioner's activities, Lexington International, Incorporated received fees from its customers or clients. These fees were paid directly to Lexington International, Incorporated and petitioner was then paid, as his commission, one-third of the aggregate fee received by the corporation.

6. During a portion of the period in question, petitioner was a participant in the "Lexington Employees Profit-Sharing Plan."

CONCLUSIONS OF LAW

A. That Lexington International, Incorporated exerted sufficient control over petitioner's activities to permit his designation as an employee, within the meaning and intent of section 703(b) of the Tax Law. Accordingly, petitioner's activities did not constitute the carrying on of an unincorporated business under section 703(a) of the Tax Law.

B. That the petition of Paul Levine for refund of unincorporated business tax under Article 23 of the Tax Law for 1967, 1968 and 1969 is granted.

DATED: Albany, New York

OCT 19 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER