

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Isadore Sabarra :  
: 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 1967 - 1970. :

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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 19th day of June, 1981, he served the within notice of Decision by certified mail upon Isadore Sabarra, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Isadore Sabarra  
50-17 228th St.  
Bayside, NY 11374

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  
19th day of June, 1981.

*Cornie A. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of  
Isadore Sabarra

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: 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 1967 - 1970.

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 19th day of June, 1981, he served the within notice of Decision by certified mail upon Lewis Steel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

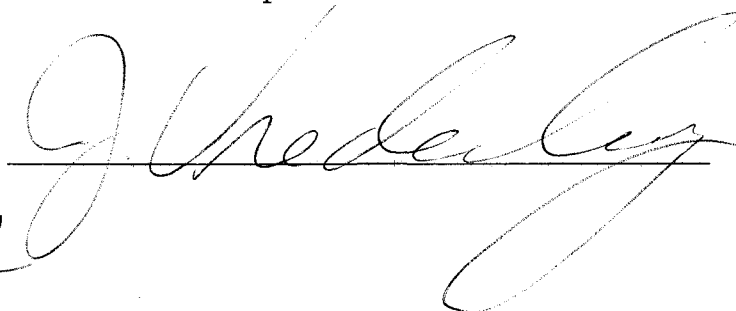
Mr. Lewis Steel  
Eisner, Levy, Steel & Bellman  
351 Broadway  
New York, NY 10013

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  
19th day of June, 1981.





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

June 19, 1981

Isadore Sabarra  
50-17 228th St.  
Bayside, NY 11374

Dear Mr. Sabarra:

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

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
ISADORE SABARRA	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1967	:	
through 1970.	:	

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Petitioner, Isadore Sabarra, 50-17 228th Street, Bayside, New York 11374, 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 1967 through 1970 (File No. 13938).

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 at 1:20 P.M. and continued to conclusion before Edward L. Johnson, Hearing Officer, on May 18, 1979 at 1:35 P.M. Petitioner appeared by Eisner, Levy, Steel & Bellman, P.C. (Lewis Steel, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the income derived from petitioner's activities as a salesman during the years 1967 through 1970 was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner timely filed New York State income tax resident returns for the years 1967 through 1970. Reported on said returns as other income or business income were commissions earned by petitioner from his activities as a

salesman. Unincorporated business tax returns were not filed for the years in question.

2. On March 20, 1972 a Notice of Deficiency was issued against petitioner for unincorporated business tax due of \$2,389.98, together with interest and penalties. Said Notice of Deficiency was based on an underlying Statement of Audit Changes wherein it was stated that "Business income earned as an independent salesman is subject to unincorporated business tax...". The penalty for 1967 and 1968 was asserted pursuant to section 685(a) of the Tax Law while the penalties for 1969 and 1970 were asserted in accordance with sections 685(a)(1) and (a)(2) of the Tax Law.

3. Petitioner was a commission salesman of sportswear apparel during the years at issue. Commissions were earned from three sources; Granite Knitting Mills, Inc., In Sportswear, Inc. and Stringbean, Inc. The latter two firms, although separate corporations (one produced bathing suits while the other produced slacks and skirts), conducted business from the same office, had the same Federal identification number and common management and principals.

4. The majority of petitioner's time and effort was devoted to selling the merchandise of In Sportswear, Inc. and Stringbean, Inc. (hereinafter collectively referred to as "Sportswear"). Petitioner testified that approximately one hour a day was spent on business relating to Granite Knitting Mills, Inc. (hereinafter "Granite"); however, no documentary evidence was submitted to support his testimony. By written contract Sportswear prohibited petitioner from carrying other lines without their expressed approval, while Granite prohibited petitioner from carrying competing lines.

5. Petitioners normal schedule would provide for four days on the road visiting customers in the metropolitan New York and New Jersey area. Tuesdays

were generally spent at the showroom/office of Sportswear where he would wait on customers, catch up on paperwork, straighten out his line and review his accounts. The commission due on sales made on the showroom floor would be credited to petitioner's account only if the customer serviced was geographically located within his territory.

6. No social security taxes, Federal or State withholding taxes, disability insurance were withheld from the commissions earned from Sportswear or Granite. Neither Sportswear or Granite provided petitioner with a health insurance plan, pension plan or unemployment insurance. Petitioner did not receive reimbursement for any business expenses he incurred. Federal Schedule C, Profit (or Losses) From Business or Profession, for the year 1970 (the only one introduced into evidence) indicates petitioner's gross receipts totaled \$31,314.32, while the following business expenses were deducted in determining his net profit:

Depreciation	\$ 950.00
Taxes on Business	38.12
Rent on Business Property	360.00
Insurance	315.00
Legal and Professional Fees	60.00
Trade Shows	545.00
Dues	212.00
Hotels and Travel	219.36
Gas and Oil	851.35
Tolls, Parking, Car	482.75
Miscellaneous	124.60
Telephone	326.66
Trimming and Hotel Equipment	284.46
Entertainment	3,741.36
Gratuities	172.20
Meals	543.33
Samples	2,362.00
TOTAL	<u>\$11,588.19</u>

7. Sportswear and Granite restricted petitioner's sales territory and provided him with customer lists and price lists. Petitioner could not extend credit nor could he authorize credit for returned merchandise. Both Sportswear

and Granite possessed and exercised their authority to reject sales orders which petitioner submitted.

8. At the beginning of a new season Sportswear would provide petitioner with an itinerary, which would be rehashed approximately every 2 to 3 weeks. Sales quotas were established by Sportswear, as well as petitioner's vacation schedule.

9. While at the showroom/office of Sportswear on Tuesdays petitioner would meet with the sales manager to go over what had transpired during the previous week and what was to be taken care of during the upcoming week. Sales meetings were held 3 or 4 times a year with all the salesmen.

10. Granite is a firm located in Sounderton, Pennsylvania. During the years at issue they did not maintain an office within New York State. Petitioner would contact Granite via telephone once a week and would physically visit their headquarters 4 to 6 times a year. Any trips made to Granite's headquarters would be made on the weekend.

11. During the tax year 1969 petitioner earned commissions of \$9,304.67 from Granite and \$20,533.60 from Sportswear. These amounts represent 31 percent and 69 percent respectively of petitioner's earned commission income for that year. A breakdown of commissions earned during the other years at issue was not submitted, however, petitioner testified that the income earned from Granite was "...about 25 or possibly 30 percent" of total commissions earned.

12. No testimony or documentary evidence was adduced at the hearing held herein to establish reasonable cause for petitioners failure to file unincorporated business tax returns and/or to pay the tax due.

CONCLUSIONS OF LAW

A. That the commission income received by petitioner Isadore Sabarra, during the years 1967 through 1970, constituted income derived from the carrying on of an unincorporated business as defined in section 703(a) of the Tax Law and that said income was not derived from services performed as an employee in accordance with the meaning and intent of section 703(b) of the Tax Law.

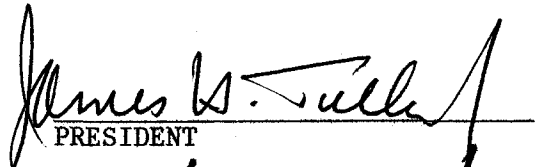
Jerry Bander v. State Tax Commission, 65 A.D.2d 847.

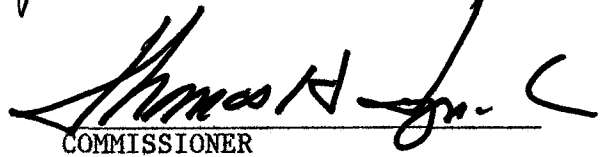
B. That the petition of Isadore Sabarra is denied and the Notice of Deficiency issued March 20, 1972 is sustained together with such additional interest and penalty as may be lawfully due and owing.

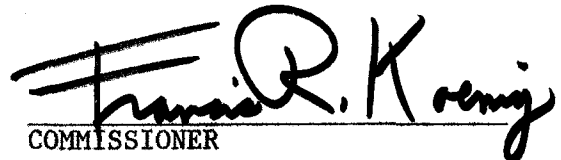
DATED: Albany, New York

JUN 19 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER