

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Lester Goldstein :

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 1970 - 1972. :

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 28th day of November, 1980, he served the within notice of Decision by certified mail upon Lester Goldstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

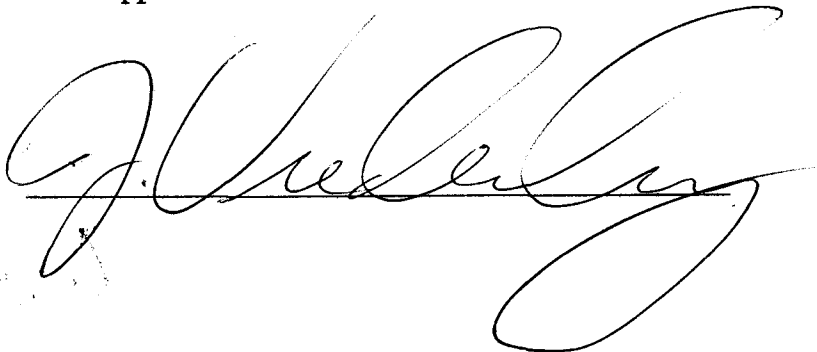
Lester Goldstein
423 A. Woodbridge Dr.
Ridge, NY 11961

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
28th day of November, 1980.

Robert A. Bank



STATE OF NEW YORK
STATE TAX COMMISSION

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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 28th day of November, 1980, he served the within notice of Decision by certified mail upon Mark L. Friedman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

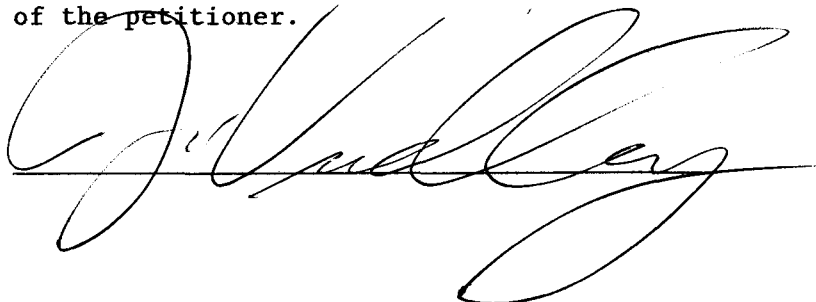
Mr. Mark L. Friedman
Goidel, Goidel & Helfenstein
96 Fulton St.
New York, NY 10038

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
28th day of November, 1980.





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

November 28, 1980

Lester Goldstein
423 A. Woodbridge Dr.
Ridge, NY 11961

Dear Mr. Goldstein:

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
Mark L. Friedman
Goidel, Goidel & Helfenstein
96 Fulton St.
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LESTER GOLDSTEIN	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business Tax :	:	
under Article 23 of the Tax Law for the	:	
Years 1970, 1971 and 1972.	:	

Petitioner, Lester Goldstein, 423A Woodbridge Drive, Ridge, New York 11961, 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 1970, 1971 and 1972 (File No. 15903).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 23, 1980 at 10:45 A.M. Petitioner appeared with Mark Friedman. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether the activities engaged in by petitioner as a sales representative constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Petitioner, Lester Goldstein, timely filed joint New York State income tax resident returns with his wife for the years 1970, 1971 and 1972 whereon he reported business income each year derived from his activities as a sales representative. He did not file an unincorporated business tax return for any of said years at issue.

2. On February 28, 1975, the Audit Division issued a Statement of Audit Changes to petitioner wherein it held that the income derived from his activities as a sales representative is subject to the unincorporated business tax. Additionally, an adjustment of \$300.00 was made on petitioner's personal income tax return. Said adjustment, which was based on a computational error, was not contested and is therefore not at issue herein. Accordingly, a Notice of Deficiency was issued against petitioner on May 24, 1976 asserting unincorporated business tax of \$1,482.27, additional personal income tax of \$24.60, plus interest of \$394.79, for a total due of \$1,901.66.

3. During the years at issue, petitioner was a sales representative for Bantam-U.S. Toys, Inc., (hereinafter Bantam), 112 West 34th Street, New York City. As such, he sold plush toys (stuffed animals) throughout his assigned territory, which consisted of metropolitan New York, Westchester, Long Island and northern New Jersey.

4. Petitioner worked a five day work week of which four days were spent soliciting business on the road, while one day was spent at Bantam's showroom. While traveling, petitioner planned his own itinerary and mailed his orders in each evening. He was not required to report to Bantam on a daily basis.

5. Petitioner was compensated on a straight commission basis on all orders shipped which originated from his territory. He was not reimbursed for ordinary and necessary business expenses incurred since it was felt that his rate of commission was sufficiently high enough for him to personally pay for such expenses.

6. Petitioner maintained an office in his home since Bantam did not provide him with regular office space.

7. Petitioner was not required to attend meetings on any regular basis.

8. Bantam supplied petitioner with catalogues and samples at no cost to him.

9. Petitioner, on occasion, was required to attend trade shows held in New York and New Jersey. He was further required to do inventory and stock control work in various house account department store chains, with no direct compensation paid by Bantam for this service.

10. Petitioner maintained a self-employed retirement plan since no pension plan was provided by Bantam.

11. Income taxes were not withheld from petitioner's compensation by Bantam. His earnings were reported on a Federal form 1099 rather than a Wage and Tax Statement.

12. During the years at issue, petitioner represented various other principals. He sold various non-competitive products for these other principals, such as children's jewelry and diaper sets. Sales for these other principals were only solicited through customers of Bantam since petitioner did not visit separate customers for this purpose. Bantam was aware of, and gave its approval for petitioner to sell other non-competitive products.

13. Although petitioner was granted time to submit a breakdown of income between Bantam and his other principals, he failed to do so.

CONCLUSIONS OF LAW

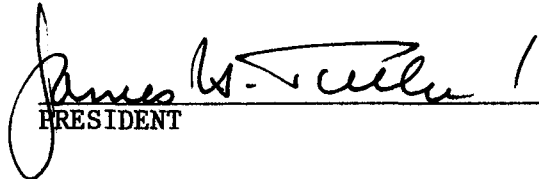
A. That since a nominal degree of direction and control was exercised by Bantam, as well as petitioner's other principals, over his day-to-day activities, the relationship between such principals and petitioner could not be construed as that of an employer-employee. Rather, petitioner's activities were those of an independent contractor, and as such, they constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to the

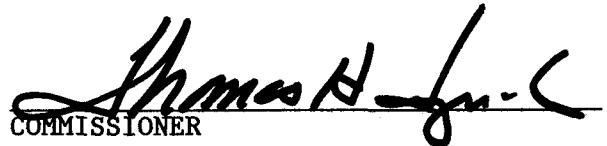
imposition of unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

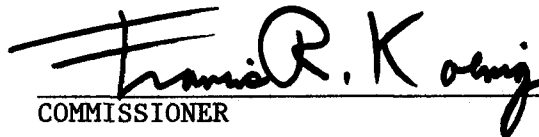
B. That the petition of Lester Goldstein is denied and the Notice of Deficiency dated May 24, 1976 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York
NOV 28 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER