

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Avery Joffe	:	
	:	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 1971 - 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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Avery Joffe, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Avery Joffe  
c/o Martin A. Litwack  
630 Third Ave.  
New York, NY 10017

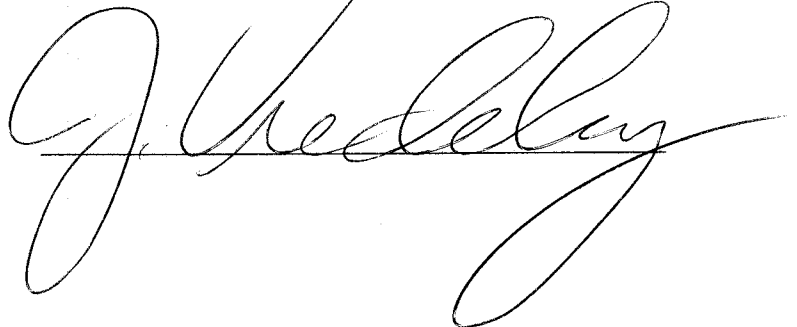
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the 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



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Avery Joffe :  
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 1971 - 1974. :  
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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 Martin A. Litwack the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

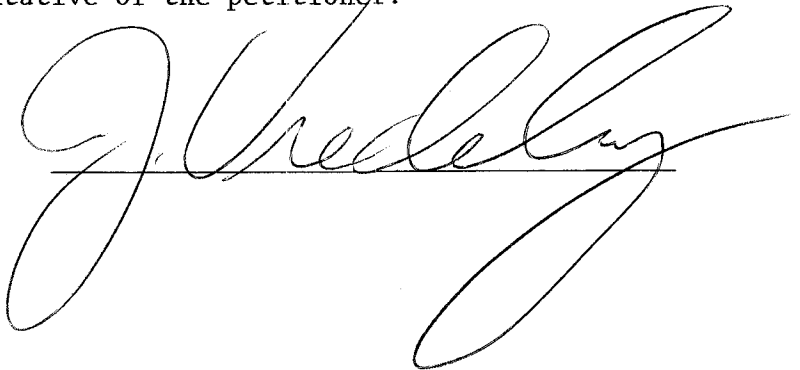
Martin A. Litwack  
Goldstein & Litwack  
630 Third Ave.  
New York, NY 10017

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  
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

Avery Joffe  
c/o Martin A. Litwack  
630 Third Ave.  
New York, NY 10017

Dear Mr. Joffe:

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  
Martin A. Litwack  
Goldstein & Litwack  
630 Third Ave.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
AVERY JOFFE	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1971,	:	
1972, 1973 and 1974.	:	

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Petitioner, Avery Joffe, c/o Martin Litwack, 630 Third Avenue, New York, New York 10017, 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 1971, 1972, 1973 and 1974 (File No. 25899).

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 August 27, 1981 at 2:45 P.M. and continued to a conclusion before Allen Caplowaith, Hearing Officer, at the same location on March 22, 1982 at 1:15 P.M. Petitioner appeared with Martin A. Litwack, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. and Paul B. Coburn, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner's activities as a salesman constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Avery Joffe (hereinafter petitioner) filed New York State income tax resident returns for the years at issue whereon he reported income derived from his sales activities of \$44,762.00 (1971), \$73,186.00 (1972), \$72,077.00 (1973)

and \$103,149.00 (1974). Petitioner did not file an unincorporated business tax return for any of said years at issue.

2. On March 12, 1976 the Audit Division issued a Statement of Audit Changes to petitioner wherein it held his net sales income (gross income as reported above less reported business expenses) subject to the unincorporated business tax. Additionally, adjustments were made for 1971 and 1972 to conform with the audit of his Federal returns for such years. However, since said adjustments were uncontested, they are therefore not at issue herein. Accordingly, a Notice of Deficiency was issued against petitioner on August 10, 1978 asserting unincorporated business tax of \$6,461.41, plus penalty and interest of \$2,542.01, for a total due of \$9,003.42. Said penalty was asserted pursuant to section 685(c) of the Tax Law for underpayment of estimated tax for the years 1971, 1972 and 1973.

3. During the years at issue, petitioner was a salesman of women's apparel for Abe Schrader Corp. and its wholly owned subsidiary, Mort Schrader, Inc. Both corporations had the same officers and directors, used the same cutting plant and distribution center, and shared the same showroom located at 530 Seventh Avenue, New York City.

4. Petitioner contended that he was an employee of Abe Schrader Corp. and Mort Schrader, Inc. (hereinafter Schrader) and as such, his income derived therefrom is exempt from the imposition of unincorporated business tax.

5. Petitioner commenced his affiliation with Schrader in 1954. At such time he was compensated on a salary basis. In approximately 1970, petitioner's compensation was changed from a salary to a commission basis.

6. Petitioner was prohibited from representing other principals and was required to devote full time to Schrader.

7. During the years at issue, petitioner spent approximately ten weeks each year attending trade shows in his assigned territory, which consisted of the midwestern United States. Petitioner testified that the balance of each year was spent selling from Schrader's New York showroom.

8. Petitioner was required to spend a full work day at Schrader's showroom although he was not provided with an office or desk. He was required, on occasion, to service customers outside his designated territory without remuneration.

9. Petitioner was required to attend sales meetings. When on the road, he was required to report to Schrader on a daily basis. He testified that Schrader was interested in the results of sales and not the method employed to obtain the sales.

10. Petitioner rented a hotel room for display of his merchandise during trade shows. Since the Schrader lines consisted of high priced merchandise, petitioner did not solicit retail stores in his territory directly. If requested at a trade show, he would subsequently appear at a qualified retail store to exhibit his merchandise to the public in a "trunk show".

11. Schrader did not provide petitioner with a pension plan or withhold income or social security taxes from his compensation.

12. Schrader reported petitioner's compensation on an information return under the category "commissions, fees, prizes and awards to nonemployees".

13. Petitioner maintained a self-employed retirement (Keogh) plan during 1974 and he paid self-employment tax for 1972 and 1974.

14. Petitioner was not reimbursed by Schrader for his business expenses incurred.

15. Petitioner claimed business expenses of \$28,672.00 for 1971, \$36,095.00 for 1972, \$37,231.00 for 1973 and \$43,678.00 for 1974. Inclusive in such business expenses were:

	1972	1973	1974
hotels & road expenses	\$ 5,235.00	\$ 5,780.00	\$ 5,863.00
meals for customers	14,080.00	15,390.00	20,664.00
clerical	100.00	120.00	240.00
sales promotion	1,100.00	800.00	400.00
trade shows	545.00	475.00	700.00
rent	1,200.00	1,200.00	1,200.00
taxi, local transportation & limo	750.00	850.00	1,100.00
telephone & telegraph	2,300.00	1,080.00	2,178.00
airline fares	1,550.00	2,190.00	2,095.00
parking	975.00	850.00	875.00
models & trade show assistants	2,739.00	3,250.00	3,100.00
automobile expense (6/7 of total expenses)	4,646.00	4,406.00	4,178.00

16. Most of petitioner's paperwork was done in an office maintained in his home.

#### CONCLUSIONS OF LAW

A. That it is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee. (E.g., Matter of Greene v. Gallman, 39 A.D.2d 270, 272 aff'd. 33 N.Y.2d 778; Matter of Frishman v. New York State Tax Comm., 33 A.D.2d 1071, mot. lv. to app. den. 27 N.Y.2d 483; Matter of Hardy v. Murphy, 29 A.D.2d 1038; see 20 NYCRR 203.10; cf. Matter of Sullivan Co., 289 N.Y. 110,112.) Matter of Liberman v. Gallman, 41 N.Y.2d 774, 778.

That the manner in which customers would be approached and persuaded to purchase was solely within petitioner's control. "In the absence of supervision and control of the sales routine salesmen do not become employees." (People Ex rel. Feinberg v. Chapman, 274 App Div 715, 720; cf. Matter of Britton v. State Tax Comm., 22 A.D.2d 987, Affd 19 N.Y.2d 613) Liberman, supra, 779.

B. That petitioner has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that sufficient direction and control was exercised by Schrader over his day-to-day activities so as to constitute a relationship of employer-employee. Accordingly, petitioner's activities did not constitute services rendered as an employee of Schrader within the meaning and intent of section 703(b) of the Tax Law.

C. That the nature and extent of petitioner's claimed business expenses indicate that he was an independent contractor rather than an employee.

D. That petitioner's sales activities constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701(a) of the Tax Law.

E. That the penalty asserted pursuant to section 685(c) of the Tax Law is sustained since petitioner has failed to show that any of the exceptions stated in section 685(d) of the Tax Law apply to him.

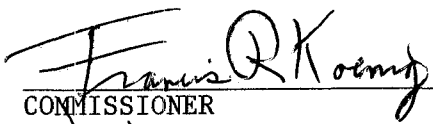
F. That the petition of Avery Joffe is denied and the Notice of Deficiency dated August 10, 1978 is sustained together with such additional penalty and interest as may be lawfully owing.

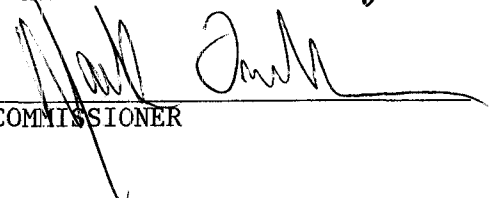
DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

ACTING   
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER