

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert Goodman :
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 1970-1974. :
:

State of New York
County of Albany

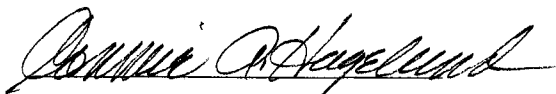
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Robert Goodman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Goodman
3482 Frederick St.
Oceanside, NY 11572

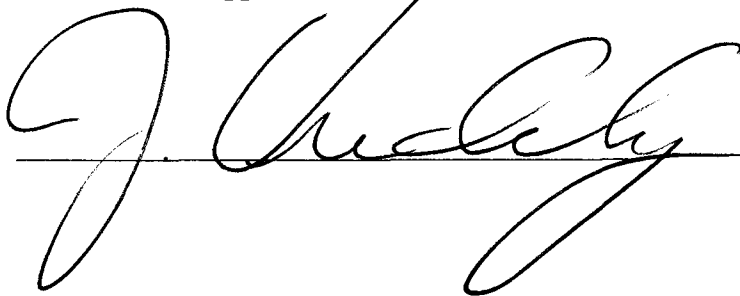
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
14th day of December, 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
Robert Goodman :

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 1970-1974. :

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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Eugene G. Eisner the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eugene G. Eisner
Eisner & Levy, P.C.
18 E. 41st St.
New York, NY 10017

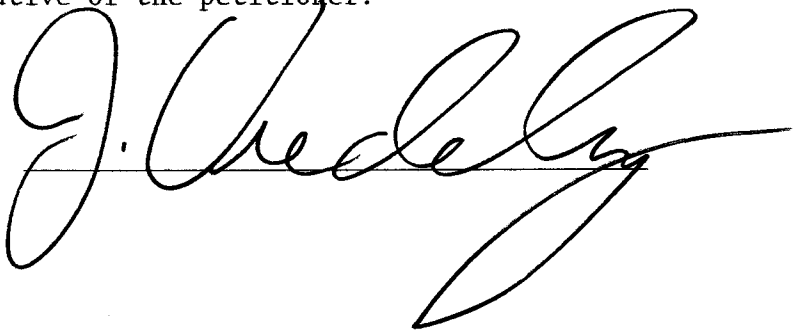
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
14th day of December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 14, 1982

Robert Goodman
3482 Frederick St.
Oceanside, NY 11572

Dear Mr. Goodman:

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
Eugene G. Eisner
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	:	
	:	
ROBERT GOODMAN	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1970	:	
through 1974.	:	

Petitioner, Robert Goodman, 3482 Frederick Street, Oceanside, New York 11572, 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 1970 through 1974 (File No. 20719).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 2, 1982 at 1:15 P.M. Petitioner Robert Goodman appeared with Eisner & Levy, P.C. (Fanette Pollack, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner's sales activities during the years 1972, 1973 and 1974 were carried on in the capacity of an independent contractor subject to unincorporated business tax or that of an employee exempt from said tax.

II. Whether petitioner's failure to file unincorporated business tax returns for the years 1970 through 1974 and pay the tax when due was based on reasonable cause, and not willful neglect, thereby permitting the penalties assessed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law to be waived.

FINDINGS OF FACT

1. Petitioner herein, Robert Goodman, timely filed New York State resident income tax returns for the years 1970 through 1974 wherein he reported business income from his activities as a manufacturers' representative. He did not file unincorporated business tax returns for any of the years at issue.

2. On October 31, 1977, the Audit Division issued a Notice of Deficiency to petitioner for the years 1970 through 1974, asserting that unincorporated business tax of \$8,561.99 was due together with penalties (for late filing and late payment) and interest. The aforementioned Notice of Deficiency was based on a Statement of Audit Changes where the following explanation was offered:

"Based on the decision made by the New York State tax commission dated March 14, 1975 and order of the Appellate Division dated December 21, 1976 the activities in which you are engaged constituted the carrying on of an unincorporated business subject to the New York State Unincorporated Business tax."

3. At the hearing held herein, petitioner indicated that he did not wish to contest the unincorporated business tax asserted for the years 1970 and 1971. Petitioner does contest the unincorporated business tax asserted due for the years 1972, 1973 and 1974 and the assertion of penalties for all five (5) years in question. Accordingly, the tax years 1970 and 1971 will be addressed hereinafter only in so far as the penalties are concerned.

4. During the years 1972, 1973 and 1974 petitioner was involved in the sale of merchandise as a manufacturers' representative for a total of five (5) principals from which he received the following income:

<u>Principal</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>
Dune Deck	\$ 2,467.00	-0-	-0-
Miss Ingenue	3,250.00	-0-	-0-
Ruth Manchester	40,146.00	\$55,892.00	\$33,253.00
K.W. International	14,856.00	18,632.00	6,600.00
Aspen	-0-	11,538.00	4,303.00
Total	<u>\$60,719.00</u>	<u>\$86,062.00</u>	<u>\$44,156.00</u>

5. Petitioner's primary principal during the years 1972, 1973 and 1974 was Ruth Manchester, a manufacturer of ladies blouses. The other principals from which petitioner derived commission income, Dune Deck, Miss Ingenue, K.W. International and Aspen, were involved in the manufacture of swimsuits, cotton knit tops, sweaters and ski wear, respectively. The blouses manufactured by Ruth Manchester were sold year round, while the products offered by petitioner's other principals were seasonal in nature.

6. Petitioner argued that his primary principal, Ruth Manchester, exercised sufficient direction and control over his activities to the extent necessary to be considered an employee of said principal. Prior to April, 1972, petitioner performed services for Ruth Manchester solely as a commissioned salesman. After March 31, 1972 and for 1973 and 1974, petitioner had two jobs with Ruth Manchester. He continued to sell, on a commission basis, the blouses manufactured by Ruth Manchester and he also set up and ran a new division for Ruth Manchester called "Classical Jazz". For setting up and running the "Classical Jazz" division, petitioner received a salary of \$400.00 per week.

7. (a) Ruth Manchester assigned petitioner a specific sales territory which encompassed metropolitan New York and all of New Jersey. Petitioner was free to develop new customers, however, he could not sell to certain designated "house accounts", nor could he sell to new customers who were geographically located in close proximity to said "house accounts".

(b) Petitioner reported his sales activities on a daily basis to Ruth Manchester via telephone and would also advise the sales manager of his next day's schedule.

(c) All sales made by petitioner for Ruth Manchester were subject to the terms, conditions and approval of said company. Petitioner had no authority to extend credit or approve price variations.

(d) Ruth Manchester maintained an office and showroom in New York City. For the first three (3) months of 1972, when petitioner was solely a salesman for Ruth Manchester, he was required to be in attendance at said office and showroom every Tuesday. Petitioner received a commission on sales made in the showroom only if the customer was located within his assigned territory. After March 31, 1972, when petitioner began his duties setting up and running the new division, he spent approximately three (3) days per week in the office/showroom.

(e) Petitioner had to clear his vacation schedule with Ruth Manchester.

8. (a) Petitioner prepared his own sales itinerary, however, he would occasionally be instructed by Ruth Manchester to visit certain customers.

(b) All expenses that were incurred in his sales activities were paid solely by petitioner. Unreimbursed expenses totaled \$19,725.00 in 1972, \$26,919.00 in 1973 and \$11,239.00 in 1974.

(c) There was no withholding of Federal, State, City or social security taxes from the commission income or salary income received by petitioner from Ruth Manchester. Petitioner received a weekly salary check and a monthly commission check.

(d) Throughout the years in question, petitioner maintained a self-employed retirement plan (Keogh Plan) and individually paid his own social security taxes via Federal Schedule SE.

(e) Petitioner, a salesman with thirty-five (35) years of experience, utilized his own sales techniques and methods in making a sale. Petitioner testified that the Ruth Manchester sales manager occasionally gave him "suggestions" on how the Ruth Manchester line should be presented. No credible evidence was adduced at the hearing detailing the manner, if any, in which

Ruth Manchester directed or controlled petitioner's activities with respect to his setting up and running of the new "Classical Jazz" division.

9. Ruth Manchester provided petitioner with an office and also provided him with a telephone for which no charge was made. Petitioner also maintained an office in his personal residence. Petitioner did not employ any assistants and he estimates that approximately eighty percent (80%) of his time was devoted to Ruth Manchester business.

10. Prior to April, 1972, petitioner was free to take on new principals as long as the product offered by any new principal did not conflict with Ruth Manchester's line. After March 31, 1972, petitioner felt he could not accept new lines since he was being paid a salary by Ruth Manchester for setting up and running the new division. Petitioner was able to pick up the Aspen account after April, 1972 only with the approval of Ruth Manchester.

11. Petitioner did not file unincorporated business tax returns for the years 1970 through 1974 on advise of counsel. Petitioner had pending before the State Tax Commission a petition for redetermination of an unincorporated business tax assessment for the years 1967, 1968 and 1969. Said petition was filed on April 5, 1971, the State Tax Commission decision concerning the years 1967, 1968 and 1969 was issued on March 14, 1975, and petitioner's Article 78 proceeding for judicial review of the Commission's decision was dismissed by default on December 21, 1976.

CONCLUSIONS OF LAW

A. That the degree of direction and control exercised by a principal is of paramount importance when determining whether a taxpayer is an employee or independent contractor (Matter of Greene v. Gallman, 39 A.D. 2d 270, aff'd 33 N.Y. 2d 778). That an employee-employer relationship exists where the principal has the right to control and direct the individual performing services, not

only as to the end result to be accomplished, but also as to the means and details to be employed (Matter of Liberman v. Gallman, 41 N.Y. 2d 774).

B. That pursuant to sections 722 and 689(e) of the Tax Law, petitioner bears the burden of proof to establish that the compensation received in 1972, 1973 and 1974 for his performance of services as a manufacturers' representative was for services rendered as an employee rather than as an independent agent carrying on an unincorporated business (Matter of Naroff v. Tully, 55 A.D.2d 755). Petitioner has failed to meet his burden of proof.

C. That petitioner's activities during the years 1972, 1973 and 1974 constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law and the income derived from said activity is subject to the unincorporated business tax (Matter of Robbins v. New York State Tax Commission, 79 A.D. 2d 805; Matter of Bander v. State Tax Commission, 65 A.D. 2d 847).

D. That petitioner's failure to file unincorporated business tax returns for the years 1970 through 1974 and pay the tax when due was based on reasonable cause and not willful neglect. Accordingly, the penalties assessed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law are waived.

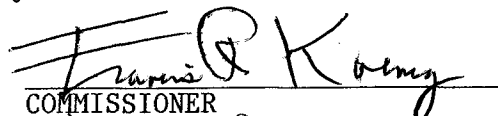
E. That the petition of Robert Goodman is granted to the extent indicated in Conclusion of Law "D", supra, and that, except as so granted, the petition is in all other respects denied.

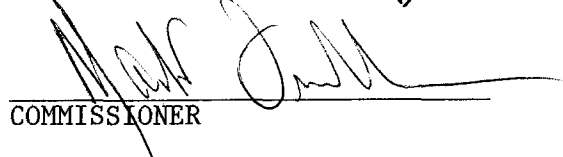
DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER