

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Julius Pine :

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 Year 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 Julius Pine, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

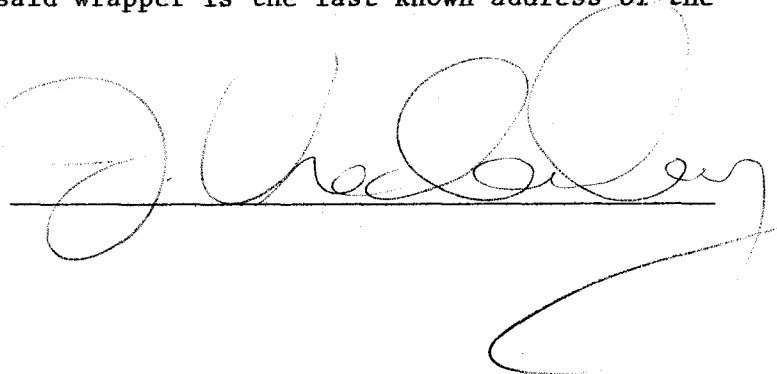
Julius Pine
282 Marion St.
Danbury, CT 06810

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 A. Hagelund



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Julius Pine :

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 Year 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. Eisner 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. Eisner
Eisner, Levy, Steel & Bellman, P.C.
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.

Connie A. Hagelund

J. Vredenburg

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

January 30, 1981

Julius Pine
282 Marion St.
Danbury, CT 06810

Dear Mr. Pine:

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. Eisner
Eisner, Levy, Steel & Bellman, P.C.
351 Broadway
New York, NY 10013
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JULIUS PINE : DECISION
for Redetermination of a Deficiency or :
for Refund of Unincorporated Business Tax :
under Article 23 of the Tax Law for the :
Year 1971. :

Petitioner, Julius Pine, 282 Marion Street, Danbury, Connecticut 06810, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1971 (File No. 14990).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 25, 1979. Petitioner appeared by Eisner, Levy, Steel & Bellman, P.C. (Arthur N. Read, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether the Notice of Deficiency issued against Julius Pine was timely.

II. Whether the income received by Julius Pine during the year 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. Julius Pine and his wife, Pearl Pine, timely filed a New York State combined income tax return for 1971. Julius Pine did not file an unincorporated business tax return for the year 1971.

2. On April 12, 1976, the Audit Division issued a Statement of Audit Changes against Julius Pine on the grounds that his business activities constituted the carrying on of an unincorporated business subject to unincorporated business tax. Accordingly, on the same date a Notice of Deficiency for the year 1971 was issued in the amount of \$567.47, plus interest of \$135.96, for a total of \$703.43.

3. The petitioner is a wholesale ladies apparel sales representative. Since 1955, petitioner has principally represented Flair of Miami (hereinafter referred to as "Flair"), a manufacturer primarily of ladies dresses in larger sizes. Flair maintains control over what territory petitioner would cover. Petitioner was assigned to cover the Metropolitan New York territory, i.e., the five boroughs of New York City, Westchester and Nassau Counties, and all of the State of New Jersey. About a year after he began working for Flair, petitioner became a representative of Daisy's Originals (hereinafter referred to as "Daisy's"), a manufacturer of ladies sportswear in misses sizes. He represented this firm throughout 1971. Petitioner took on Daisy's as a sideline only with the express consent of Flair. A partner in Flair suggested that petitioner represent Daisy's and he introduced him to an official of Daisy's. It was understood by all parties when petitioner took on Daisy's that Flair would continue to be his principal employer. Any conflicts in the allocation of time between the two manufacturers would be resolved in favor of Flair. Petitioner was paid a commission on all goods ordered and shipped. Each manufacturer allowed petitioner a draw against commissions. In 1971, petitioner received a \$200 per week draw from Flair and a \$100 per week draw from Daisy's. There were no deductions made for either taxes or social security. Petitioner continued to receive his draw from each manufacturer while he was on vacation. In 1970, Daisy's requested that petitioner sell the line of a third designer,

Bernard Falk ("Falk"). Upon Flair's objection that it had not agreed to let petitioner carry a third line, petitioner dropped the Falk line. Petitioner's income in 1971 from Falk of \$1,262.48 represented sales made in 1970, which were delivered and on which commissions were paid in 1971. This amount represented 3 percent of petitioner's income in 1971. Daisy's required petitioner to be in its New York showroom on Tuesday mornings and Flair required him to be in its New York showroom on Tuesday afternoons. Petitioner was under the supervision of the sales manager in the showroom of each manufacturer. While in the showroom, the sales manager instructed petitioner as to what goods to show customers. If one manufacturer requested petitioner to change his schedule, petitioner first had to obtain the approval of the other manufacturer. Each manufacturer required petitioner to arrange or rearrange his schedule to be in the showroom full-time to cover for the sales manager when the sales manager went to the Florida showroom or office to work on new lines, or had other appointments that required him to be out of the office, or was on vacation. If a call came from one of petitioner's manufacturers while petitioner was in another's showroom, the petitioner could not leave if the sales manager was not in. If the sales manager was in, he had to obtain permission to leave. When in the showroom, petitioner was required to show the manufacturers' line to all customers regardless of whether they were from his territory. He received no extra compensation for this. Petitioner was required by both manufacturers to service house accounts, for which he received no extra compensation. Each manufacturer provided him with office space in the showroom at no cost to him. Each manufacturer provided petitioner with a telephone in the office and did not charge him for long-distance calls. Each firm supplied petitioner with order forms, office supplies, stationery and business cards imprinted with the firm name. Petitioner serviced about 250 accounts for

Flair and about 150 accounts for Daisy's. Of the total of approximately 400 accounts serviced, only about 50 were customers of both manufacturers. He therefore generally divided his time, working separately for each manufacturer. Each manufacturer supplied petitioner with customer lists and instructions on when and which customers he was to see. Petitioner's supervisors at each firm reprimanded or instructed him on how to handle sales to buyers. Daisy's sales manager reviewed the sales records for each account with petitioner, discussing the reasons for decline in sales and suggesting methods of increasing sales. Each manufacturer required petitioner to attend sales meetings several times a year, including a sales meeting at the start of each of the five selling seasons. At each of these sales meetings, petitioner would receive instructions and training in the quality of the goods, the styling of the goods, the aspects of the foregoing which were to be emphasized to customers, the pricing, the goods which were in stock and which should be pushed to customers, and other similar information. The sales meetings also emphasized comparison with other lines' prices and workmanship. Each week when he was in the showroom, petitioner prepared a schedule, noting his appointments with customers and the shows he would be attending. Petitioner included any customers the sales managers instructed him to see. Before leaving the showroom, petitioner left his schedule with each manufacturer. While he was out seeing customers, petitioner would rearrange his schedule at the direction of either sales manager to see customers whose needs took priority. When not in the showroom, petitioner was required to call in daily to receive instructions and obtain information. Often he called in two or three times per day. Each manufacturer required petitioner to make periodic oral and written reports, and each manufacturer set prices for all merchandise. Petitioner had no authority to vary the price on his own. Petitioner had no control over whether goods ordered by a customer

would be shipped. He had no authority to extend credit. Each manufacturer could and did refuse to ship orders submitted by him because the customer had a poor credit record or prior bad experience with the manufacturer. Each manufacturer could and did refuse to ship goods on orders solicited by him for other reasons of its own. His services were integrated into the overall operation of his employers; he was the primary means for each manufacturer to reach retail customers. He did not make his services available to the general public, and he never advertised for himself. All deductions for advertisements were his share of the expense of advertising shows. Petitioner was required to offer his services personally. He could not hire someone else to do his work for him. Petitioner never hired assistants. Each firm retained the right to approve petitioner's vacation schedule. Petitioner was required to notify each firm that he planned to take vacations. On one occasion, a Daisy's official reprimanded petitioner for taking off too much time in December. Each manufacturer retained the right to discharge petitioner and in fact, Daisy's discharged petitioner in 1978. Petitioner was a member of a union, the National Association of Womens and Childrens Apparel Salesmen. 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 required that he entertain customers when they were in New York or when he was traveling. Petitioner's income from Flair in 1971 was \$22,815.72. This amount represents 58 percent of his earned income for that year. Petitioner's income from Daisy's in 1971 was \$15,374.39. This amount represents 39 percent of his earned income for that year. The balance, 3 percent, as noted above, was from Falk.

4. Petitioner filed an attachment to his Federal income tax return wherein he deducted the following expenses (which included the use of his home

as an office) from his gross income:

Telephone	\$ 1,298.00
Postage and Stationery	940.00
Hotels and Meals	1,116.12
Plane Fares and Car Rental	804.65
Showrooms and Advertising	3,276.26
Tips and Gratuities	275.00
Entertainment of Buyers	2,956.31
Charges for Samples	3,440.97
Use of Home as Office	329.00
Office Supplies	138.95
Use of Car	4,722.43
Total	\$19,297.69

5. Petitioner submitted proposed findings of fact. All of said proposed findings are supported by the record herein except proposed findings No. 19 and 20 in Part II which state as follows:

"19. Petitioner maintained no office for himself. Each manufacturer provided him with office space in the showroom at no cost to him.

20. Petitioner's business deduction for use of his home was solely for the storage of samples."

The attachment to petitioner's Federal income tax return included "use of home as office \$329.00."

CONCLUSIONS OF LAW

A. That the income received by Julius Pine during the year 1971 from Flair, Daisy's and Falk 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, Matter of the Petition of Julius Pine and Pearl Pine, State Tax Commission, July 15, 1975.

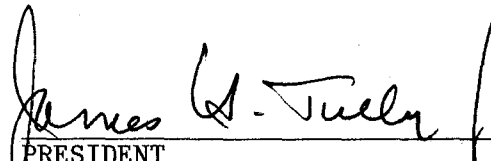
B. That the Notice of Deficiency issued on April 12, 1976 to Julius Pine was timely in accordance with section 683(c)(1)(A) and 722 of the Tax Law.

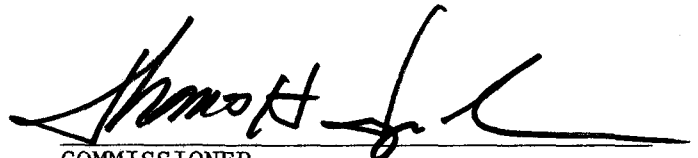
C. That the petition of Julius Pine is denied and the Notice of Deficiency issued April 12, 1976 is sustained.

DATED: Albany, New York

JAN 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER