

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Isaac Cabasso :
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 - 1975. :

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 21st day of May, 1982, he served the within notice of Decision by certified mail upon Isaac Cabasso, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Isaac Cabasso
1 Roseld Ave.
Deal, NJ 07723

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
21st day of May, 1982.

Ernie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Isaac Cabasso :

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 - 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 21st day of May, 1982, he served the within notice of Decision by certified mail upon Fanette Pollack the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fanette Pollack
Eisner & Levy, P.C.
18 E. 41st St.
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
21st day of May, 1982.

Amie P. Haglund

J. Vredenburg

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

May 21, 1982

Isaac Cabasso
1 Roseld Ave.
Deal, NJ 07723

Dear Mr. Cabasso:

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
Fanette Pollack
Eisner & Levy, P.C.
18 E. 41st St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ISAAC CABASSO
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1973,
1974 and 1975.

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DECISION

Petitioner, Isaac Cabasso, 1 Roseld Avenue, Deal, New Jersey 07723, 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, 1974 and 1975 (File No. 22260).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 2, 1981 at 1:45 P.M. Petitioner appeared by Eisner & Levy, P.C. (Fanette Pollack, Esq., of counsel). The Audit Division appeared by Paul Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner's income from his activities as a manufacturer's representative was properly subject to unincorporated business tax.

II. If so, whether petitioner was entitled to deductions from unincorporated business income for charitable contributions and for contributions to a Keogh plan.

FINDINGS OF FACT

1. On March 27, 1978, the Audit Division issued to petitioner, Isaac Cabasso, a Notice of Deficiency, asserting unincorporated business income taxes

under Article 23 of the Tax Law for the years 1973, 1974 and 1975, plus interest, scheduled as follows:

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
1973	\$1,002.21	\$296.74	\$1,298.95
1974	1,125.85	282.11	1,407.96
1975	<u>1,492.32</u>	<u>247.09</u>	<u>1,739.41</u>
	\$3,620.38	\$825.94	\$4,446.32

2. Mr. Cabasso was engaged as a manufacturer's representative by Babyfair Imports Co. ("Babyfair"), an importer of children's clothing. He began with Babyfair in approximately 1953 as a part-time shipping clerk, part-time salesman. Mr. Ralph Shamah, petitioner's supervisor, instructed him in selling techniques and four or five years later, promoted petitioner to full-time salesman.

3. Prior to 1968, Babyfair withheld Federal, state and local income taxes and Social Security from petitioner's wages. In 1968 petitioner requested that Babyfair cease withholding such amounts in order that he could begin contributing to a Keogh plan. Babyfair did not provide any pension plan or health insurance benefits for its salesmen.

4. Mr. Cabasso's territory, as determined by Mr. Shamah, encompassed the greater New York metropolitan area, Boston, Atlanta and Savannah. Mr. Cabasso had developed a routine over the years, according to which he visited a certain city one day and another city the next. He had a list of accounts and visited the accounts located in the particular city. Before calling upon any new account, petitioner was required to obtain Mr. Shamah's approval.

5. In general, petitioner spent four days on the road and one day in the Babyfair showroom weekly. At Christmastime and other peak shopping seasons, Mr. Cabasso spent more than one day per week in the showroom because clients were reluctant during such times to see salesmen. Mr. Cabasso was paid on a

commission basis, but did not earn commissions for sales made in the showroom on other than his own accounts.

6. Mr. Cabasso was obliged to telephone Mr. Shamah each day he was on the road for the purpose of reviewing his activities. It was also necessary for petitioner to obtain final approval for sales from Babyfair, especially with regard to the extension of credit to a client.

Babyfair provided petitioner with samples and order forms. Babyfair determined the prices for all merchandise, which could be reduced for a particular customer only with Mr. Shamah's approval.

7. Petitioner was required to sell exclusively on behalf of Babyfair.

8. When sales meetings were occasionally conducted, attendance of all salesmen was mandatory.

9. Petitioner's business cards showed his name, "Babyfair" and the Babyfair address and telephone number.

10. Babyfair did not provide petitioner with an office at the business premises. Nor did petitioner maintain an office in his home.

11. Petitioner took two to three weeks vacation annually, scheduled with Mr. Shamah's approval.

12. For each year at issue, petitioner's accountants prepared his Federal and state personal income tax returns, including Schedule C, Profit (or Loss) from Business or Profession. In 1974 and 1975, petitioner deducted business expenses in the respective amounts of \$19,085.00 and \$18,397.00; he detailed his 1975 expenses as follows:

Trade shows	\$ 964.00
Automobile	1,489.00
Travel	410.00
Depreciation	1,333.00
Parking and tolls	550.00
Dues, subscriptions, magazines and papers	187.00

General and miscellaneous	155.00
Heat, light, power and water	84.00
Legal and accounting	185.00
Office expense, printing and postage	115.00
Supplies and samples	2,260.00
Telephone and telegraph	450.00
Taxi and local travel	685.00
Promotion and entertaining	6,970.00
Christmas gifts	2,560.00

Petitioner did not file any unincorporated business tax return.

13. Petitioner maintains that he began his association with Babyfair as an employee and that the character of this association remained constant, though he was promoted to salesman.

CONCLUSIONS OF LAW

A. That the rendering of services by an individual as an employee is not considered an unincorporated business for purposes of Article 23 of the Tax Law.

"The performance of services by an individual as an employee or as an officer or director of a corporation, society, association, or political entity, or as a fiduciary, shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual."
Section 703(b).

B. That the determination whether services were performed by an individual as an "employee" or as an "independent agent" turns upon the degree of direction and control exercised by the employer over the individual. Matter of Liberman v. Gallman, 41 N.Y.2d 774.

C. That for the years at issue, petitioner was an employee of Babyfair Imports Co. Petitioner was obligated, among other things, to report his activities to his supervisor each day that he was on the road; call upon only certain accounts; attend sales meetings; work in the Babyfair showroom when not travelling; and obtain his supervisor's approval for sales, price variations, extensions of credit and visits to new accounts. All the aforementioned

factors are indicative of an employer/employee relationship and are not outbalanced by the firm's failure to withhold taxes from petitioner's wages or to reimburse him for expenses incurred. Matter of Kenneth Kolkebeck, State Tax Commission, April 6, 1979 [TSB-H-79(107)I]; Matter of Edward Birnbaum, State Tax Commission, January 24, 1979 [TSB-H-79(11)I].

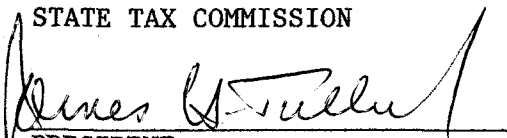
D. That in view of the foregoing, it is unnecessary to decide the second issue raised.

E. That the petition of Isaac Cabasso is hereby granted, and the notice of deficiency issued March 27, 1978 is cancelled in full.

DATED: Albany, New York

MAY 21 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER