

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Theodore Bauer :

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 1968 - 1971. :

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Theodore Bauer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Theodore Bauer
50 Fairway Rd.
Lido Beach, NY 11561

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
7th day of July, 1980.

Deborah A. Brink

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Theodore Bauer

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 1968 - 1971. :

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Alvin I. Goidel 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. Alvin I. Goidel
Goidel, Goidel & Helfenstein, P.C.
127 John St.
New York, NY 10038

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
7th day of July, 1980.

Robert A. Bank

J. J. Vredenburg

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

July 7, 1980

Theodore Bauer
50 Fairway Rd.
Lido Beach, NY 11561

Dear Mr. Bauer:

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
Alvin I. Goidel
Goidel, Goidel & Helfenstein, P.C.
127 John St.
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
THEODORE BAUER	:	DECISION
for Redetermination of Deficiencies or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1968	:	
through 1971.	:	

Petitioner, Theodore Bauer, 50 Fairway Road, Lido Beach, New York 11561, filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1968 through 1971 (File Nos. 14342, 14343 and 14344).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 19, 1978 at 1:15 P.M. Petitioner appeared by Goidel, Goidel & Helfenstein, P.C. (Bruce S. Leffler, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Samuel J. Freund, Esq., of counsel).

ISSUE

Whether petitioner's activities constituted the carrying on of a trade, business or occupation subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Theodore Bauer, and his wife, Rose Bauer, timely filed joint New York State income tax resident returns for the years 1968 through 1970. They timely filed a combined resident return for 1971. On the 1968 and 1969 return, Mr. Bauer listed his occupation as "Sales Representative". The 1970 and 1971 returns did not show an occupation. Petitioner did not file unincorporated business tax returns for the years at issue.

2. On April 19, 1971, the Income Tax Bureau issued a Statement of Audit Changes against Theodore Bauer for the years 1968 and 1969, holding his income as a sales representative subject to unincorporated business tax and imposing a penalty, for 1968, under section 685(a) of the Tax Law then in effect and for 1969 under section 685(a)(1) and (a)(2) of the Tax Law.

On February 19, 1973, the Income Tax Bureau issued a Statement of Audit Changes against Theodore Bauer for the year 1970 on the basis that income from his business activities was subject to unincorporated business tax.

On February 24, 1975, the Income Tax Bureau issued a Statement of Audit Changes against Theodore Bauer for the year 1971 on the basis that his activities prior to incorporating on June 3, 1971 were subject to unincorporated business tax. It also prorated his business exemption over 154 days of operation as an unincorporated business.

3. On July 26, 1971, the Income Tax Bureau issued a Notice of Deficiency to petitioner for the tax years 1968 and 1969, indicating a deficiency of \$2,431.37, plus penalty and interest. On October 28, 1974, the Income Tax Bureau issued a Notice of Deficiency to petitioner for 1970, indicating a deficiency of \$1,515.91, plus interest. On February 24, 1975, the Income Tax Bureau issued a Notice of Deficiency to petitioner for 1971, indicating a deficiency of \$1,004.08, plus interest.

4. During the years in question, petitioner, Theodore Bauer, represented five companies in the baby furniture and accessory business as a salesman. Petitioner worked exclusively on a commission basis.

5. Each of the companies which petitioner represented assigned him to a specific geographical territory. The territory for both the Peterson Company and Questar Corporation (which accounted for a large percentage of his commissions)

was the five boroughs of New York City, Westchester, Nassau and Suffolk counties and New Jersey, excluding Camden County.

Within this territory, there were specific accounts which petitioner could not handle. For example, he could not sell to major department stores such as Macy's, Gimbel's and Bloomingdale's.

6. Petitioner usually determined the order in which he visited his accounts on the basis of geographical convenience. He was not required to submit itineraries to a sales manager for approval. Petitioner did not stay in close telephone contact with the companies he represented while he was on the road. When he was ill, some companies would require that he call in sick, while others did not.

7. When petitioner solicited an order, he would write the order down on order blanks provided by each company.

8. From time to time, the companies would ask petitioner to visit an account for various reasons. When requested to visit an account, petitioner considered the request to be an obligation. From time to time, he would be asked to accompany a company sales manager to visit accounts.

The companies required petitioner to attend seminars or to give lectures at the stores which he serviced. These seminars and lectures totaled twelve to sixteen days a year.

9. Each Friday throughout the year, petitioner was required to work in a showroom in Manhattan, where three of the companies which he represented jointly rented space to display merchandise. Petitioner's job on Fridays was to sell to anyone who came through the door. If the customer was not from within his territory, petitioner would still service the customer, but would receive no commission from the sale.

10. Occasionally a company represented by petitioner would request that he buy a competitive item and send it to its factory. Sometimes he would help select patterns for the companies.

11. None of the companies withheld income or social security taxes for petitioner. He asked them to do so, but was told that the companies believed that they would incur additional taxes if they put salesmen on their payroll. None of the companies provided petitioner with a health, pension or profit-sharing plan.

12. In July of 1971, petitioner created a corporation called Ted Bauer, Inc. He incorporated because among other reasons, he and his wife were planning to handle some imported goods on their own.

CONCLUSIONS OF LAW

A. That New York State imposes a tax on the income of every unincorporated business wholly or partially carried on within the State (Section 701(a) of the Tax Law). Section 703(a) of the Tax Law defines an unincorporated business as any trade, business or occupation conducted, engaged in, or being liquidated by an individual or an unincorporated entity. However, "[t]he performance of services by an individual as an employee of a corporation ... shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual." (Section 703(b) of the Tax Law). Section 703(f) of the Tax Law provides that "an individual, other than one who maintains an office ... or who otherwise regularly carries on a business, shall not be deemed engaged in an unincorporated business solely by reason of selling goods ... for more than one enterprise."

B. That "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, 289 N.Y.S. 2d 694, 697. In Lieberman v. Gallman, 41 N.Y. 2d 774, 396 N.Y.S. 2d 159, the Court of Appeals stated that "In the absence of supervision and control of the sales routine, salesmen do not become employees."

In Lieberman v. Gallman, supra, the selection of locations to be visited and the timing of the visits were left primarily to Liberman's discretion; however, periodically, the company would direct him to visit particular sales areas or customers. Also, as in the present case, the company occasionally required Liberman to concentrate on specific duties and to attend to specific accounts.

C. That for the most part, the companies which petitioner represented did not exercise supervision and control over his sales routine. Petitioner usually determined the order of visits to accounts on his own. He was not required to submit itineraries for approval, nor did he stay in close telephone contact with the companies he represented while visiting accounts. This is much the same situation as in Lieberman v. Gallman, supra, where "Petitioner conducted solicitations of business while traveling on his own ..., and his selection of sales approaches was primarily a matter of personal style and discretion [T]he manner in which customers would be approached and persuaded to purchase was solely within Liberman's control." (p. 162)

It is true that the companies occasionally required petitioner to call on specific accounts; that on occasion he had to accompany sales managers on visits to accounts; that he had to participate in seminars and lectures and be present at the Manhattan showroom each Friday. For most of the time, however, petitioner worked on his own, free from supervision and control of his sales

routine and, thus, must be considered to be an independent contractor rather than an employee.

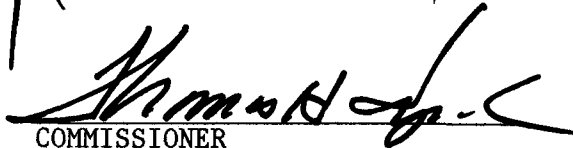
D. That for the tax years in dispute, petitioner's tax returns were prepared by an accountant. Petitioner is neither an accountant nor a lawyer. Petitioner did not willfully neglect to file unincorporated business tax returns for the years in dispute and accordingly, the penalty asserted against petitioner under section 685(a) for 1968 and section 685(a)(1) and (a)(2) for 1969 on the Notice of Deficiency dated July 26, 1971 is cancelled.

E. That the petitions of Theodore Bauer are granted to the extent indicated in Conclusion of Law "D" and the Audit Division is directed to accordingly modify the Notice of Deficiency dated July 26, 1971. That the Notice of Deficiency dated July 26, 1971 as modified and the notices of deficiency dated October 28, 1974 and February 24, 1975 are sustained.

DATED: Albany, New York
JUL 07 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER