

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Melvin 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 1968 - 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 Melvin Goldstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Melvin Goldstein  
155 E. 34th St., Apt. 4A  
New York, NY 10016

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.

Deborah A. Bank



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

Melvin 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 1968 - 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 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  
18th day of July, 1980.

Doro A. Bank

J. Vredenburg

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

July 18, 1980

Melvin Goldstein  
155 E. 34th St., Apt. 4A  
New York, NY 10016

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  
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

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In the Matter of the Petitions	:	
	:	
of	:	
	:	
MELVIN GOLDSTEIN	:	DECISION
	:	
for Redetermination of Deficiencies or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1968 through 1973.	:	

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Petitioner, Melvin Goldstein, 155 East 34th Street, Apt. 4A, New York, New York 10016, 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 1973 (File Nos. 14338 and 14339).

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 21, 1978 at 1:30 P.M. Petitioner appeared by Alvin I. Goidel, Esq. (Bruce S. Leffler, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Robert W. Felix, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. Petitioner filed New York State income tax resident returns for the years at issue on which he listed his occupation as "salesman". He did not file unincorporated business tax returns for said years.

2. On January 28, 1974, the Income Tax Bureau issued a Notice of Deficiency to petitioner for the tax years 1968, 1969 and 1970, indicating a deficiency of \$1,244.13, plus penalty and interest. On October 28, 1974, the Income Tax

Bureau issued a Notice of Deficiency to petitioner for the tax years 1971, 1972 and 1972, indicating a deficiency of \$896.67, plus interest.

3. Petitioner, Melvin Goldstein, was a salesman in the lingerie field for sixty years. During the period at issue, petitioner represented four companies. One-third of his commission income was earned by representing Russ-Wear Undergarments Co., and one-half of his commission income was earned by representing Lingerie Associates, Inc.

4. Each firm that petitioner represented knew that he was representing other firms. When asked at the formal hearing whether he needed their permission to carry other lines, petitioner responded, "No limitation" (Tr., p. 11).

5. When taking an order from a customer, petitioner would use his own order sheet, on which was printed "Mel Goldstein, 152 Madison Avenue." The name of the customer and manufacturer, along with other necessary data, would be written in on the form.

6. Petitioner maintained his own office at 152 Madison Avenue. The name on the office door read "Mel Goldstein Associates". Petitioner paid the office rent himself. Petitioner incurred certain other business expenses which he also paid.

7. When asked at the formal hearing whether he determined his own hours, petitioner testified: "My own hours. My own office and I acted accordingly." (Tr., p. 25).

8. Petitioner met with officials of Lingerie Associates at their office two or three times a week. He had regular meetings with a junior partner of Russ-Wear Undergarments, who would drop by to see petitioner at petitioner's office. When asked at the formal hearing, "Would you tell the company personnel what accounts you had visited and what accounts you hadn't visited?", petitioner testified: "Not very often, no. They relied upon me to use my own judgment."

(Tr., p. 18). Later in his testimony, petitioner testified that accounts, orders and products were discussed at these meetings.

9. The companies represented by petitioner did not withhold taxes from the commissions paid to him. Petitioner paid his own social security taxes.

#### CONCLUSIONS OF LAW

A. That the State of New York 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...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: "[a]n 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 is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee....In the absence of supervision and control of the sales routine, salesmen do not become employees." Lieberman v. Gallman, 41 N.Y.2d 774, 396 N.Y.S.2d 159. "A second important factor [in determining whether the taxpayer is an employee or an independent contractor] is that petitioner was directly responsible for paying for his own office space and clerical help." Lieberman v. Gallman, supra. (396 N.Y.S.2d at p. 162).

C. That the lingerie manufacturers represented by petitioner did not exercise control and direction over his activities so as to constitute him as their employee. Petitioner was able to determine his own hours. He maintained

his own office, for which he himself paid rent. Petitioner was not reimbursed for expenses that he incurred in connection with his business. The lingerie manufacturers which he represented did not withhold taxes from the commissions paid him. He paid his own social security taxes. Petitioner used forms bearing his name when taking orders. Petitioner's testimony at the formal hearing is inconsistent as to how closely he kept the companies he represented apprised of the status of accounts at their various meetings.

D. That petitioner's activities as a salesman constituted the carrying on of an unincorporated business and the income therefrom is subject to unincorporated business tax.

E. That for the tax years in dispute, petitioner's tax returns were prepared by an independent accountant. Petitioner is neither an accountant nor a lawyer. His failure to file unincorporated tax returns was not due to willful neglect; therefore, the penalty imposed against petitioner on the Notice of Deficiency dated January 28, 1974, under section 685(a) of the Tax Law then in effect for 1968 and section 685(a)(1) and (a)(2) of the Tax Law for 1969 and 1970, is cancelled and the Audit Division is directed to modify the deficiency accordingly.

F. That the petitions of Melvin Goldstein are granted to the extent indicated in Conclusion of Law "E" above. The Notice of Deficiency dated January 28, 1974, as modified, and the Notice of Deficiency dated October 28, 1974 are sustained.

DATED: Albany, New York

JUL 1 8 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER