

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stephen Berkley :
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 1975. :

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Stephen Berkley, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen Berkley
2 Meadow Lane
Roslyn Heights, NY 11577

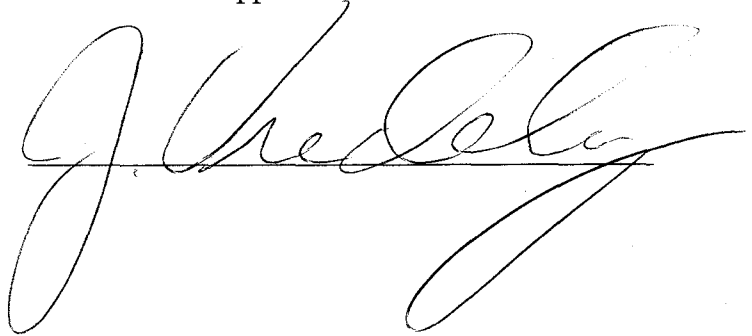
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
29th day of December, 1982.

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Robert Jurgens the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Jurgens
66 North Broadway
Hicksville, NY 11801

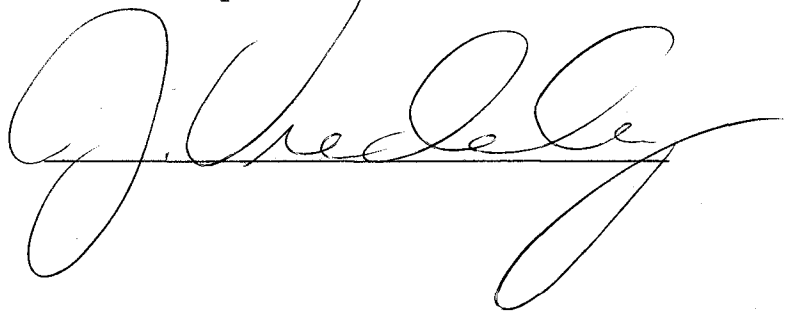
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
29th day of December, 1982.

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 29, 1982

Stephen Berkley
2 Meadow Lane
Roslyn Heights, NY 11577

Dear Mr. Berkley:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Robert Jurgens
66 North Broadway
Hicksville, NY 11801
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
STEPHEN BERKLEY
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1975.

DECISION

Petitioner, Stephen Berkley, 2 Meadow Lane, Roslyn Heights, New York 11577, 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 1975 (File No. 28695).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1982 at 9:15 A.M. Petitioner appeared by Robert Jurgens, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether petitioner's activities as a sales representative during the year 1975 constituted the conduct of an unincorporated business within the meaning and intent of section 703 of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Stephen Berkley, together with his wife, Marlene Berkley, who is not a party to this proceeding, timely filed a New York State Combined Income Tax Return (Form IT-208) for the year 1975.

2. Included with the above filing was a New York State Unincorporated Business Tax Return (Form IT-202) for 1975, listing petitioner's name and

social security number and the words "not subject". This form showed neither figures nor any calculation of unincorporated business tax, and was signed by Greenbaum & Gillman (petitioner's accountants) rather than by petitioner.

3. On February 7, 1979 the Audit Division issued to petitioner a Notice of Deficiency asserting additional tax due for 1975 in the amount of \$3,386.00, plus interest.

4. A Statement of Audit Changes issued by the Audit Division to petitioner on September 27, 1977, stated that petitioner's activities as a salesman were subject to unincorporated business tax, and contained computations showing unincorporated business tax due in the amount of \$2,376.22. A subsequent Statement of Audit Changes dated December 12, 1978, contained revised computations based on Federal adjustments to petitioner's income, and showed additional personal income tax due of \$484.00, as well as unincorporated business tax due in the amount of \$2,902.00. It is the total of these two amounts shown on the second Statement of Audit Changes (\$3,386.00) which constitutes the amount of tax asserted as due on the Notice of Deficiency.

5. Petitioner has not raised the issue of the additional personal income tax asserted as due (\$484.00), and apparently does not contest this portion of the asserted deficiency.

6. Petitioner, Stephen Berkley, worked as a salesman carrying lines of children's clothing for three (3) different companies in 1975. Mr. Berkley's selling activities consisted of traveling to call on various established, as well as potential, customers. Petitioner also did direct selling in the showroom and from booths rented at trade shows, as well as servicing of other large "house" accounts and buyers from various parts of the country for one of his principals, namely Crystal Sunflowers, Inc.

7. Mr. Berkley was assigned a specified sales territory which included all of the New England States and New York State. He was paid on a commissions-earned basis. His commissions were determined monthly, based on the volume of merchandise shipped into his assigned territory, and he had the right to draw an advance against his commissions.

8. Mr. Berkley received no commissions on sales made to "house" accounts or to buyers from other parts of the country visiting the showroom, nor was he paid for time spent in the showroom. He was, however, reimbursed for expenses incurred in entertaining these buyers.

9. Mr. Berkley would go on road trips to call on customers at the times of the year when each of his principals' particular new lines of clothing were ready to be shown. Mr. Berkley would file an itinerary of his trip with the particular principal before traveling, wherein he would outline the dates and various customers he would be visiting. He also would call the particular principal's home office daily when he was traveling.

10. When Mr. Berkley attended trade shows, he often hired a person to assist him in display setup and in taking orders. Wages paid to such assistants, as well as booth rental costs and other fees associated with these trade shows, were paid by Mr. Berkley without reimbursement. Mr. Berkley also employed his wife as a clerical assistant, and paid wages to her in the amount of \$10,400.00 without reimbursement by his principals.

11. Except for the limited reimbursement of certain entertainment expenses (see Finding of Fact "8"), Mr. Berkley was not reimbursed for expenses incurred in the course of his sales activities.

12. Mr. Berkley was required to purchase his merchandise samples for display from his principals without reimbursement. His cost for these samples was approximately fifty percent (50%) of their wholesale cost.

13. Attached to Mr. Berkley's 1975 U.S. Individual Income Tax Return (Form 1040) was a Schedule C ("Profit or (Loss) From Business or Profession"), on which Mr. Berkley itemized and deducted business and selling expenses not reimbursed, including (but not limited to) telephone charges, automobile expenses, stationery, printing and postage costs, and entertainment expenses. This schedule also contained an item of expense labeled "commissions" (paid) for which no explanation was given at the hearing.

14. Mr. Berkley was not furnished with a company car, nor did he receive paid vacation or sick leave. None of Mr. Berkley's principals provided him with company benefits such as health or life insurance, nor did any of them provide him with a pension plan. Mr. Berkley did have a Keogh plan on his own in 1975. In addition, only one of Mr. Berkley's principals (Kingold Sales Corporation) withheld Federal income tax and F.I.C.A. charges on his behalf.

15. None of Mr. Berkley's principals trained him in any particular method of selling or dealing with customers. His selling technique reflected his own personal style of presentation. Mr. Berkley had no other salesmen working for him or with him in his assigned territory.

16. In 1975, Mr. Berkley's major principal was Crystal Sunflowers, Inc. ("Crystal"), which offered a line of children's clothing bearing the Izod Lacoste label. He also carried a line of swimwear and other playwear for Kingold Sales Corporation and a line of infants and toddlers clothing and sportswear for a firm called Basic Togs. While each of these firms offered similar types of clothing, their lines were generally non-competitive with each

other due to differences in price and in the type of store to which the respective line would be offered for sale.

17. During the years preceeding 1975, Crystal had grown progressively more successful, such that by 1975 its line of clothing provided Mr. Berkley with his major source of income. Accordingly, he directed the majority of his time and effort to selling Crystal's line of clothing.

18. Mr. Berkley testified he spent approximately ninety percent (90%) of his business hours working for Crystal. He did not work a specific number of hours on a set time schedule each week, but rather worked at the convenience of his customers. Mr. Berkley often worked nights and weekends as well as on weekdays. The decision concerning what hours he would work, as well as the amount of time he would devote respectively to each of his principals' lines, was his own and was based on the relative amounts of income which could be generated by each of the lines of clothing he carried.

19. Mr. Berkley was involved with training other salesmen for Crystal. He also helped set up displays in stores carrying Crystal's clothing and often instructed store salesmen as to methods of selling Crystal's clothing.

20. In addition to his usual selling activities, Crystal required Mr. Berkley to handle large "house" accounts and also out-of-town buyers who visited Crystal's showroom (see Finding of Fact "6"). Crystal provided Mr. Berkley with a small office at its New York showroom to aid him in the performance of these duties. In addition, Crystal supplied Mr. Berkley with stationery and the use of photocopying equipment.

21. Crystal's seasonal line of clothing was available to be shown approximately two (2) months before Mr. Berkley's other lines were available. Mr. Berkley

called Crystal collect when traveling, but had to pay for calls to his other principals out of his own pocket.

22. Mr. Berkley was required to attend regular sales meetings held by Crystal. He also advised Crystal's designers of items requested by his customers, and also worked with the designers in an effort to make such items available to his customers.

23. Crystal only allowed its line to be carried by those stores which fit the Izod Lacoste "image". This "image", as determined by Crystal's management, generally meant stores which were well-maintained and carried the "better" lines of merchandise. Mr. Berkley testified he was often prohibited by Crystal's management from selling to certain stores even though he felt those stores met the proper "image" to carry Crystal's line.

24. Prior to and including the year 1975, Mr. Berkley was free to work for any other principals carrying lines which were non-conflicting with Crystal's line. As a matter of courtesy, he always sought permission from Crystal to carry other lines. For years beginning after 1975, Crystal's management told Mr. Berkley he would have to drop the other lines he was carrying and devote full-time efforts to selling for Crystal. Mr. Berkley complied with this demand and ceased carrying other lines at the end of 1975.¹

CONCLUSIONS OF LAW

A. That "[i]t is the degree of control and direction exercised by the employer which determines whether the taxpayer is an employee or an independent contractor subject to the unincorporated business tax." Liberman v. Gallman, 41 N.Y.2d 774, (1977). Regulations of the State Tax Commission provide:

¹ In 1976, Mr. Berkley received 90 percent of his income from Crystal and 10 percent from previous year's billings from other principals. In 1977, he received 100 percent of his income from Crystal.

"[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case." 20 NYCRR 203.10(c), (adopted February 1, 1974).

B. That among the facts and circumstances to be examined are whether petitioner maintained an office, engaged assistants, incurred expenses without reimbursement and was covered by a pension plan. Also, whether the principal(s) withheld State and Federal taxes, F.I.C.A. and other payments on behalf of petitioner, and the amount of control over petitioner's activities exercised by the principal(s). Raynor v. Tully, 60 A.D.2d 731, lv. to app. den. 44 N.Y.2d 643 (1978).

C. That section 703(f) of the Tax Law provides:

"Sales representative -- an individual,..., shall not be deemed engaged in an unincorporated business solely by reason of selling goods, wares, merchandise or insurance for more than one enterprise." (Emphasis added.)


D. That during the year 1975, petitioner Stephen Berkley's principals neither retained nor exercised sufficient direction and immediate control over his daily activities to classify him as an employee rather than as an independent contractor. Petitioner maintained his own office, incurred expenses for which he was not reimbursed and utilized his own selling methods and techniques to accomplish the desired result of a high volume of sales. The showroom duties and the restrictions on the type of store to which Mr. Berkley could offer Crystal's line were not sufficient to create the relationship of employer and employee.


E. That the petition of Stephen Berkley is hereby denied and the Notice of Deficiency dated February 7, 1979, together with such interest as may be lawfully owing, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 29 1982

ACTING 
PRESIDENT


COMMISSIONER


COMMISSIONER