

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Philip Schnitzer

: 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 Year 1974.

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Philip Schnitzer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip Schnitzer
41 Voorhis Ave.
Rockville Center, NY 11570

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
6th day of May, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 6, 1983

Philip Schnitzer
41 Voorhis Ave.
Rockville Center, NY 11570

Dear Mr. Schnitzer:

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
Bernard Lovett
Lovett, Baron & Beitler
225 W. 57th St.
New York, NY 10019
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
PHILIP SCHNITZER
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1974.

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DECISION

Petitioner, Philip Schnitzer, 41 Voorhis Avenue, Rockville Center, New York 11570, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1974 (File No. 23793).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, 114 Old Country Road, Mineola, New York, on July 26, 1982 at 10:00 A.M. Petitioner appeared with Bernard Lovett, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner's activities engaged in as an outside salesman constituted the carrying on of an unincorporated business of which the income derived therefrom is subject to the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Philip Schnitzer (hereinafter petitioner) timely filed a joint New York State Income Tax Resident Return with his wife for the year 1974 whereon he reported the income derived from his activities, described as "outside sales", in the following manner:

	<u>INCOME</u>	<u>SOURCE</u>
Reported as Wages	\$24,666.00	Greater New York Box Co., Inc. Entin Road, Clifton, NJ
Reported as Other Income	21,945.00	Art Kraft Container Corp. 100 Main Street, Tullytown, PA
Reported as Other Income	12,919.00	Security Container Corp. Brooklyn, NY
Total "Outside Sales" Income	<u>\$59,530.00</u>	

Petitioner did not file an unincorporated business tax return for 1974.

2. On April 6, 1978 the Audit Division issued a Statement of Audit Changes to petitioner wherein his total outside sales income of \$59,530.00 was held subject to the unincorporated business tax. Accordingly, a Notice of Deficiency was issued against petitioner on June 19, 1978 asserting unincorporated business tax of \$2,008.00, plus penalties and interest of \$1,619.35, for a total due of \$3,627.35. Said penalties were asserted pursuant to sections 685(a)(1), 685(a)(2) and 685(c) of the Tax Law for failure to file an unincorporated business tax return, failure to pay the tax determined to be due and failure to file a declaration of estimated tax, respectively.

3. During 1974 petitioner sold corrugated boxes on a regular, continuous basis for Greater New York Box Company, Inc. (Greater NY) and its subsidiary, Art Kraft Container Corporation (Art Kraft).

4. Art Kraft, a wholly-owned subsidiary of Greater NY, files a consolidated tax return with said company. Both companies have substantially the same management, produce the same corrugated products, and compensate petitioner on an identical commission basis. Neither company withheld New York State personal income taxes from petitioner's compensation. Art Kraft reported petitioner's commission income on an information return, Federal form 1099. Greater NY reported his commission income on a W-2 form.

5. Petitioner's commission income of \$12,919.00, derived from Security Container Corp. (Security), resulted from a sole, nonrecurring business transaction made by petitioner at the request of Art Kraft. Knickerbocker Toy Corporation, a major, long-term account of petitioner through Art Kraft, required litho labeling on certain corrugated cartons. Since Art Kraft was not properly equipped for this special job, it instructed petitioner to have these cartons produced by Security. This measure was taken since Art Kraft intended to have the necessary equipment installed in the near future and it believed that the account might be lost if it was unable to provide the requested product.

6. Petitioner was on the road daily. Twice a week he visited the main office of Greater NY in Clifton, New Jersey. On days where he did not visit the office, he communicated with his supervisor by telephone. Sales meetings were attended by petitioner approximately twice per year. Occasionally, such meetings were consolidated and attended by sales persons of both Greater NY and Art Kraft.

7. Petitioner was not reimbursed for business expenses incurred. Rather, he was given \$50.00 per month to cover the cost of certain expenses.

8. Petitioner purported that, as stated in a letter from Greater NY, he "is not an independent selling agent, but a full-time sales employee subject to management decisions and eligible as a full-time employee for employee benefits."

9. Petitioner was eligible for participation in Greater NY's company-paid group life insurance and medical insurance plans. He was a member of the pension plan. Such plan's benefits were computed based on petitioner's income derived from both Greater NY and Art Kraft.

10. Petitioner testified that he was prohibited from representing other principals. To do so, he claimed, would cause his removal from those aforesaid company-provided benefit plans.

11. Petitioner did not maintain an office. His stationery and business cards provided his principals' names and addresses.

12. Petitioner had no control over pricing. His sales were not limited to an assigned territory and the orders he placed were subject to company approval.

13. When questioned with respect to the direction and control exercised by his principals over his activities, petitioner responded that "they only tell you to go out and bring as much business as you can for the company and nothing else."

14. Petitioner was not provided with accounts by principals. He testified that "you had to do everything on your own."

15. Petitioner's representative, Mr. Bernard Lovett, CPA, prepared his 1974 return. It was his professional opinion that petitioner's activities constituted services rendered as an employee. Accordingly, an unincorporated business tax return was not filed for said year.

CONCLUSIONS OF LAW

A. That 20 NYCRR 203.10(c) provides, in pertinent part, that:

"The designation and description of the relationship by the parties, whether by contract or otherwise, is not necessarily determinative of the status of the individual for unincorporated business tax purposes."

B. That the determination whether services were performed by an individual as an "employee" or as an "independent agent" turns upon the unique facts and circumstances of each case.

"The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used.' (Matter of Morton, 284 N.Y. 167, 172.) 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. for 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.

C. That petitioner has failed to sustain his burden of proof, required pursuant to section 689(e), as incorporated into section 722 of the Tax Law, to show that the degree of direction and control exercised by his principals over his activities was sufficient for the existence of a bona fide employer-employee relationship. Accordingly, petitioner's sales activities did not constitute services rendered as an employee within the meaning and intent of section 703(b) of the Tax Law.

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 petitioner has established reasonable cause for his failure to file a 1974 unincorporated business tax return. Accordingly, the penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are hereby abated.

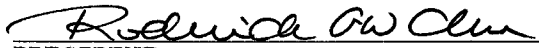
F. That the petition of Philip Schnitzer is granted to the extent provided in Conclusion of Law "E" supra, and except as so granted, said petition is, in all other respects, denied.

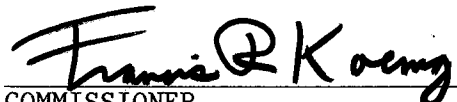
G. That the Audit Division is hereby directed to modify the Notice of Deficiency dated June 19, 1978 to be consistent with the decision rendered herein.

DATED: Albany, New York

MAY 06 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

NEW YORK

CLAIM CHECK

NO.

S BUREAU

AMPUS

Y. 12227

☐ HOLD

DATE

1ST NOTICE

2ND NOTICE

RETURN

Detached from
PS Form 3843-A
Oct. 1980

CERTIFIED

89 758 950

MAIL

Bernard Lovett
Lovett, Baron & Beitler
225 W. 57th St.
New York, NY 10019

601

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TA-36 (9/76)

State of New York - Department of Taxation and Finance
Tax Appeals BureauREQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition SC 5-06-83
Name PHILIP SCHNITZER	
Address Rep. copy returned address correct - called 586-8070	

Results of search by Files

<input type="checkbox"/> New address:	
<input checked="" type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other:	Sent regular mail per Rep.

Searched by	Section	Date of Search

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER