

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Frank Seymour	: : : : : :	: : : : : :
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 - 1975.		

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 13th day of May, 1983, he served the within notice of Decision by certified mail upon Frank Seymour, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank Seymour  
394 Washington Ave.  
Pelham, NY 10803

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  
13th day of May, 1983.

David Parchuck

Emile A. Hagelund

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 :  
Frank Seymour :  
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 - 1975. :  
\_\_\_\_\_

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 13th day of May, 1983, he served the within notice of Decision by certified mail upon Richard C. Ross the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard C. Ross  
235 Main St.  
White Plains, NY 10601

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  
13th day of May, 1983.

David Parchuck

Conrad A. Haglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 13, 1983

Frank Seymour  
394 Washington Ave.  
Pelham, NY 10803

Dear Mr. Seymour:

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) 690 & 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 Law 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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Richard C. Ross  
235 Main St.  
White Plains, NY 10601  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
FRANK SEYMOUR	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1973,	:	
1974 and 1975.	:	

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Petitioner Frank Seymour, 394 Washington Avenue, Pelham, New York 10803, 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, 1974 and 1975 (File No. 30702).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 13, 1982 at 10:45 A.M. Petitioner appeared with Richard C. Ross, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner's selling activities constituted services rendered as an employee and thus are exempt from the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Frank Seymour (hereinafter petitioner) and his wife, Grace Seymour, timely filed a New York State Combined Income Tax Return for each of the years 1973, 1974 and 1975. On each return petitioner reported business income from activities variously described as "Sales Rep - Consultant" (1973), "Sales Rep"

(1974), and "Sales Rep" (1975). Petitioner did not file an unincorporated business tax return for any of said years at issue herein.

2. On September 6, 1977, the Audit Division issued a Statement of Audit Changes to petitioner wherein the reported business income derived from his sales activities was held subject to the unincorporated business tax. Accordingly, a Notice of Deficiency was issued against petitioner on December 8, 1978 asserting unincorporated business tax of \$707.30, plus penalty and interest of \$364.91, for a total of \$1,072.21. Said penalty was asserted pursuant to section 685(a)(1) of the Tax Law for failure to file unincorporated business tax returns.

3. Prior to the years at issue, petitioner was a salesman for Sinclair and Valentine, a company whose principal activity was the manufacture of printing ink. Toward the end of 1971, petitioner was forced to retire since he had reached the mandatory retirement age of sixty-five. Since Sinclair and Valentine (the company) desired that petitioner continue rendering services, a contract was entered into on January 4, 1972.

4. Petitioner testified that said contract, which was submitted into evidence, was subsequently modified with respect to its duration and compensation features. A copy of such purported modification was not offered into evidence.

5. Said contract, which was between the company and S. Bar-Litho Blanket Services, a trade name petitioner had contemplated using but ultimately never did, provided that:

(a) The company will use the services of S. Bar-Litho Blanket Services (S. Bar) for a period of two years starting January 1, 1972 and ending December 31, 1973.

(b) The company will pay S. Bar the sum total of \$20,000.00 in equal monthly payments.

(c) Petitioner will be reimbursed for personal expenses not to exceed \$100.00 per calendar month provided proper expense forms with substantiating receipts are submitted to the company.

(d) The company will provide and pay for a telephone on the S. Bar premises.

(e) S. Bar will maintain contact with the company's product manager.

(f) S. Bar will maintain follow-ups and relationships in certain specific fields and with certain specific individuals.

(g) S. Bar will submit weekly activities reports.

(h) S. Bar will receive a 5% commission on sales of the company's metal decorating inks.

Said contract further provided that "all of the above is construed to be for the personal services of Frank I. Seymour and cannot be assigned to any other individual."

6. Petitioner alleged that prior to his retirement in 1971 he had been an employee of the company since 1939.

7. Petitioner testified that after his retirement his duties and relationship with the company remained, for the most part, unchanged. He alleged that the only changes were that the company ceased to withhold payroll taxes from his compensation and that he devoted less time to his activities after his official retirement.

8. Prior to his retirement in 1971 petitioner held the title "sales manager". He visited the company's Englewood Cliffs, New Jersey office on a daily basis. Subsequent to his retirement his title was "salesman" and he

ceased visiting said office on a regular basis but only did so as the need arose, which was approximately once a week.

9. Subsequent to petitioner's retirement his immediate supervisor was located in the company's office in Des Moines, Iowa. He communicated with such supervisor via telephone approximately once or twice a week.

10. Petitioner testified that during the years at issue he was paid strictly on a salary basis.

11. Petitioner was not assigned a specific territory. He testified that he was directed as to which clients he could solicit business from.

12. Petitioner received a pension from the company upon his official retirement in 1971.

13. Petitioner received paid vacation and sick days during the years at issue.

14. The stationery petitioner used during the years at issue indicated his name and address at the top and only the company's name at the bottom. The return address printed on his envelopes contained the company name over petitioner's name and address.

15. Subsequent to his retirement in 1971, petitioner rendered services solely for the company.

16. Petitioner terminated his affiliation with the company in 1981.

17. Petitioner filed a Federal Schedule C for 1974.

#### CONCLUSIONS OF LAW

A. 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.

B. 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 Sinclair and Valentine 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.

C. 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.


D. That the petition of Frank Seymour is denied and the Notice of Deficiency dated December 8, 1978 is hereby sustained together with such additional penalties and interest as may be lawfully owing.



DATED: Albany, New York

STATE TAX COMMISSION

MAY 13 1983

  
\_\_\_\_\_  
PRESIDENT

  
\_\_\_\_\_  
COMMISSIONER

   
\_\_\_\_\_  
COMMISSIONER