

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Bernard Cahn :
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 1973 & 1974. :

State of New York
County of Albany

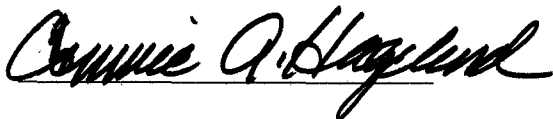
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 30th day of October, 1981, he served the within notice of Decision by certified mail upon Bernard Cahn, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

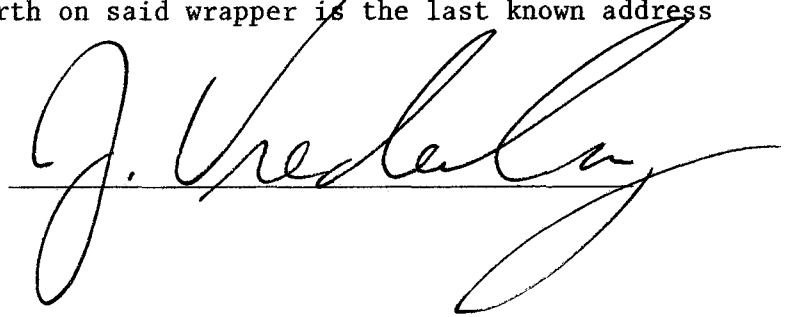
Bernard Cahn
371 Kenridge Road
Lawrence, NY 11559

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 October, 1981.





STATE OF NEW YORK
STATE TAX COMMISSION

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of :
Bernard Cahn :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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Business Tax under Article 23 of the Tax Law for :
the Years 1973 & 1974.

State of New York
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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 October, 1981, he served the within notice of Decision by certified mail upon Seymour Gross the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Seymour Gross
Sommer, Abraham & Gross
424 Madison Ave.
New York, NY 10017

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 October, 1981.

Carmie A. Hagedorn

J. Vredenburg

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

October 30, 1981

Bernard Cahn
371 Kenridge Road
Lawrence, NY 11559

Dear Mr. Cahn:

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
Seymour Gross
Sommer, Abraham & Gross
424 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BERNARD CAHN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1973	:	
and 1974.	:	

Petitioner, Bernard Cahn, 371 Kenridge Road, Lawrence, New York 11559, 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 1973 and 1974 (File No. 21735).

On May 19, 1981, petitioner advised the State Tax Commission, in writing, that he desired to waive a small claims hearing and to submit the case to the State Tax Commission, based on the entire record contained in the file.

ISSUE

Whether petitioner's sales activities, for which he derived commission income, constituted the carrying on of an unincorporated business, and if so, whether petitioner's activities as an employee were so integrated and interrelated with his activities on behalf of his unincorporated business, so as to constitute a part of such unincorporated business for the years 1973 and 1974.

FINDINGS OF FACT

1. Petitioner, Bernard Cahn, timely filed joint New York State income tax resident returns with his wife, Muriel Cahn, for the years 1973 and 1974 whereon he reported wage income derived from his sales activities engaged in on

behalf of Evans-Aristocrat Industries, Inc. (hereinafter Aristocrat). Additionally, petitioner reported commission income during each of said years derived from activities engaged in as an "outside salesman". Petitioner did not file unincorporated business tax returns for the years at issue herein.

2. On August 25, 1977 the Audit Division issued a Statement of Audit Changes to petitioner wherein both his salary and commission income were held subject to the imposition of unincorporated business tax. Accordingly, a Notice of Deficiency was issued against petitioner on April 14, 1978 asserting unincorporated business tax of \$3,749.07, plus interest of \$1,053.14, for a total due of \$4,802.21.

3. Petitioner commenced employment with C.F. Rumpp and Sons, Inc. (predecessor to Aristocrat) on December 3, 1963. Pursuant to the terms of an agreement executed on said date, petitioner was:

- (a) To act in an administrative and selling capacity
- (b) to devote substantially all of his time and efforts to the business
- (c) not to engage in any competitive business
- (d) to receive an annual salary of \$20,000.00 and
- (e) to receive reimbursement for all reasonable and proper business expenses incurred on behalf of the company.

4. During the year 1974, while in the employ of Aristocrat, petitioner engaged in selling activities on behalf of Benedict Grossman Associates, Benedict Grossman Associates Ltd, and Model Lace Co; Inc. Commissions derived from said principals during 1974 were \$15,789.07, \$5,188.92 and \$3,203.26, respectively. For taxable year 1973 the record contains no breakdown of the gross commission income earned of \$41,700.00.

5. Pursuant to a letter submitted by Benedict Grossman Associates:

"Bernard Cahn received finder's fees in connection with an introduction made by him to one particular buyer of a major retail chain of stores, who purchased the lines of merchandise which this company represented as manufacturers agents. The amounts paid to Mr. Cahn were measured by a flat fee in one instance and the volume of sales in the remaining."

With respect to petitioner's income derived from Model Lace Co; Inc., said letter stated that:

"Due to internal requirements, Model Lace, a company represented by Benedict Grossman Associates, an arrangement was made with Model Lace to pay the entire sales commission due this company to Mr. Cahn which he remitted less the portion earned by him as finder."

6. Although petitioner alleged that his reported commission income "arose from a one-time finder's fee arrangement" the nature and amount of expenses charged to such income appear usual to activities which are carried on with a degree of regularity.

7. The record is void of information with respect to the nature of direction and control exercised by petitioner's principals and employer over his activities.

8. The record is void of information with respect to whether, and if so, in what manner, petitioner divided his time and effort between principals and his employer.

CONCLUSIONS OF LAW

A. That petitioner's selling activities engaged in on behalf of principals other than his employer, Aristocrat, constituted the carrying on of an unincorporated business pursuant to section 701 of the Tax Law.

B. That where the individual rendering personal services as an employee, officer, director or fiduciary is also actively engaged in his own independent business without a clear division of time....such services will be deemed to

constitute part of an unincorporated business regularly carried on by the individual (20 NYCRR 203.10(d)).

C. That petitioner has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that the activities he engaged in as an employee were separate and distinguishable from his unincorporated business activities. Accordingly, the services rendered by petitioner, Bernard Cahn, as an employee of Evans-Aristocrat Industries, Inc. are deemed to have been so integrated and interrelated with his unincorporated business activities so as to constitute part of the unincorporated business. As such, the salary income derived by petitioner as an employee was not exempt from the imposition of unincorporated business tax within the meaning and intent of section 703(b) of the Tax law.

D. That the petition of Bernard Cahn is denied and the Notice of Deficiency dated April 14, 1978 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER