

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
William Berson :

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 1969 - 1971. :

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 30th day of January, 1981, he served the within notice of Decision by certified mail upon William Berson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

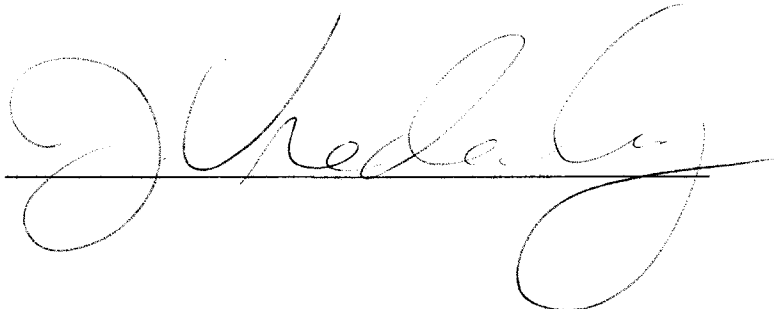
William Berson
1523 Broadway
Hewlett, NY 11557

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
30th day of January, 1981.

Connie P. Hagelstead



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

William Berson :

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 1969 - 1971. :

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 30th day of January, 1981, he served the within notice of Decision by certified mail upon Arthur N. Read 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. Arthur N. Read
Eisner, Levy, Steel & Bellman
351 Broadway
New York, NY 10013

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
30th day of January, 1981.

Cornelia P. Haglund

J. Vredenburg

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

January 30, 1981

William Berson
1523 Broadway
Hewlett, NY 11557

Dear Mr. Berson:

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
Arthur N. Read
Eisner, Levy, Steel & Bellman
351 Broadway
New York, NY 10013
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WILLIAM BERSON	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business Tax :	:	
under Article 23 of the Tax Law for the	:	
Years 1969, 1970 and 1971.	:	

Petitioner, William Berson, 1523 Broadway, Hewlett, New York 11557, 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 1969, 1970 and 1971 (File No. 00157).

A formal hearing was held before Harvey Baum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 20, 1977 and continued before Julius E. Braun, Hearing Officer, at the same location on January 24, 1979. Petitioner appeared by Eisner, Levy, Steel & Bellman, P.C. (Arthur N. Read, Esq, of counsel). The Audit Division appeared by Peter Crotty, Esq. (Laurence Stevens and William Fox, Esqs., of counsel).

ISSUES

I. Whether the notices of deficiency issued against William Berson were timely.

II. Whether the income received by William Berson during the years in issue was derived from services performed by him as an employee, or whether said income was derived from the carrying on of an unincorporated business, thereby making it subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, William Berson, and his wife, Charlotte Berson, timely filed New York State combined income tax returns for the years 1969 through 1971. Petitioner did not file any unincorporated business tax returns for said years.

2. On December 28, 1973, the Audit Division issued notices of deficiency against petitioner, William Berson, on the grounds that the business activities reported by him constituted the carrying on of an unincorporated business subject to unincorporated business tax. The Notice of Deficiency for 1969 and 1970 was for a total of \$1,449.33 in tax plus interest. The Notice of Deficiency for 1971 was for \$463.58, plus \$152.99 in penalty under sections 685(a)(1) and (a)(2) of the Tax Law, plus interest.

3. Petitioner was hired by Julius Berger and Co. ("Berger"), a manufacturer of infants' and toddlers' knitwear, in 1936 as a shipping clerk. Over the years petitioner took on added responsibilities and eventually became head of the billing department. He was the main contact of Berger with contractors and suppliers of yarn and other materials. In addition, he assisted the president of Berger in producing each sample line, particularly by going out with him to purchase yarn and select fabrics and colors. After 1946, when he became a full-time sales representative, petitioner was paid solely on commission, receiving a weekly draw against commissions. No deductions were taken from him. The president of Berger always determined when petitioner should take road trips. Each year during the period 1969 through 1971, petitioner spent approximately 20 weeks on the road. The twenty weeks were spent on approximately equal trips for the Spring and Fall seasons. When petitioner first started to travel, Berger specified the length of time he would be away, where he was to go, and what customers he was to call on. During the period 1969 through

1971, petitioner prepared an itinerary which he discussed with the sales manager, Benjamin Engel, or the president, Bob Berger, before it was finalized. Berger had final authority over where and when he would go on trips. Berger required petitioner to attend apparel shows in Charlotte, Atlanta and Birmingham. Berger supplied petitioner with customer lists. Petitioner was required to mail notices of shows to customers on the list and to contact those customers he could not otherwise see at shows. Berger required petitioner to solicit orders only at popular price and better department stores and specialty stores. It did not permit him to sell to discount or off-price stores or to department store basements. Berger instructed petitioner as to which customers he should not solicit because they had a poor credit rating. Before each trip petitioner received instructions from Benjamin Engel or Bob Berger regarding which lines to push. He received similar instructions in phone conversations while he was on the road. While on the road petitioner was required to phone either Bob Berger or Benjamin Engel at least once a week. In most cases, he would call at least twice a week. In addition, he received frequent calls from Berger or Engel with instructions on various matters. Petitioner was required to change his schedule in accordance with instructions received from Berger or Engel while he was on the road to see additional customers or to drop a customer from his schedule. While petitioner was on the road, Berger required him to mail orders and a report of the day's activities every day. Sometime before 1969, petitioner was injured in a serious auto accident. As a result, during the period 1969 through 1971, petitioner did not do his own driving while on the road. Berger assigned an employee from its warehouse staff to drive for petitioner, to set up rooms, to pack samples and to load the car. This employee did no selling. On the completion of the road trip, the employee returned to his duties in the warehouse. Petitioner was not entitled to hire an assistant

to do his work for Berger. He was required to render the services personally. Other than the driver hired by Berger, petitioner had no assistants. During the approximately 30 weeks per year when he was not traveling, petitioner was required to report to the Berger showrooms every day at 9:00 A.M. and to spend 5-6 hours per day in the showroom. While in the showroom, petitioner was under the supervision of Benjamin Engel, the sales manager. If petitioner was ill on a day he was scheduled to be in the showroom, he would call Bob Berger or Benjamin Engel. Berger required petitioner to obtain prior approval before taking a vacation. While petitioner maintained no office of his own, he deducted use of his home on federal Schedule C in the amount of \$1,000.00. Berger provided petitioner with office space in its showroom at which he did all his office work for them. Berger provided petitioner with business cards, order forms and stationery imprinted with its name and phone number at no cost to him and provided samples, which he returned after use, at no cost to him. Petitioner was not charged for postage in Berger's office or for phone calls made from the office or for credit card or collect calls to the company when he was on the road. In the showroom, petitioner was required to service house accounts and customers from areas outside his territory. For this he would receive no additional compensation. Berger set prices for all merchandise. Petitioner had no authority to vary the price. Berger further reserved the right to change prices after petitioner had solicited an order. Petitioner had no control over whether goods ordered by a customer would be shipped. Petitioner had no authority to extend credit. Berger could and did refuse to ship goods on orders solicited by petitioner because it decided not to extend credit to the customer. Berger also could and did fail to ship goods on orders solicited by the petitioner if the product was not made or in short

supply because of production problems. During the period 1969 through 1971, petitioner's drawing account from Berger was approximately \$200.00 per week; the commission rate was 7.5 percent net, on orders actually shipped, less goods returned. Petitioner generally overdrew his draw in the Spring season because it is not as lucrative a season in the outerwear business. He nevertheless continued to receive his draw. He was covered under Berger's Blue Cross/Blue Shield plan. Berger retained the right to discharge petitioner.

4. In 1951 Tidykins, Inc. ("Tidykins"), manufacturers of infants' and children's outerwear, asked petitioner to represent its products in the territory he covered for Berger. He responded that he could not agree to do so without discussing the matter with Berger. Berger agreed to allow petitioner to represent Tidykins on the specific understanding that:

(a) When he was in New York petitioner would spend all but one half to one hour per day in the Berger showroom;

(b) Petitioner would spend a maximum of 25 percent of his time working for Tidykins;

(c) The product lines of Berger & Co. and Tidykins did not conflict.

Tidykins agreed that Berger would remain petitioner's main concern. If any conflict arose regarding demands for petitioner's time, Tidykins agreed that those of Berger took precedence. Petitioner covered the same territory for Tidykins as he did for Berger. Tidykins placed the same restrictions on petitioner as Berger with regard to the class of stores at which he could sell. When not on the road, petitioner continued to come to the Berger showroom every day. He was required to obtain the permission of Benjamin Engel before going to the Tidykins showroom. Petitioner represented Tidykins from 1951 through the first two months of 1969.

5. In 1969 the sales manager of Ramer Industries ("Ramer") asked petitioner to represent its products. Ramer, like Tidykins, was a manufacturer of infants' and children's outerwear. It operated Kute Kiddies Coats, Inc., the girls' wear division, and Fieldston Clothes, Inc., the boys' wear division. Petitioner responded that he could not accept without the approval of Berger. Berger consented to petitioner's representing Ramer as long as it meant no change in his relationship with Berger. Ramer was not a competitor of Berger. Petitioner continued to spend 70-75 percent of his time in New York at Berger and continued to report to their offices 5 days per week.

6. In September 1971, petitioner was asked by Feltman Bros., manufacturers of handmade cotton infantwear, to represent its products. Before reaching an agreement, petitioner discussed the matter with Berger. Berger gave its permission on assurance that Feltman Bros.' products were not competitive and that petitioner would continue to spend 70-75 percent of his time on work for Berger. The contract in effect between petitioner and Ramer required that petitioner obtain Ramer's permission before representing any line other than Berger's. Ramer agreed to allow petitioner to drop its Kute Kiddies division lines and represent only Fieldston division lines.

7. As a condition of allowing petitioner to take on a sideline, Berger required that each sideline agree that the timing and itinerary of petitioner's road trips would continue to be planned by Berger. Petitioner submitted a copy of his itinerary to each sideline. Ramer required petitioner to notify him of any change in itinerary worked out with Berger while he was on the road. As long as he did not disturb Berger's itinerary, petitioner could go to another town at the instruction of a sideline. He could not, however, change the Berger itinerary. Ramer required petitioner to attend a sales

meeting at the beginning of each season. At this meeting, the manufacturer explained the line and instructed petitioner which lines to push. Feltman Bros. gave petitioner similar instructions. Petitioner received additional instructions from Ramer by phone or bulletin while he was on the road. Each sideline provided petitioner with a customer list. It required him to attend shows, to mail notices of shows to those customers and to contact directly those customers he would not see at shows. Some of Ramer's customers were different from Berger's. Petitioner had to have Berger's permission to show Ramer's products to a Berger customer. When showing more than one manufacturer's line to a customer, petitioner kept each line separate and showed Berger's line first. It took petitioner one to one and one half hours to show the Berger line to a customer. It took 15-30 minutes to show each of Ramer's two lines. Feltman Bros. was primarily a re-order business. Customers ordered from the brochure and price list. It took only a few minutes to go over the Feltman Bros. line. When he was on the road, petitioner was required to report by phone to the Ramer sales manager at least once a week. In addition, the sales manager would call him at least once every week or two with instructions. Often he called two or three times per week. When he was on the road, petitioner was required to mail daily all orders and a report of the day's activities to each manufacturer. Ramer supplied petitioner with samples at no charge; a memorandum of charge was made but petitioner did not have to pay it and a credit was made upon return of the samples. When not traveling, petitioner spent one half to one hour each day in the office of each sideline. He took care of all office work, phone calls and correspondence for each sideline in their respective offices. Petitioner maintained an office in his home. He also used the room in his home for the storage of Tidykins samples. Tidykins,

Ramer and Feltman Bros. provided order forms and stationery to petitioner at no cost. When he was in New York, Ramer required petitioner to phone its offices once a day. Petitioner's sidelines could reach him at the Berger showroom, but Berger required that he obtain permission to leave its showroom to go to the showroom of a sideline. Petitioner was required to obtain approval from each manufacturer for vacations. The prices of each sideline's products were set by the company. Petitioner had no authority to vary them. Petitioner had no authority to bind the manufacturer to ship goods. Each manufacturer could refuse to ship because it refused to extend credit, or because the product was not made or was in short supply. Petitioner received a drawing account with Kute Kiddies of approximately \$150.00 a week and with Fieldston of \$100.00 a week. Petitioner received no draw from Feltman Bros. He was paid his commissions at the end of each month. Each company with which petitioner had a drawing account allowed him to overdraw in the Spring season and still continue to receive a draw. Petitioner never advertised in newspapers for himself and never maintained a business telephone listing for himself. Any advertising expenses deducted by petitioner were for advertising allowances granted to a store by Tidykins or Ramer. The manufacturer charged him for half the cost. As is the custom in the industry, each manufacturer required petitioner to pay his own traveling expenses. Petitioner was required to pay his own business entertainment expenses. Each manufacturer represented required that he entertain customers when they were in New York or when he was traveling. Each manufacturer whom petitioner represented had the right to discharge petitioner.

8. In 1969, petitioner earned a total of \$22,300.00 from Berger. This amount represents 41 percent of petitioner's earned income for that year. He

earned \$6,229.27 from Tidykins. This amount represents 11 percent of petitioner's earned income for that year. He earned \$18,900.15 from the Kute Kiddies division of Ramer and \$7,422.21 from the Fieldston division. These amounts represent 34 percent and 14 percent respectively of petitioner's earned income for that year. In 1970, petitioner earned \$21,657.50 from Berger. This amount represents 39 percent of petitioner's earned income for that year. He earned \$24,629.99 from the Kute Kiddies division of Ramer and \$9,163.80 from the Fieldston division. These amounts represent 44 percent and 17 percent respectively of petitioner's earned income for that year. In 1971, petitioner earned \$19,400.00 from Berger. This amount represents 37 percent of petitioner's earned income for that year. He earned \$21,900.00 from the Kute Kiddies division of Ramer and \$7,908.32 from the Fieldston division. These amounts represent 42 percent and 15 percent respectively of petitioner's earned income for that year. He earned \$3,120.16 from Feltman Bros. in 1971. This amount represents 6 percent of petitioner's earned income for that year.

9. Petitioner filed Federal Schedule C Profit (or Loss) from Business or Profession for the years in issue. He deducted \$31,478.22 for business expenses in 1969, \$33,421.69 in 1970 and \$35,574.24 in 1971.

10. Petitioner took the following deductions in his business in 1971:

Assistance on Road	\$ 2,173.40
Bags - Hangers	180.03
Cabs in New York	428.50
Car Maintenance	393.10
Entertainment - Buyers - Road	3,870.75
Entertainment - Buyers - N.Y.	2,743.00
Garage Parking	617.00
Gifts to Buyers on Road	2,425.50
Gas - Oil	944.66
Gifts to Buyers - N.Y.	482.47
Fares	1,881.35
Hold up Theft Insurance	50.00
Hotels	3,649.93
Meals	2,296.25

Printing	55.86
Postage	298.42
Professional	300.00
Rent of Autos	4,634.45
Tips	1,877.00
Tolls	52.05
Telephone	3,017.70
Trade Shows	1,103.65
Use of Home	1,200.00
U-Haul	187.52
Christmas Gifts	261.00
Credit Cards	15.00
Repair of Samples	14.00
Allowance to Customers	320.00
Freight	101.65
TOTAL	<u>\$35,574.24</u>

11. Petitioner submitted proposed findings of fact. All of said proposed findings are supported by the record herein except proposed finding No. III D 32 which states as follows:

"Petitioner maintained no office space in his home and did no office work at home. He used one room in his house exclusively for the storage of Tidykins samples."

Petitioner deducted \$1,000.00 on his Schedule C for "use of home". He offered no documentary or other substantial evidence as to how it was used.

CONCLUSIONS OF LAW

A. That the income received by petitioner, William Berson, during the years 1969, 1970 and 1971 from his suppliers, constituted income derived from the carrying on of an unincorporated business as defined in section 703(a) of the Tax Law and not services performed in the capacity of an employee in accordance with the meaning and intent of section 703(b) of the Tax Law. Jerry Bander v. State Tax Commission, 65 A.D.2d 847.

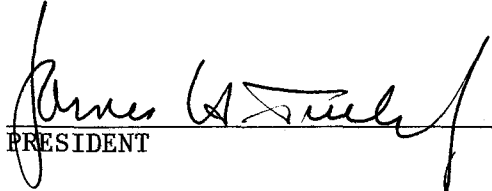
B. That the notices of deficiency issued on December 28, 1973 to William Berson were timely in accordance with section 683(c)(1)(A) and 722 of the Tax Law.

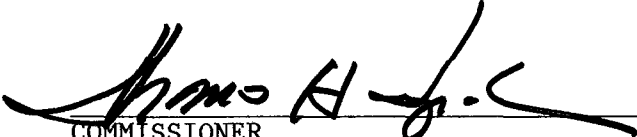
C. That petitioner had reasonable cause for not filing New York State unincorporated business tax returns for the years in issue.


D. That the petition of William Berson is granted only to the extent of cancelling all penalties and, except as so granted, is in all other respects denied and the notices of deficiency issued December 28, 1973 are sustained.

DATED: Albany, New York
JAN 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER