

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Leon & Edith Kass

:

:

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 1973 - 1974.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Leon & Edith Kass, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leon & Edith Kass
487 Charles Lane
Wantagh, NY 11793

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
9th day of April, 1982.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Leon & Edith Kass : 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 1973 - 1974. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Denis Brody the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Denis Brody
3814 Merrick Rd.
Seaford, NY 11783

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
9th day of April, 1982.

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

April 9, 1982

Leon & Edith Kass
487 Charles Lane
Wantagh, NY 11793

Dear Mr. & Mrs. Kass:

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
Denis Brody
3814 Merrick Rd.
Seaford, NY 11783
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LEON KASS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1973	:	
and 1974.	:	

Petitioner, Leon Kass, 487 Charles Lane, Wantagh, New York 11793, 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 and 1974 (File No. 23928).

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 June 17, 1981 at 9:15 A.M. Petitioner appeared by Denis Brody, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the activities of petitioner, Leon Kass, as a sales representative constituted the carrying on of an unincorporated business for the years 1973 and 1974.

FINDINGS OF FACT

1. Petitioner, Leon Kass, filed claims for refund of unincorporated business tax for 1973 and 1974 in the amounts of \$695.58 and \$1,138.63 respectively.

2. Petitioner, Leon Kass', claims for refund (Form IT-113X) were based on his contention that unincorporated business tax returns for 1973 and 1974 were filed in error because he was not engaged in an unincorporated business.

3. On November 22, 1976, the Audit Division disallowed the claims in full on the ground that petitioner, Leon Kass, terminated his services as an employee of Woodward Graphics, Inc. (hereinafter "corporation"), as of January 1, 1973 and, thereafter, was employed by the corporation as an independent contractor. Accordingly, the Audit Division notified the petitioner on February 27, 1978 that his claims for refund was denied.

4. Petitioner, Leon Kass, began his employment as a silk screen printing salesman for Woodward Graphics, Inc., sometime in 1968. Initially, petitioner solicited house accounts for the corporation and received a commission on consummated sales. Subsequently, petitioner developed his own clientele from whom he obtained orders, estimated cost of production and purchased the materials necessary for each order, for which he received a commission from the corporation.

5. For the subject years, the commissions earned by petitioner from the corporation were reported on Form 1099. For prior years, the commissions earned by petitioner was reported on W-2 Forms.

Petitioner contends that the change in forms received by him from the corporation was the result of a corporate error; that his duties were substantially the same for the instant years as in the prior years.

6. For years at issue, the corporation did not withhold income taxes or social security taxes from petitioner's commission.

7. Petitioner's state income tax returns for the subject years indicated his occupation as self employed. The Federal Schedule C, attached to the State income tax returns, indicated his self-employment occupation as a broker of

silk screen products. The Schedule C reflected substantial amounts of expenses incurred by petitioner for which he was not reimbursed by the corporation.

8. Petitioner contends that he was required to report to the corporate offices daily, both in the morning and upon completion of his daily duties to discuss his activities of the day with his principal.

9. Petitioner made up his own itinerary without review or approval by his principal. There was little or no control over his day-to-day activities by his principal. The corporation was primarily interested in the results obtained by petitioner and not the manner in which the results were obtained.

CONCLUSIONS OF LAW

A. That Woodward Graphics, Inc. did not exercise that degree of control and supervision over petitioner's activities so as to establish an employee-employer relationship within the meaning and intent of section 703(b) of the Tax Law (Lieberman v. Gallman, 41 N.Y.2d 774).

B. That the selling activities of petitioner, Leon Kass, for the years 1973 and 1974 constituted the carrying on of an unincorporated business and that the income derived therefrom is subject to the imposition of unincorporated business tax in accordance with section 701(a) of the Tax Law.

C. That the petition of Leon Kass is denied and the refund denial by the Audit Division dated February 27, 1978 is sustained.

DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION

Mrs. H. Tully
PRESIDENT

Francis P. Koenig
COMMISSIONER

[Signature]
COMMISSIONER