

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Sidney Korn

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 1968-1972. :

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 4th day of April, 1980, he served the within notice of Decision by certified mail upon Sidney Korn, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney Korn
4032 Meadow Lane
Seaford, NY 11783

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
4th day of April, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of

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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 1968-1972.

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 4th day of April, 1980, he served the within notice of Decision by certified mail upon Bertrand Leopold 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. Bertrand Leopold
18 Joseph St.
New Hyde Park, NY 11040

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
4th day of April, 1980.

Joanne Knapp

J. Vredenburg

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

April 4, 1980

Sidney Korn
4032 Meadow Lane
Seaford, NY 11783

Dear Mr. Korn:

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
Bertrand Leopold
18 Joseph St.
New Hyde Park, NY 11040
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
SIDNEY KORN	:	DECISION
for Redetermination of Deficiencies or	:	
for Refund of Unincorporated Business Tax :	:	
under Article 23 of the Tax Law for the	:	
Years 1968, 1969, 1970, 1971 and 1972.	:	

Petitioner, Sidney Korn, 4032 Meadow Lane, Seaford, New York, 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 1972 (File Nos. 00260 and 13795).

A formal hearing was held before Harry Issler, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 12, 1977 at 10:30 A.M. Petitioner appeared by Bertrand D. Leopold, Public Accountant. The Income Tax Bureau appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUES

I. Whether the business activities of petitioner, Sidney Korn, as a sales representative during 1968 through 1972 constituted the carrying on of an unincorporated business.

II. Whether petitioner would be allowed a deduction for contributions and payments to a Keogh Plan in arriving at unincorporated business taxable income, if petitioner is held subject to the unincorporated business tax.

III. Whether, during the formal hearing before the Hearing Officer, petitioner had the burden of proof.

IV. Whether the Income Tax Bureau properly asserted penalties against petitioner pursuant to Sections 685(a)(1) and (a)(2) of the Tax Law for tax

years 1971 and 1972.

FINDINGS OF FACT

1. Petitioner, Sidney Korn, timely filed New York State income tax returns for the years 1968 through 1972. He did not file unincorporated business tax returns for said years.

2. On November 26, 1973, a Notice of Deficiency was issued for tax years 1968, 1969 and 1970 based on a Statement of Audit Changes imposing unincorporated business tax in the amount of \$2,356.16, plus \$519.66 in interest, for a total due of \$2,875.82. On January 26, 1976, a separate Notice of Deficiency was issued on for tax years 1971 and 1972 based on a Statement of Audit Changes imposing unincorporated business tax in the amount of \$1,157.77, plus penalty of \$497.51, plus interest of \$253.78, for a total due of \$1,909.06.

3. Petitioner, Sidney Korn, was a sales representative for Dofan Handbag Company, Inc. ("Dofan"), which manufactured ladies' handbags. He was compensated for his sales on a strict commission basis. He had no discretion regarding the acceptance of orders, rejections, returns, credits and disputes with customers.

4. Petitioner stated that pursuant to a verbal agreement and understanding, he was obligated to spend 80 percent to 90 percent of his time on the business of Dofan.

5. During the audit periods, petitioner worked from time to time for six other manufacturers as their sales representative. However, he stated that he was required to, and did receive the approval of his principal Dofan. He advised each of the other companies whose merchandise he handled of the existence of his other lines and of the amount of time that he was to work for Dofan.

6. Petitioner was not permitted to have an office, other than the office of Dofan. However, he used a room at his house as an office in which he

maintained a desk, file cabinet and typewriter and in which he would maintain his own records, primarily relating to expenses and sales. He did not hire any assistants. His sales territory was specified by Dofan.

7. None of the companies deducted payroll taxes or Social Security taxes from the commissions paid to him. During the audit periods, petitioner made payments to a Keogh plan as a "self-employed individual".

8. On his personal return, petitioner claimed charitable contributions of \$720.00 in 1968, \$665.00 in 1969, \$640.00 in 1970, \$620.00 in 1971 and \$440.00 in 1972.

9. Petitioner contended that since no unincorporated business tax returns were filed, he therefore, in effect, omitted more than 25 percent of his business income and the burden of proof rests on the State Tax Commission.

CONCLUSIONS OF LAW

A. That petitioner, Sidney Korn, did not present sufficient evidence in accordance with Sections 722 and 689(e) of the Tax Law to clearly show that his principals exercised that degree of control and supervision over the manner of his work performance so that he may be deemed an employee of the companies and not an independent contractor; therefore, petitioner is not considered to be an employee during the subject years in accordance with Section 703(b) of the Tax Law.

B. That petitioner's sales activities during the years 1968 through 1972 constituted the carrying on of an unincorporated business, in accordance with Section 703(a) of the Tax Law.

C. That according to Section 689(e) of the Tax Law, the burden of proof shall be on petitioner, except for certain instances. Omission of income is not one of the instances that would place the burden of proof on the State Tax Commission.

D. That petitioner, Sidney Korn, failed to show that his failure to file unincorporated business tax returns for 1971 and 1972 was due to reasonable cause; therefore, the penalties assessed pursuant to Sections 685(a)(1) and (a)(2) of the Tax Law are sustained.

E. That petitioner, Sidney Korn, is allowed a deduction for charitable contributions in computing his unincorporated business taxable income, as described in Section 706(1) of the Tax Law.

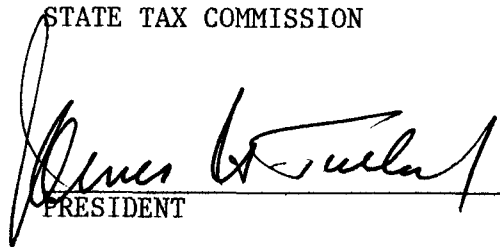
F. That the amount of contributions made to a self-employed retirement plan is treated as a deduction from gross income in computing personal adjusted gross income [Code Sec. 62(7)]. Therefore, petitioner, Sidney Korn, is not allowed a deduction for contributions to a self-employed retirement plan in computing unincorporated business taxable income.

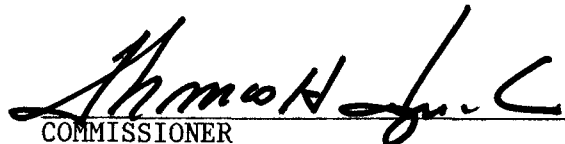
G. That the petition of Sidney Korn is granted to the extent of Conclusion of Law "E", above. The Audit Division is hereby directed to modify accordingly the notices of deficiency issued November 26, 1973 and January 26, 1976. Except as so granted, the petition is in all other respects denied.

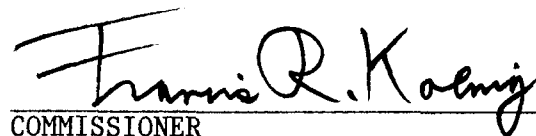
DATED: Albany, New York

APR 4 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER