

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Leonard Bloom :
AFFIDAVIT OF MAILING
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 1978 & 1979. :
:

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Leonard Bloom, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard Bloom
20 Deepdale Dr.
Great Neck, NY 11021

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
7th day of November, 1985.

David Parchuck

Annex A. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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Business Tax under Article 23 of the Tax Law for :
the Years 1978 & 1979. :
:

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Harold B. Bonime, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold B. Bonime
170 Broadway, Rm. 201
New York, NY 10038

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.

Sworn to before me this
7th day of November, 1985.

David Parchuck

James P. [Signature]

Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Leonard Bloom
20 Deepdale Dr.
Great Neck, NY 11021

Dear Mr. Bloom:

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: Petitioner's Representative
Harold B. Bonime
170 Broadway, Rm. 201
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
LEONARD BLOOM
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1978
and 1979.

:
:
:
DECISION
:
:
:

Petitioner, Leonard Bloom, 20 Deepdale Drive, Great Neck, New York 11021, 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 1978 and 1979 (File Nos. 43289 and 44725).

A 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 June 20, 1985 at 2:45 P.M. Petitioner appeared by Harold B. Bonime, CPA. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether petitioner's activities constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Leonard Bloom (hereinafter "petitioner") filed New York State income tax resident returns with his wife, Annette Bloom, for the years 1978 and 1979 whereon he reported income from his activities described as "Mfgs. Rep" (1978) and "Sales Rep." (1979). On each return, petitioner's income from the aforesaid activities was reported as derived from his sole principal, Leon of Paris Co., Inc. ("Leon"), 46 West 23rd Street, New York, New York. Such income was

reported by Leon during each of said years on a Statement for Recipients of Miscellaneous Income, Form 1099-Misc. According to such forms, petitioner derived income from Leon of \$112,717.60 in 1978, which was characterized as "Commissions and fees to non-employees" and \$105,214.48 in 1979, which was characterized as "Other fixed or determinable income". Personal income taxes were not withheld from said compensation. On his 1978 return, petitioner reported the \$112,717.60 as wages and the total deductions of \$72,358.00 attributable to such income as an adjustment to income. On his 1979 return, he reported his net profit of \$37,048.00 (\$105,214.00 less deductions of \$68,166.00) as "business income". For Federal purposes, said income and deductions were reported each year on a Schedule C, Profit or (Loss) From Business or Profession. Petitioner did not file an unincorporated business tax return for either year at issue herein.

2. On August 17, 1982, the Audit Division issued a Statement of Audit Changes to petitioner wherein his gross income derived from Leon during 1978 of \$112,718.00 (rounded to the nearest dollar) and his reported net profit derived from Leon during 1979 of \$37,048.00 were held subject to unincorporated business tax.

3. On November 8, 1982, the Audit Division sent petitioner a notice advising him that the Statement of Audit Changes was partially cancelled. According to the recomputation of tax detailed thereon, said partial cancellation was based on allowance of the aforesaid 1978 deductions of \$72,358.00 against petitioner's 1978 income from Leon of \$112,718.00.

4. On January 12, 1983, the Audit Division issued a Notice of Deficiency against petitioner asserting unincorporated business tax of \$1,217.16 for the year 1979, plus penalties of \$529.90 and interest of \$370.57, for a total due for 1979 of \$2,117.63.

5. On February 25, 1983, the Audit Division issued a Notice of Deficiency against petitioner asserting unincorporated business tax (as reduced by the notice of partial cancellation) of \$1,518.00 for the year 1978, plus penalties of \$767.10 and interest of \$615.32, for a total due for 1978 of \$2,900.42. Said penalties were asserted for each year at issue 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 unincorporated business tax pursuant to sections 685(a)(1), 685(a)(2) and 685(c) of the Tax Law, respectively, as incorporated into Article 23 by section 722(a).

6. Petitioner claimed that he was an employee of Leon during 1978 and 1979 and that, accordingly, his income derived therefrom was exempt from unincorporated business tax. In his petition he stated, "I was an outside salesman employed by one employer."

7. Petitioner did not personally appear for the hearing. His representative testified that he contributed to a Keogh retirement plan, was on the road the major part of each year, and was compensated strictly on a commission basis.

8. Petitioner was not reimbursed by Leon for business expenses incurred. Such expenses, totalling \$72,358.00 for 1978 and \$68,166.00 for 1979, consisted, inter alia, of the following deductions:

<u>Deduction Claimed</u>	<u>1978</u>	<u>1979</u>
Advertising	\$ 2,061.00	\$ -0-
Insurance	2,156.00	1,946.00
Office supplies & expense	1,156.00	509.00
Rent on business property	3,600.00	4,800.00
Telephone	1,447.00	1,097.00
Travel	5,580.00	5,032.00
Trade shows	7,471.00	6,552.00
Hotel, food & lodging	9,876.00	10,971.00
Sample purchases	209.00	1,077.00
Sample maintenance	1,242.00	1,010.00
Entertainment	13,352.00	14,700.00
Gifts	2,710.00	4,411.00
Alarm security	372.00	135.00

9. Petitioner's representative submitted an "employment agreement" between petitioner and Leon dated January 1, 1979. Said agreement provided, inter alia, that:

(a) "employment shall be for an initial term of two years commencing January 1, 1979 and ending on December 31, 1981...". (However, said term as specified is actually three years.)

(b) "The Employee (petitioner) shall be employed as Executive Vice President of the Employer (Leon) and agrees to perform such executive and administrative services in the running of the business of the Employer, its subsidiaries and affiliates as the Employer may, from time to time, assign to the Employee. Employee's duties shall include the promotion, marketing and merchandising of the products of the Employer, its subsidiaries and affiliates, with special emphasis on coordinating national sales."

(c) "For all services rendered by the Employee under this Agreement to the Employer, its subsidiaries and affiliates, Employer shall pay to the Employee during the term of his employment hereunder:

(a) A salary as (sic) the rate of \$108,000 per annum...

(b) Additional incentive compensation..."

(d) "Employee shall be included in any insurance, pension or other fringe benefit program maintained by Employer at the same level as similar executives..."

10. Petitioner's representative submitted a letter from the President of Adolfo (a division of Leon) dated May 13, 1985, wherein it was stated:

"Please be advised that Mr. Leonard Bloom was employed by this company as sales manager during 1978 and 1979.

Mr. Bloom worked directly under my control and supervision. Mr. Bloom had the right to hire and fire sales personnel subject to my approval. Mr. Bloom's sales itinerary was subject to my approval along with his expenses.

Mr. Bloom was not an independent contractor, but he was an employee with this firm who had to account to his employer for his time and work schedule."

11. Petitioner's representative submitted three (3) dictated statements, each dated May 13, 1985 and purportedly signed by a salesman for Leon, wherein it was stated:

"Please be advised that in 1978 and 1979 I was employed as a salesman for Leon of Paris.

During this period Mr. Leonard Bloom was employed as Vice President sales manager and I reported directly to him."

12. Petitioner's representative had no knowledge of the specific direction and control exercised by Leon over petitioner's activities.

CONCLUSIONS OF LAW

A. That 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. 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's actual activities and his relationship with Leon were described in the record in vague, general terms and lacked the specific detailed information necessary to establish that a bona fide employer-employee relationship existed. Accordingly, petitioner has failed to sustain his burden of proof imposed pursuant to section 689(e) of the Tax Law, as incorporated into Article 23 by section 722(a), to show that sufficient direction and control was exercised by Leon over his day-to-day activities so as to constitute a relationship of employer-employee. Therefore, petitioner's activities did not constitute services rendered as an employee of Leon within the meaning and intent of section 703(b) of the Tax Law.

C. That the nature and extent of petitioner's claimed business expenses indicate that he was an independent contractor rather than an employee.


D. That petitioner's activities on behalf of Leon 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.

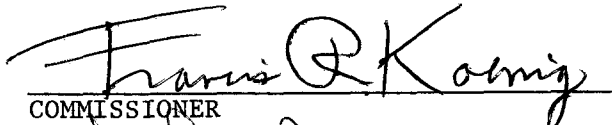
E. That the petition of Leonard Bloom is denied and the notices of deficiency dated January 12, 1983 and February 25, 1983 are sustained together with such additional penalty and interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985


PRESIDENT


COMMISSIONER


COMMISSIONER