

STATE TAX COMMISSION

of

AFFIDAVIT OF MAILING

State of New York }

SS.:

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Joel R. Schweidel, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

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 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.

Daniel Parobuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

James A. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Harry Wolff
114 Pacific Blvd.
Long Beach, NY 11561

Dear Mr. Wolff:

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, 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: Petitioner's Representative
Joel R. Schweidel
Rosen & Reade
666 Fifth Ave.
New York, NY 10103
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HARRY WOLFF	:	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, Harry Wolff, 114 Pacific Boulevard, Long Beach, New York 11561, 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. 35421).

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 February 10, 1984 at 1:15 P.M., with all briefs to be submitted by March 10, 1984. Petitioner appeared with Joel R. Schweidel, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. Harry Wolff (hereinafter petitioner) timely filed New York State income tax resident returns with his wife, Pearl Wolff, for the years 1973 and 1974. On each of said returns petitioner, who listed his occupation as "commission salesman", reported "business income" of \$13,253.59 (1973) and \$26,302.18

(1974). Petitioner did not file an unincorporated business tax return for either year at issue herein.

2. On June 8, 1981, the Audit Division issued a Notice of Deficiency against petitioner wherein unincorporated business tax of \$1,204.78 was asserted on petitioner's 1973 and 1974 reported business income. Additionally, penalties of \$1,062.71 were asserted plus interest of \$171.84, for a total due of \$2,439.33. Said penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law (as incorporated into Article 23 by section 722 of the Tax Law) for failure to file unincorporated business tax returns and failure to pay the tax shown on returns, respectively. Said Notice of Deficiency was premised upon a previously issued Statement of Unincorporated Business Tax Audit Changes wherein it was explained that: "Your activities as a manufacturer's representative are deemed subject to unincorporated business tax."

3. During the years at issue, petitioner engaged in activities as an outside salesman of costume jewelry. His services were rendered on behalf of his principal, Packer Associates ("Packer"), 5704 Cutshaw Avenue, Richmond, Virginia. Packer had an exclusive distribution contract with Vargas, Inc., a costume jewelry manufacturer located in Providence, Rhode Island and petitioner was restricted from selling merchandise other than that manufactured by Vargas, Inc.

4. Petitioner's assigned territory consisted of the entire states of New York and New Jersey. When he commenced his relationship with Packer he was given approximately 150 established accounts within his assigned territory. He serviced his assigned accounts and solicited new accounts. Occasionally he was requested to call on house accounts.

5. Petitioner was compensated on a straight five percent commission basis. No compensation was received for occasional services rendered with respect to house accounts.

6. Petitioner was not reimbursed for ordinary business expenses incurred in connection with his sales activities. He alleged that his commissions were paid at a rate higher than that usual to the industry in order to cover business expenses incurred.

7. Petitioner was required to attend eight trade shows per year. He was reimbursed for expenses incurred with respect to his attendance at out-of-town shows. He was not reimbursed for expenses incurred in attending New York shows.

8. Petitioner alleged that he was required to attend sales meetings approximately once a month.

9. Petitioner did not have a written contract or employment agreement with Packer. He claimed he was required to work a minimum of five days per week.

10. Petitioner contended that he corresponded with his office in Virginia a minimum of two or three times per week.

11. Petitioner was not required to meet a sales quota. When on the road he planned his own itinerary.

12. Orders for merchandise were taken on Vargas, Inc.'s printed purchase order forms and mailed directly to Vargas, Inc.

13. Petitioner did not pay for his samples. Said samples were provided by either Packer or Vargas, Inc.

14. Petitioner used a portion of his personal residence for business purposes. Expenses incurred with respect to such use were claimed on his Federal schedules C.

15. Packer did not withhold personal income taxes or social security tax from petitioner's compensation.

16. Petitioner's brother, Nat Wolff, was president of Packer during the years at issue herein. In an affidavit, sworn to on April 14, 1983, Nat Wolff deposed and said that:

"Mr. [Harry] Wolff was not employed by Packer, nor was he considered to be an employee; i.e. he received no employee benefits such as vacation pay, insurance, etc. Rather, he served Packer as an independent contractor under the conditions outlined above."

CONCLUSIONS OF LAW

A. That it 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. (Matter of Liberman 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 the degree of direction and control exercised by Packer over petitioner's day-to-day activities was insufficient for the existence of a relationship of employer-employee. Indeed, petitioner's own principal characterizes his relationship with Packer as that of an independent contractor rather than that of an employee. Accordingly, petitioner's sales activities did not constitute services rendered as an employee of Packer 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 unincorporated business tax pursuant to section 701(a) of the Tax Law.


D. That the petition of Harry Wolff is denied and the Notice of Deficiency dated June 8, 1981 is sustained together with such additional penalties and interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


PRESIDENT


COMMISSIONER


COMMISSIONER