

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Maxwell J. Wortman :

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 - 1974. :

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Maxwell J. Wortman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Maxwell J. Wortman
5 Nancy Lane
Spring Valley, NY 10977

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

7th day of July, 1980.

Deborah A Bank

J. J. Vredenburg

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Norman J. Elliott 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. Norman J. Elliott
522 Fifth Ave.
New York, NY 10036

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
7th day of July, 1980.

Deborah A. Bank

J. J. Vredenburg

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

July 7, 1980

Maxwell J. Wortman
5 Nancy Lane
Spring Valley, NY 10977

Dear Mr. Wortman:

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
Norman J. Elliott
522 Fifth Ave.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
MAXWELL J. WORTMAN	:	DECISION
	:	
for Redetermination of Deficiencies or	:	
for Refund of Unincorporated Business Tax :	:	
under Article 23 of the Tax Law for the	:	
Years 1971 through 1974.	:	

Petitioner, Maxwell J. Wortman, 5 Nancy Lane, Spring Valley, New York 10977, filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1971 through 1974 (File Nos. 15164 and 16611).

A 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 15, 1977 at 1:15 P.M. Petitioner appeared by Norman J. Elliott, Esq. The Audit Division appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether the business activities of petitioner, Maxwell J. Wortman, as a sales representative for the years 1971 through 1974 constituted the carrying on of an unincorporated business, thereby subjecting said petitioner to the unincorporated business tax of this State.

FINDINGS OF FACT

1. Petitioner, Maxwell J. Wortman, timely filed New York State income tax resident returns for the years 1971 through 1974, listing his address as 5 Nancy Lane, Spring Valley, New York. Said petitioner did not file unincorporated business tax returns for said years.

2. On February 24, 1975, the Audit Division issued a Statement of Audit Changes and a Notice of Deficiency against petitioner imposing unincorporated business tax for the years 1971, 1972 and 1973 of \$5,321.73, plus interest of \$604.82, making a total of \$5,926.82, on the ground that income received in said years as an independent sales agent was subject to unincorporated business tax.

3. On February 3, 1976, the Audit Division issued a Statement of Audit Changes against petitioner, Maxwell J. Wortman and his spouse asserting additional tax, penalty and interest of \$2,453.92 for the year 1974, as follows: (i) the sum of \$481.99 as personal income tax due based on substantiation submitted by petitioner for his travel and entertainment expenses and a statutory medical adjustment and (ii) unincorporated business tax in the sum of \$1,439.23, plus penalty (based on the unincorporated business tax) of \$395.79, pursuant to sections 685(a)(1) and (a)(2) of the Tax Law, plus interest.

4. On or about February 20, 1976, petitioner paid to the Audit Division the sum of \$481.99 (plus pro rata interest) in satisfaction of the personal income tax portion of the February 3, 1976 Statement of Audit Changes.

5. In recognition of the aforementioned payment, on June 28, 1976, the Audit Division issued a revised Statement of Audit Changes and a Notice of Deficiency against petitioner asserting unincorporated business tax for the year 1974 of \$1,439.83, plus updated penalty of \$424.58, pursuant to section 685(a)(1) and (2) of the Tax Law and interest of \$147.19, making a total of \$2,011.60, on the ground that income received in that year as independent sales agent was subject to unincorporated business tax.

5. Petitioner timely filed petitions for redetermination of a deficiency or for refund of unincorporated business taxes with respect to each of the aforesaid notices of deficiency.

6. During the years in question, petitioner listed his occupation on his Federal and New York State income tax returns as "salesman". Petitioner's income tax returns disclosed substantial income derived from his performance of services as a salesman, but no wage and tax statements were offered with respect to the principals from whom he received payment for such services.

7. Petitioner was hired in 1961 as a showroom salesman by Madison Sportswear Co., Inc. (hereinafter "Madison") and Wardrobe Maker, Inc. (hereinafter "Wardrobe"). Madison and Wardrobe were comprised of the same principals, engaged in business at the same address and maintained the same accounting system. The companies, however, handled and sold separate lines of merchandise. Madison and Wardrobe merged on some undetermined date in 1974.

8. Petitioner performed services for Madison and Wardrobe as a showroom salesman until 1962, when he was asked to cover certain accounts in the Metropolitan New York area two days per week and to remain in the showroom the other three days. At this time, petitioner received salary and commission for his services. At some undetermined date thereafter, petitioner's mode of compensation was changed to a draw against commission and, in 1966 and 1974, respectively, Madison and Wardrobe both paid said petitioner on a straight commission basis.

9. During the years in question, petitioner serviced the accounts in his territory on Mondays, Thursdays and Fridays, being required by his principals to be in their showroom on Tuesdays and Wednesdays. While in the showroom, petitioner rendered services to all of his principals' customers, performed various incidental duties on behalf of his principals, including interviewing (but not hiring) perspective sales and office personnel, and generally, was under the direct supervision of an office manager. Said petitioner did not receive commissions or any other separate compensation for the services performed

by him in the principals' showroom.

10. During the years in question, petitioner's activities in servicing accounts within his territory were subject to some restrictions by his principals: major stores were removed from him, being considered "house" accounts, and thereby were removed from his commission statements; he was not permitted to sell to poor credit risks, as determined by his principals; he was directed at times by his principals to visit certain accounts within his territory; he was directed at times to make collections from certain accounts within his territory; he was directed at times by his principals to cover the showroom on days other than his designated days by reason of someone's illness; he was directed at times by his principals to attend sales meetings, which meetings took precedence over his appointments in the field; he was not permitted to handle or sell any other lines, whether or not competitive to his principals.

11. During the years in question, petitioner performed services for Madison and Wardrobe without a written contract and without a clear division of time.

12. There is no credible evidence to support the contention that, whether in the showroom or in the field, petitioner, Maxwell J. Wortman, was under the control and direction of his principals, with respect to the manner in which customers were approached and persuaded to make purchases.

13. During the years in question, petitioner maintained a Keogh Plan; did not have coverage under his principals' workmen's compensation, unemployment and group life insurance, health and hospitalization, or disability plans; did not have withholding taxes and social security deducted from his compensation; did not receive reimbursement from his principals for business expenses; did not have a sales quota; and, while in the field, arranged his own hours.

14. During the years in question, petitioner received commissions from Madison and Wardrobe by separate check; said petitioner deducted pro rata expenses for his home office, including the cost of aluminum siding, which office was not a requirement and condition of his employment; said petitioner fully deducted the expenses incurred in the use of one of his automobiles even on days he was in principals' showroom; said petitioner paid his own social security taxes; said petitioner deducted the cost and expense of health and accident policies; said petitioner deducted the cost and expense of business lunches, entertaining customers, Christmas cards and gifts; and said petitioner deducted the cost and expense of travelling and selling his principals' lines.

15. By decision dated August 5, 1976, the State Tax Commission rendered a decision against petitioner, Maxwell J. Wortman, for the years 1968, 1969 and 1970, finding that said petitioner was an independent sales agent and subject to unincorporated business tax for those years. It is noted, however, that said petitioner did not appear and testify at the hearing in the course of that proceeding on the advice of his then accountant.

CONCLUSIONS OF LAW

A. 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.

B. 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.

C. 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".

D. That, 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 Matter of Liberman v. Gallman, 41 N.Y.2d 774, 778 (1977).

E. That "(f)rom 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, Id. at 778.

F. That, a salesman cannot be deemed to be 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, Id. at 779.

G. That, pursuant to sections 722 and 689(e) of the Tax Law, petitioner, Maxwell J. Wortman, bears the burden of proof to establish that the compensation received during the years in question for his performance of services as a sales representative or agent 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 Liberman v. Gallman, Id. at 777.

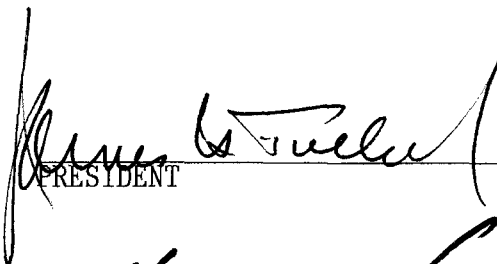
H. That petitioner, Maxwell J. Wortman, failed to sustain his burden of establishing that he was an employee within the meaning and intent of sections 703(b) and (f) of the Tax Law. Said petitioner demonstrated the indicia of an independent agent or contractor rather than an employee. Matter of Seifer v. State Tax Commission, 58 A.D.2d 726, 396 N.Y.S.2d 493 (3rd Dept. 1977). Matter of Liberman v. Gallman, Id. at 779. Accordingly, the income received

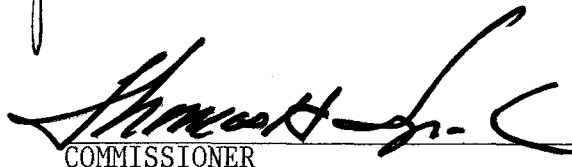
by said petitioner for his services as an independent sales representative or agent for the years 1971 through 1974 is subject to unincorporated business tax.

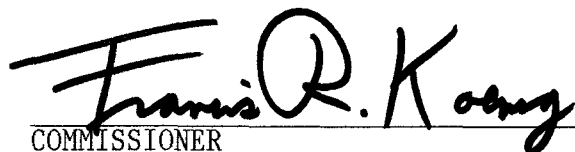
I. That the petitions of Maxwell J. Wortman are denied and the notices of deficiency issued against said petitioner on February 24, 1975 and June 28, 1976 are sustained.

DATED: Albany, New York
JUL 07 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

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STATE TAX COMMISSION

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Maxwell J. Wortman
5 Sparrow Ave.
Spring Valley, NY 10977

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