

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harold Gallin : 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 1975 - 1977. :
_____:

State of New York
County of Albany

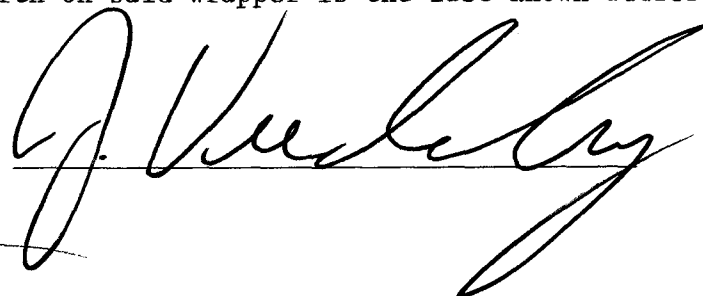
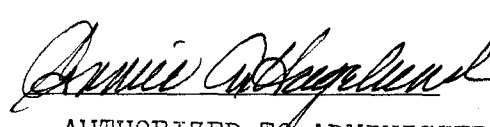
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Harold Gallin, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold Gallin
89-85 S.W. 6th Court
Plantation, FL 33324

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
12th day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Harold Gallin

AFFIDAVIT OF MAILING

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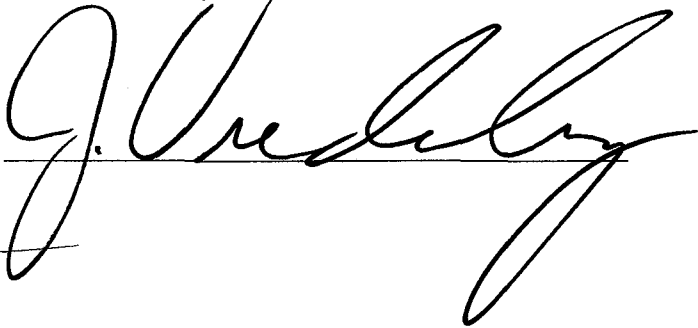
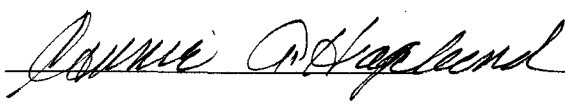
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Milton Kreitzman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Milton Kreitzman
3150 Palm Aire Dr. N. (406)
Pompano Beach, FL 33060

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
12th day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 12, 1982

Harold Gallin
89-85 S.W. 6th Court
Plantation, FL 33324

Dear Mr. Gallin:

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
Milton Kreitzman
3150 Palm Aire Dr. N. (406)
Pompano Beach, FL 33060
Taxing Bureau's Representative

STATE TAX COMMISSION

2. On April 14, 1980, the Audit Division issued a Notice of Deficiency against the petitioner together with an explanatory Statement of Audit Changes

for subject years asserting unincorporated business tax of \$947.63 and interest thereon of \$265.73 for a total of \$1,213.36. The issuance of the Notice of Deficiency and Statment of Audit Changes was on the grounds that "[a]s there is no agreement between your principals as to the division of your working time for New York State unincorporated business tax purposes you are considered an independent agent carrying on an Unincorporated Business. Accordingly, for New York State Income Tax purposes you are an independent agent carrying on an Unincorporated Business and therefore subject to the tax."

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

4. Petitioner received income of \$29,150.00, \$28,600.00 and \$28,600.00 from Swirl, Inc. for the years 1975 through 1977, respectively. He received income from one or two other principals in the sum of \$17,137.00, \$30,310.00 and \$30,953.00 for the years 1975 through 1977, respectively.

5. Petitioner, Harold Gallin, argued that the income earned from his activities as an outside salesman for Swirl, Inc. was not subject to unincorporated business tax as the services he rendered were those of an employee and not those of an independent contractor. The petitioner offered in evidence a letter, dated January 7, 1981 executed by Dennis W. Gleaves, Vice-President of Swirl, Inc., which states, in relevant part, that:

"In response to your request for a statement concerning your employee status with Swirl for the calendar years 1975, 1976 and 1977, I have reviewed your records and found that for the years in question, Swirl did withhold and pay FICA on your earnings. During this period, I suppose one could say that you were considered to be an employee of the company."

6. Petitioner Harold Gallin did not maintain an office for the purpose of selling goods and did not employ any assistants in the conduct of his activities.

7. Petitioner contended that he travelled throughout the Northeast in pursuit of his duties of selling merchandise. His commission rate was intended to defray the expenses necessary to carry out full coverage of the territory assigned to him by Swirl, Inc. When the expenses became excessive, the petitioner was obligated to carry additional lines to increase his income in order to enable him to retain his employment with Swirl, Inc.

8. Swirl, Inc., as a matter of policy, did not provide any of its employees with health and welfare benefits, and neither did the company provide a pension plan. It did provide disability, social security, unemployment and workers' compensation benefits.

9. Petitioner further contends that he was always an employee of Swirl, Inc. and the company directed all of his activities as such, including territory covered and customers contacted in such territory. The company required periodic reports as to the performance of his duties, orders taken and time devoted to coverage of the territory and customers. Appointments were made in advance as per schedules mailed to the company every week. Petitioner maintained an individual retirement ("IRA") plan for 1976 and 1977.

CONCLUSIONS OF LAW

A. That the principals represented by Harold Gallin for the subject years did not exercise sufficient direction and control over his activities so as to constitute an employer-employee relationship with any such principal. That the selling activities of the 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 income derived therefrom is subject to unincorporated business tax imposed under section 701, subdivision (a) of the Tax Law.

B. That the petition of Harold Gallin is denied, and the Notice of Deficiency issued April 14, 1980 is sustained, together with such additional interest as may be lawfully due and owing.


DATED: Albany, New York

OCT 12 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER