

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gerald Tenenbaum :
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 1968 - 1971. :

AFFIDAVIT OF MAILING

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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Gerald Tenenbaum, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

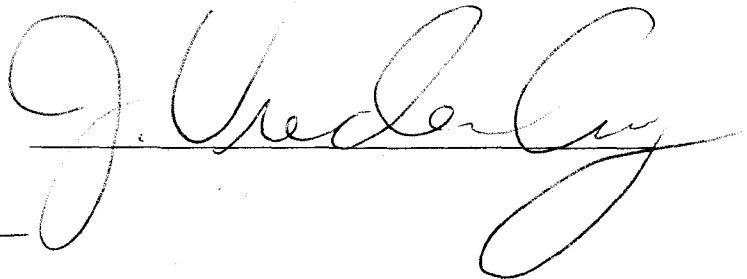
Gerald Tenenbaum
20 Stuart Dr.
Syosset, NY 11791

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
27th day of November, 1981.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gerald Tenenbaum :
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 1968 - 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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Marcus Schwartz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Marcus Schwartz
34-29 Jerome Ave.
Bronx, NY 10467

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
27th day of November, 1981.

Carrie R. Hagedorn

J. Vredenburg

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

November 27, 1981

Gerald Tenenbaum
20 Stuart Dr.
Syosset, NY 11791

Dear Mr. Tenenbaum:

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
Marcus Schwartz
34-29 Jerome Ave.
Bronx, NY 10467
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
GERALD TENENBAUM
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1968,
1969, 1970 and 1971.

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DECISION

Petitioner, Gerald Tenenbaum, 20 Stuart Drive, Syosset, New York 11791, 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 1968, 1969, 1970 and 1971 (File No. 14097).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 26, 1980 at 10:45 A.M. Petitioner appeared by Marcus Schwartz, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner's activities as an outside salesman constitute the carrying on of an unincorporated business, the income from which is subject to the unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Gerald Tenenbaum, and Phyllis Tenenbaum, his wife, filed New York State income tax resident returns (Form IT-201) for years at issue. Petitioner, Gerald Tenenbaum, did not file unincorporated business tax returns for said years.

2. On January 26, 1976, the Audit Division issued a Notice of Deficiency against petitioner, together with an explanatory Statement of Audit Changes for subject years asserting unincorporated business tax of \$4,611.65 and interest thereon of \$1,445.91, for a total of \$6,057.56. The issuance of the Notice of Deficiency and Statement of Audit Changes was based on a decision of the State Tax Commission dated January 28, 1975 for the year 1967 which held that petitioner's activities for such year constituted the carrying on of an unincorporated business.

3. For subject years, petitioner was a sales representative for two (2) or three (3) principals.

4. Petitioner received income of \$34,287.80, \$32,902.08, \$36,379.58 and \$31,364.72 from Wippette Sportswear, Inc. (hereinafter "Wippette") for the years 1968 through 1971, respectively. He received income from one or two other principals in the sum of \$7,609.81, \$7,881.35, \$12,576.92 and \$13,103.17 for the years 1968 through 1971, respectively. Petitioner conceded that the income earned from principals other than Wippette was subject to unincorporated business tax.

5. Petitioner, Gerald Tenenbaum, argued that the income earned from his activities as an outside salesman for Wippette was not subject to the unincorporated business tax as the services he rendered were that of an employee and not that of an independent contractor. The petitioner offered in evidence an undated affidavit, executed by Irving Bagatelle, sales manager of Wippette (who also signed for Wippette an employment contract noted infra), which states, in relevant part, that:

"5. Mr. Tenenbaum was subject to the corporation's complete control based on the following:

- a. He was required to report to the corporate offices at least once a week.
 - b. Prepared (sic) to submit reports at least weekly.
 - c. Orders taken were required to be forwarded to the corporate offices and such orders were subject to complete corporate approval.
 - d. When the company made appointments for him, he was required to be present at the appointed place and hour regardless of his own schedule.
 - e. There was withheld from his earnings all of the required taxes as any other employee, and in fact, such taxes were withheld.
 - f. The company paid unemployment insurance, disability insurance and workmen's compensation insurance for Mr. Tenenbaum.
6. Mr. Tenenbaum was permitted to be employed by one (1) other company, only as long as his other employment did not interfere with his ability to represent this corporation and his continued ability to produce sales for Wippette Sales Corp. and his daily routine of covering his territory, all of the other myriad details necessary and the other corporation was not in competition with Wippette Sales Corp."

6. Petitioner entered into an employment contract with Wippette Sales Corporation under date of April 4, 1962, which was amended on October 18, 1962. The contract was executed on behalf of Wippette by Mr. Irving Bagatelle. The express terms of the agreement provided in relevant part, limitations on petitioner's territory, exclusion of solicitation of specific retail outlets and written company approval for petitioner to carry one non-conflicting line. Further, no alteration and variations of the terms of the contract were valid unless made in writing and signed by both parties.

The express terms of the employment agreement, did not provide that petitioner was to report to the company offices at least once a week; nor that the company was to schedule appointments for him or that he was required to be present at the appointed place and hour regardless of his own schedule.

7. Petitioner contended that when he took noncompensatory vacations during slack seasons he was required to inform the company of his whereabouts at all times, so that in the event customer problems developed, he would be immediately available for its resolution.

8. Petitioner further argued that the details and means by which new merchandise was to be sold was set forth in detail during sales meetings which required petitioner's attendance at corporate offices for a period of ten or more days a year.

9. Petitioner's hours of work were erratic and not subject to control, as Wippette's primary concern was in sales generated by him and not in hours worked.

10. Petitioner maintained a self-employed ("Keogh") plan for subject years.

11. Petitioner was not reimbursed for any selling expenses incurred by him on behalf of Wippette.

12. For subject years, Wippette Sportswear, Inc. withheld Federal and New York State income taxes and social security tax from the commissions paid to petitioner. Wippette covered him for workmen's compensation and disability insurance.

CONCLUSIONS OF LAW

A. That the principals represented by Gerald Tenenbaum for subject years did not exercise sufficient direction and control over his activities so as to constitute an employer-employee relationship of any such principal. That the parol evidence submitted by petitioner, i.e., affidavit, supra, contravenes and materially alters the terms of the contract by creating duties which were not provided for by the express terms of the contract.

B. That the selling activities of petitioner constituted the carrying on of an unincorporated business in accordance with the meaning and intent of section 703, subdivision (a) of the Tax Law, and that the income derived therefrom is subject to unincorporated business tax imposed under section 701, subdivision (a) of the Tax Law.

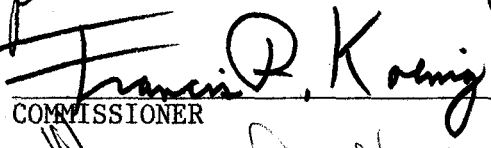
C. That the petition of Gerald Tenenbaum is denied and the Notice of Deficiency issued January 26, 1976 for subject years is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER