

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Henry Weiner :

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 1971 - 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 Henry Weiner, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

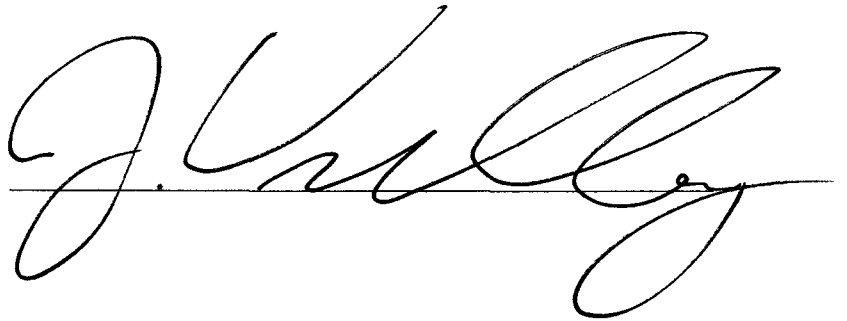
Henry Weiner
1055 Esplanade Avenue
Bronx, NY 10461

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
ALBANY, NEW YORK 12227

July 18, 1980

Henry Weiner
1055 Esplanade Avenue
Bronx, NY 10461

Dear Mr. Weiner:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HENRY WEINER	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business Tax :	:	
under Article 23 of the Tax Law for the	:	
Years 1971, 1972 and 1973.	:	

Petitioner, Henry Weiner, 1055 Esplanade Avenue, Bronx, New York 10461, 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 1971, 1972 and 1973 (File No. 20951).

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 4, 1980 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Al Schwartz, Esq., of counsel).

ISSUE

Whether petitioner Henry Weiner's activities as a salesman, is exempt from unincorporated business tax as an employee.

FINDINGS OF FACT

1. Petitioner Henry Weiner, and Selma Weiner, his wife, filed New York State combined income tax resident returns for the subject years. Petitioner Henry Weiner did not file unincorporated business tax returns for said years.

2. The Audit Division held petitioner's occupation, as reported on the New York State income tax return as a "Broker", subject to the unincorporated business tax. Accordingly, on September 26, 1977, the Audit Division issued a

Notice of Deficiency for 1971, 1972 and 1973, in the amount of \$1,269.00 for unincorporated business tax, plus \$390.51 in interest, for a total due of \$1,659.51.

3. Petitioner Henry Weiner solicited sales of goods for Senco Fabrics Corporation ("Senco") pursuant to a contract dated February 26, 1971. Petitioner's contract with Senco provided, in relevant part, that all orders obtained by him were to be placed with Senco. Senco reserved the right to refuse any orders obtained by petitioner.

The contract further provided that petitioner was retained by Senco as an independent commission salesman, and, for services as a salesman, Senco was to pay petitioner a commission on the net amount of shipments made by Senco on sales. During the effective period of the agreement Senco shall advance, against commission to be earned, \$300.00 at the end of each week. Pursuant to the contract, petitioner was to devote appropriate time and attention to duties as salesman, except that he was afforded the privilege of selling nonconflicting lines of fabrics for others. He was to perform such other services pertaining to selling as may be required.

4. Petitioner contended that in addition to being an outside salesman for Senco, he was also a purchasing agent and on occasion performed clerical services for which he received a weekly advance. The advance was applied against all work performed by petitioner for Senco. He contended that the advance was all he received for services rendered, and he did not receive a commission.

The petitioner obtained leads from various individuals as to which manufacturers or jobbers required Senco's fabrics. Petitioner also made arrangements for the purchase of fabrics by Senco from organizations going out of business. For the leads furnished petitioner by these various individuals,

he paid a "finder's fee".

Petitioner was not reimbursed by Senco for finder's fees, nor was petitioner reimbursed by Senco for traveling, telephone or other miscellaneous expense incurred by him for Senco.

Senco did not withhold tax of any kind from petitioner's "commission".

5. Petitioner prepared his own daily itinerary as to where and whom he would call upon in furtherance of his duties. Senco was concerned only with results obtained by petitioner and not with his means adopted. Petitioner's agreement with Senco permitted him "free wheeling" and his only duty to Senco was to telephone its president and inform him of results obtained.

CONCLUSIONS OF LAW

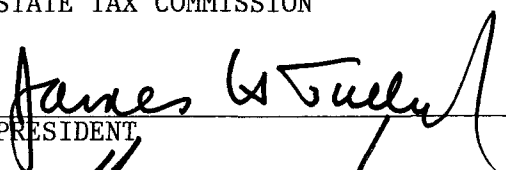
A. That the activities of petitioner Henry Weiner for subject years was not subject to the control and direction of his principal. That petitioner was left essentially unguided by Senco, which was only interested in the results obtained. Therefore, the activities engaged in by the petitioner constituted the carrying on of an unincorporated business in accordance with the meaning and intent of section 703 of the Tax Law.

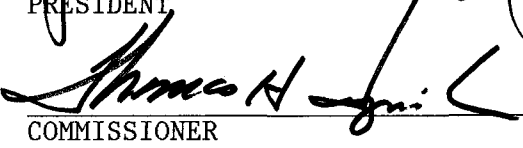
B. That the petition of Henry Weiner is denied and the Notice of Deficiency issued September 26, 1977 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JUL 1 8 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER