

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alex & Mariam Witkin :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1976 - 1978. :
_____ :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Alex & Mariam Witkin, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alex & Mariam Witkin
417 Jordan St.
Oceanside, NY 11572

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
2nd day of May, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 2, 1984

Alex & Mariam Witkin
417 Jordan St.
Oceanside, NY 11572

Dear Mr. & Mrs. Witkin:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ALEX WITKIN	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1976,	:	
1977 and 1978.	:	

Petitioner, Alex Witkin, 417 Jordan Street, Oceanside, New York 11572, 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 1976, 1977 and 1978 (File No. 33032).

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 October 27, 1983 at 11:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

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

II. Whether penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law were proper.

FINDINGS OF FACT

1. Alex Witkin (hereinafter petitioner) timely filed a New York State Income Tax Resident Return with his wife, Miriam Witkin, for each of the years 1976, 1977 and 1978. On each of said returns petitioner, who listed his occupation as "salesman", reported "business income" of \$24,178.79, \$25,237.00

and \$19,436.00, respectively. Mrs. Witkin listed her occupation as "housewife" and reported income which was passive in nature. Petitioner did not file an unincorporated business tax return for any of said years at issue.

2. On September 2, 1980, the Audit Division issued a Statement of Unincorporated Business Tax Audit Changes to petitioner and his wife wherein it held petitioner's reported "business income" subject to the unincorporated business tax. The explanation stated for such action was that "Your activities constitute the carrying on of an unincorporated business and the income therefrom is subject to the Unincorporated Business Tax". Accordingly, a Notice of Deficiency was issued against petitioner and his wife on November 13, 1980. However, since said notice inadvertently listed only the year 1976, a corrected Notice of Deficiency was issued on March 20, 1981 asserting unincorporated business tax of \$2,148.70 for the years 1976, 1977 and 1978, plus penalties and interest of \$1,387.93, for a total due of \$3,536.63. Said penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to file unincorporated business tax returns and failure to pay the tax determined to be due, respectively.

3. During the years at issue, petitioner was a salesman of women's apparel for Trissi, Inc. ("Trissi"), 309 Veterans Boulevard, Rutherford, New Jersey. He contended that he was an employee of Trissi, and as such, his income derived therefrom is properly exempt from the imposition of unincorporated business tax. Petitioner's wife, Miriam Witkin, was not engaged in any sales activities connected with Trissi.

4. Petitioner's assigned territory consisted of the entire state of New York north of Westchester county. His itinerary was planned by him and his

sales manager. He was compensated on a seven percent commission basis.

Payment was received when orders were shipped.

5. During the years at issue, petitioner sold exclusively for Trissi. However, he was not restricted from selling non-competing lines. If he had wished to do so, he would have had to obtain permission from Trissi.

6. Petitioner testified that he was on the road approximately forty weeks per year. When not on the road, his time was spent at Trissi's showroom where, in addition to his accounts, he handled accounts of other salesmen with no additional compensation being received. Petitioner further testified that he spent "about half" his time at the showroom.

7. When on the road, petitioner was required to submit written reports on a daily basis. Additionally, he corresponded with Trissi every other day by telephone.

8. During the years at issue, Trissi reported petitioner's compensation on an information return, Federal form 1099, rather than on a wage and tax statement, Federal form W-2.

9. Trissi did not provide petitioner with a pension plan or withhold income or social security taxes from his compensation. Petitioner maintained a self-employed retirement (Keogh) plan during the years at issue.

10. Petitioner was required to attend sales meetings four times per year. Trissi reimbursed him for travel expenses incurred with respect to the sales meetings. All other business expenses incurred by petitioner were not reimbursed.

11. Trissi did not provide petitioner with paid vacation or sick leave.

12. Petitioner reported his "business income" and expenses each year at issue on a Federal Schedule C, Profit or (Loss) From Business or Profession. On said schedules, he reported his personal residence as his business address.

Business deductions of \$35,710.87 (1976), \$42,900.07 (1977) and \$36,861.00 (1978) were claimed. Said deductions were comprised, inter alia, of the following:

	<u>1976</u>	<u>1977</u>	<u>1978</u>
Rent	\$ 900.00	\$1,200.00	\$1,200.00
Insurance	833.00	1,033.00	1,033.00
Telephone	3,211.74	3,725.60	3,720.00
Advertising & Markdowns	2,874.74	4,892.48	4,946.00
Samples & Supplies	5,248.50	9,198.41	9,472.00
Sales Models	900.00	900.00	900.00

Petitioner also deducted substantial amounts for automobile expenses, telephone expenses, travel expenses and entertainment expenses.

13. Petitioner deducted amounts paid to "subcontractors" of \$2,800.00 (1976), \$16,904.38 (1977) and \$17,504.00 (1978). When questioned as to these deductions, petitioner replied that he never had a subcontractor.

14. The deductions claimed by petitioner for "Advertising & Markdowns" and "Samples & Supplies" represented half of the total cost for these items. The other half was paid for by Trissi.

15. The rent deductions claimed by petitioner were with respect to a portion of his residence which he used to store his samples, make telephone calls and file invoices.

16. Petitioner testified that Trissi did not advise him on sales techniques to be employed to obtain sales.

17. Petitioner testified that Trissi had urged him to incorporate his sales activities.

18. Petitioner contended that he was fired by Trissi. In support of such contention, he submitted a letter from Trissi dated May 23, 1973. Such letter constituted a written reprimand rather than a termination notice. Petitioner

continued to sell for Trissi for at least five years subsequent to the date of said letter.

19. Petitioner submitted a letter from Trissi dated September 13, 1983 wherein it was stated that "In his status as independent contractor we had limited directions of his activities in his conduct as a salesman".

20. With respect to the penalties asserted, petitioner claimed that such penalties should be abated since he "was not in business for himself".

CONCLUSIONS OF LAW

A. That "[i]t is the degree of control and direction exercised by the employer which determines whether the taxpayer is an employee or an independent contractor subject to the unincorporated business tax." Lieberman v. Gallman, 41 N.Y.2d 774. Furthermore, "[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case." 20 NYCRR 203.10(c).

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 Trissi over his day-to-day activities so as to constitute a relationship of employer-employee. This conclusion is further supported by the nature and extent of petitioner's claimed business expenses. Accordingly, petitioner's activities did not constitute services rendered as an employee of Trissi 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 penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are sustained since petitioner has failed to show reasonable cause for his failure to file unincorporated business tax returns for the years at issue herein.

E. That the name of Miriam Witkin is to be removed from the Notice of Deficiency since she was not engaged in an unincorporated business.

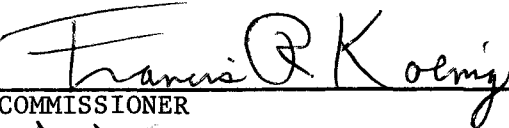
F. That the petition of Alex Witkin is denied and the Notice of Deficiency dated March 20, 1981 is sustained, together with such additional penalties and interest as may be lawfully owing.

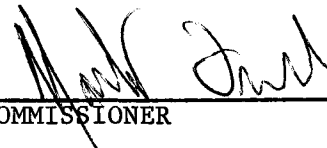
DATED: Albany, New York

STATE TAX COMMISSION

MAY 02 1984


PRESIDENT


COMMISSIONER


COMMISSIONER