

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Robert Bien

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 1965 - 1973. :

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 18th day of July, 1980, he served the within notice of Decision by certified mail upon Robert Bien, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

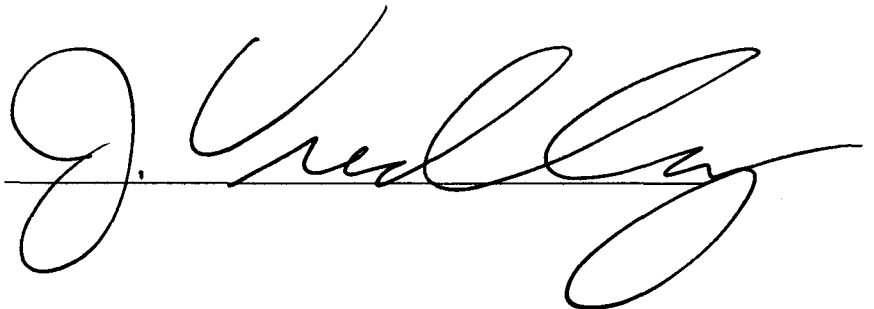
Robert Bien
521 May La.
East Meadow, NY 11554

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
18th day of July, 1980.

Rebecca A. Bank



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Robert Bien

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Unincorporated Business Tax :
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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 18th day of July, 1980, he served the within notice of Decision by certified mail upon Alvin I. Goidel and Bruce S. Leffer the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

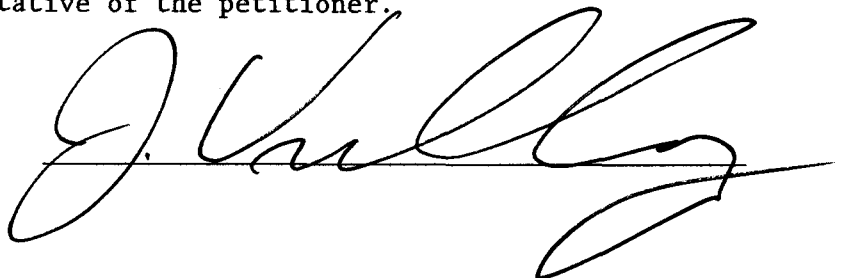
Sirs Alvin I. Goidel and Bruce S. Leffer
Goidel, Goidel & Helfenstein, P.C.
127 John St.
New York, NY 10038

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
18th day of July, 1980.

Debbie A. Bank



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

July 18, 1980

Robert Bien
521 May La.
East Meadow, NY 11554

Dear Mr. Bien:

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 and Bruce S. Leffer
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	:	
	:	
ROBERT BIEN	:	DECISION
	:	
for Redetermination of Deficiencies or	:	
for Refund of Unincorporated Business	:	
Taxes under Article 23 of the Tax Law	:	
for the Years 1965 through 1973.	:	

Petitioner, Robert Bien, 521 May Lane, East Meadow, New York 11554, filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1965, 1966 and 1967 (File No. 14349) and a separate petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1968 through 1973 (File No. 14348).

A consolidated formal hearing was held before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 20, 1978 at 1:25 P.M. Petitioner appeared by Alvin I. Goidel, Esq. (Bruce S. Leffler, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the business activities of petitioner, Robert Bien, as a manufacturer's representative or salesman for the years 1965 through 1973, constituted the carrying on of an unincorporated business, thereby subjecting petitioner to the unincorporated business tax of this State.

FINDINGS OF FACT

1. Petitioner, Robert Bien, timely filed New York State income tax resident returns for the years 1965 through 1973, listing his address as 521

May Lane, East Meadow, New York. Petitioner did not file unincorporated business tax returns for those years.

2. On May 24, 1971, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against petitioner imposing additional income tax for the years 1965, 1966 and 1967 of \$2,324.50, plus interest of \$561.27, making a total of \$2,885.77, on the ground that income received in said years as an independent sales agent or manufacturer's representative was subject to unincorporated business tax.

3. On October 28, 1974, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against petitioner imposing additional income tax for the years 1968 through 1973 of \$5,980.44, plus interest of \$1,239.58, making a total of \$7,220.02, on the ground that income received in that year as an independent sales agent or manufacturer's representative was subject to unincorporated business tax.

4. Petitioner timely filed petitions for redetermination of the deficiency or for refund of unincorporated business taxes, with respect to each of the aforesaid notices of deficiency, challenging the constitutionality of the application of the Tax Law and claiming an exemption as a sales representative under section 703(f) of the Tax Law.

5. For 1965 and 1967 through 1969, petitioner listed his occupation on his New York State income tax returns as manufacturer's representative. Thereafter, for 1970 through 1973, petitioner's occupation was listed as "outside salesman" or, merely "salesman". In any event, petitioner's New York State income tax returns disclosed substantial "business income" from his performance of services in such occupations but no wage and tax statements were offered with respect to the principals from whom petitioner received payment for such services.

6. During the years in question, petitioner performed services as a sales representative without a written contract for Lewittes Furniture Enterprises, Inc. (hereinafter "Lewittes"), Crawford Furniture, Inc. (hereinafter "Crawford") and, to a much lesser degree, Frazier & Son, Inc. Petitioner did not perform services directly for Crawford, but, rather, was a subagent or subcontractor to one Harold Strasser, who had the Crawford account and who engaged and paid said petitioner and one other as sales representatives to cover his (Strasser's) assigned territory.

7. Petitioner earned approximately 90 percent of his total income from Lewittes, and the balance, substantially by reason of the services he performed, on behalf of Strasser for Crawford.

8. While petitioner was subject to some degree of control and direction in the performance of his duties as a sales representative for Lewittes (primarily with respect to cost controls, internal procedures of the company, attendance at market shows three or four times annually, attendance in the company's showroom every Friday, and the territory and accounts which he could or could not service, for credit or other reasons), the preponderance of credible evidence establishes that petitioner was not subject to the control and direction of any principal in the manner in which he approached customers and persuaded them to make purchases; petitioner was not subject to the will and control of any superior to whom he reported with respect to the means and methods of obtaining a particular result; petitioner arranged his own travel itinerary and appointments; petitioner set his own daily work schedule; petitioner could represent other principals so long as their lines did not conflict with that of any principal; there was no division of time and effort between the principals; petitioner bore the cost and expense of his duties as a sales representative, including, a home office, telephone, part-time secretary, file clerk, stationery

and the like, all without reimbursement from any principal; petitioner deducted all such expenses on his Federal income tax return as business expenses; petitioner was paid on a straight commission basis by all of his principals; petitioner's business card bears only his name, not that of any principal, and his home and business address as shown thereon is one and the same; petitioner maintains no office, desk space or telephone at the place of business of any principal; petitioner is not provided with vacation, workmen's compensation, unemployment insurance, retirement, health or hospitalization benefits by any of his principals; petitioner did not have withholding or social security taxes deducted from his income by any principal.

CONCLUSIONS OF LAW

A. That the constitutionality of the laws of the State of New York is presumed at the administrative level and the New York State Tax Commission does not have jurisdiction to declare such laws unconstitutional. Accordingly, the unincorporated business tax, generally, and the application of section 703 of the Tax Law, particularly, is constitutional to the extent that income tax liability is sought to be imposed on petitioner.

B. That, pursuant to section 701(a) of the Tax Law, the State of New York imposes a tax on the income of every unincorporated business wholly or partially carried on within the State.

C. That, pursuant to section 703(a) of the Tax Law, an unincorporated business is defined as any trade, business or occupation engaged in by an individual or unincorporated entity.

D. That, pursuant to section 703(b) of the Tax Law, the: "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".

E. That, pursuant to 20 NYCRR 203.10(b), the employer-employee relationship exists where the principal has the right to control and direct the individual performing services, not only as to the end result to be accomplished, but also as to the means and details to be employed. See also, Matter of Liberman v. Gallman, 41 N.Y.2d 774, 778 (1977).

F. That "from the nature of the problem the degree of control which must be reserved by the employer in order to create the employer-employee relationship cannot be stated in terms of mathematical precision, and various aspects of the relationship may be considered in arriving at the conclusion in a particular case", Matter of Liberman v. Gallman, supra at 778.

G. That a sales representative cannot be deemed an "employee" where the principal does not exercise control and direction over the manner in which customers are approached and persuaded to make sales or otherwise supervise and control the sales routine. Matter of Liberman v. Gallman, supra at 779.

H. That, pursuant to sections 722 and 689(e) of the Tax Law, petitioner bears the burden of proof to establish that the compensation received during the years in question for his performance of services as a manufacturer's or sales representative was for services rendered as an employee rather than as an independent contractor or agent carrying on an unincorporated business. Matter of Naroff v. Tully, 55 A.D.2d 755, 389 N.Y.S.2d 453 (3rd Dept. 1976). See also, Matter of Lieberman v. Gallman, supra at 777.

I. That petitioner failed to sustain his burden of establishing that he was an employee within the meaning of section 703(b) of the Tax Law and, within the meaning and intent of sections 703(b) and (f) of the Tax Law, said petitioner demonstrated the indicia of an independent agent or contractor rather than an employee. Matter of Seifer v. State Tax Commission, 58 A.D.2d 726, 396 N.Y.S.2d 493 (3rd Dept. 1977). Matter of Liberman v. Gallman, supra

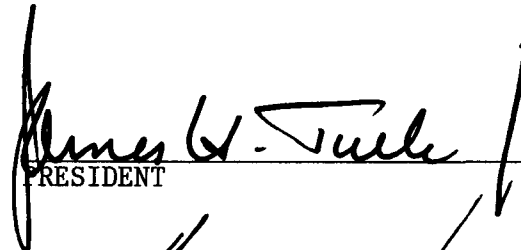
at 779. Accordingly, the income received by said petitioner for his services as an independent sales or manufacturer's representative for the years 1966 through 1973 is subject to the unincorporated business tax of this State.

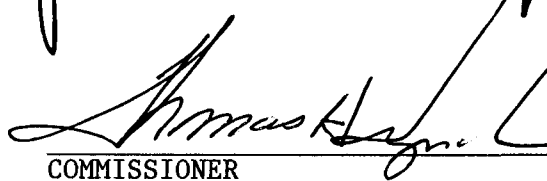
J. That the petition of Robert Bien is denied and the notices of deficiency issued against petitioner on May 24, 1971 and October 28, 1974 are sustained.

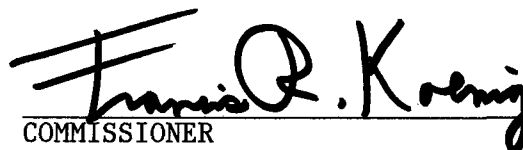
DATED: Albany, New York

JUL 18 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER