

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Albert Rubin

:

:

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 & 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 26th day of March, 1982, he served the within notice of Decision by certified mail upon Albert Rubin, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert Rubin  
41 Wren Dr.  
Roslyn, NY 11576

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  
26th day of March, 1982.

*Quinn P. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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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 26th day of March, 1982, he served the within notice of Decision by certified mail upon Lester B. Janoff the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lester B. Janoff  
Janoff and Kravetz  
565 Fifth 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  
26th day of March, 1982.

*Connie A. Hagelund*

*J. Vredenburg*

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

March 26, 1982

Albert Rubin  
41 Wren Dr.  
Roslyn, NY 11576

Dear Mr. Rubin:

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  
Lester B. Janoff  
Janoff and Kravetz  
565 Fifth Ave.  
New York, NY 10017  
Taxing Bureau's Representative

## STATE TAX COMMISSION

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 27, 1981 at 9:00 A.M. Petitioner appeared by Janoff & Kravetz, Esqs., (Lester B. Janoff, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq., (Samuel Freund, Esq., of counsel).

## ISSUE

Whether the business activities of petitioner for the years 1973, 1974 and 1975 constituted the carrying on of an unincorporated business, thereby subjecting petitioner to unincorporated business tax.

## FINDINGS OF FACT

1. Petitioner, Albert Rubin, and his wife Lillian Rubin timely filed New York State Combined Income Tax Returns for the years 1973, 1974 and 1975. In

each instance petitioner listed his occupation as sales representative and his wife listed hers as housewife.

2. The income giving rise to the issue herein was all generated by petitioner and he maintained it was not subject to New York State Unincorporated Business Tax.

3. On April 14, 1978, the Audit Division issued a Statement of Audit Changes against petitioner Albert Rubin. The Statement of Audit Changes contained the following explanation:

"The income from your activities as Sales Representative is subject to Unincorporated Business Tax.

<u>UNINCORPORATED BUSINESS TAX</u>	<u>1973</u>	<u>1974</u>	<u>1975</u>
Business income	\$61,508.32	\$70,672.15	\$85,581.00
Less: Allowance for service	<u>5,000.00</u>	<u>5,000.00</u>	<u>5,000.00</u>
Balance	\$56,508.32	\$65,672.15	\$80,581.00
Less: Exemption	<u>5,000.00</u>	<u>5,000.00</u>	<u>5,000.00</u>
Taxable income	\$51,508.32	\$60,672.15	\$75,581.00
 Tax on above	 \$ 2,832.96	 \$ 3,336.97	 \$ 4,156.96

UNINCORPORATED BUSINESS TAX DUE.....\$10,326.89"

4. On April 14, 1978, the Audit Division issued the Notice of Deficiency, herein, and on May 29, 1978 the petition herein was filed.

5. That although petitioner's New York State income tax returns disclosed income from his performance of services as a sales representative for the years in issue, no withholding statements from either of his asserted employers were annexed to the returns. In all instances herein, petitioner indicated on his tax returns that the income in issue was "Business Income". No unemployment insurance premiums were paid on petitioner's behalf by either asserted employer.

6. The income in issue was received by petitioner as compensation in the form of commissions for services rendered as a sales or manufacturer's representative for Bakan Plastics, 2500 Summit, Kansas City, Missouri (hereinafter "Bakan") and to a much lesser degree U.S. Cap & Closure, Inc., 7101 West Higgins Avenue, Chicago, Illinois (hereinafter "U.S. Cap").

7. Petitioner earned approximately two thirds of the income in issue from Bakan and the other one third of the income in issue from U.S. Cap. On the other hand petitioner devoted approximately 90 percent of his working time to Bakan and approximately 10 percent of his working time to U.S. Cap.

8. While petitioner was subject to some degree of control and direction in the performance of his duties as a sales or manufacturer's representative (primarily with respect to cost controls, internal procedures of the two companies, attendance at trade shows, submission of monthly sales reports and the territory and accounts which he could or could not service, for credit or other reasons), evidence establishes that said petitioner performed services for both Bakan and U.S. Cap with their knowledge and consent but without any agreement between the two companies for the division of his time and efforts on their behalf. Petitioner was not subject to the control and direction of any principal in the manner in which he approached customers and persuaded them to make purchases; petitioner was not subject to the will and control of any superior to whom he reported with respect to the means and methods of obtaining a particular result. Petitioner arranged his own appointments, set his own daily work schedule; bore the cost and expense of his duties as a sales or manufacturer's representative, including, a home office, office furniture and equipment, all without reimbursement from either Bakan or U.S. Cap. Likewise,

petitioner sustained the cost of all telephone calls and travel without reimbursement, except for telephone calls to and travel to either Bakan or U.S. Cap.

9. For 1973 petitioner deducted all of the aforementioned expenses, and others, against his gross receipts in order to determine his net profit as a sales or manufacturer's representative. Petitioner could not recall whether he made similar deductions on his Federal returns for 1974 and 1975.

10. Petitioner was paid on a commission basis for services rendered Bakan and to U.S. Cap.

11. Petitioner used Bakan stationery and business cards and U.S. Cap stationery and business cards. On the Bakan cards petitioner was listed as Eastern Sales Manager and on the U.S. Cap cards he was listed as sales representative.

12. Petitioner did not have any employees nor assistants.

13. Petitioner did not receive any benefits from Bakan other than commissions, however, he did receive a health insurance policy along with his commissions from U.S. Cap.

14. U.S. Cap maintained "House Accounts" in petitioner's assigned territory. U.S. Cap did not pay any commission on these "House Accounts".

#### CONCLUSIONS OF LAW

A. That Tax Law §703(a) defines an unincorporated business as "...any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity, including a partnership...".

B. That under Tax Law §722 and 689(e), petitioner has the burden of proof to establish that the income in issue herein as a manufacturer's or sales representative was for services rendered as an employee and not as an independent

agent carrying on an unincorporated business. Matter of Naroff v. Tully, 55 A.D.2d 755.

C. That although Tax Law §703(b) provides "The performance of services by an individual as an employee... shall not be deemed an unincorporated business unless such services constitute part of a business regularly carried on by such individual", petitioner has failed to sustain his burden of proving that he was an "employee" within the meaning of said section. Matter of Seifer v. State Tax Commission, 58 A.D.2d 726.

D. That, within the meaning and intent of Tax Law §703(a) and (b), petitioner demonstrated all of the indicia of an entrepreneur instead of an employee and, accordingly, petitioner's income in issue herein is subject to unincorporated business tax. Matter of Seifer v. State Tax Commission, Id.

E. That the petition herein is denied and that the Notice of Deficiency, herein, against petitioner is sustained.

DATED: Albany, New York

MAR 26 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER