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Record No. 6402

In the Supreme Court of Appeals of Virginia at Richmond

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF C. H. MORRISSETT, STATE TAX COMMISSIONER

v.

JOHN B. MANZER

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6402

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 27th day of April, 1966.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF C. H. MORRISSETT, STATE TAX COMMISSIONER,
Plaintiff in error,

against

JOHN B. MANZER, Defendant in error.

From the Circuit Court of Albemarle County
Lyttelton Waddell, Judge

Upon the petition of Commonwealth of Virginia, at the relation of C. H. Morrissett, State Tax Commissioner, a writ of error is awarded her from an order entered by the Circuit Court of Albemarle County on the 12th day of November, 1965, in a certain proceeding then therein depending entitled, In *Re:* John B. Manzer; no bond being required.

* * * * *

RECORD

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* * * * *

ANSWER OF C. H. MORRISSETT, STATE TAX COMMISSIONER, ON BEHALF OF DEPARTMENT OF TAXATION, COMMONWEALTH OF VIRGINIA

The answer of Department of Taxation, Commonwealth of Virginia, by C. H. Morrissett, State Tax Commissioner, to an application filed by John B. Manzer for correction of alleged erroneous assessments of commission merchants' license for the years 1957, 1958, 1959 and 1960.

Respondent, reserving the benefit of all just exceptions to said application, for answer thereto or to so much thereof as it is advised it is material it should answer, answers and avers:

(1) On November 25, 1960, the Department of Taxation, Commonwealth of Virginia, made an assessment against John B. Manzer for omitted commission merchants' license taxes for the tax years of 1957, 1958, 1959 and 1960 and said assessments were filed with said John B. Manzer by mailing the same to him on December 1, 1960 to his address at Box 218, Crozet, Virginia.

(2) Said assessments were made upon the gross commissions earned by said John B. Manzer, as follows:

Calendar Year	*Commissions*
1957	$ 9,757.00
1958	11,463.00
1959	11,299.00
1960	11,515.00

page 4 } (3) The taxes accrued and were computed pursuant to Section 58-293 of the Code of Virginia and are for the years and in the basic or principal amount, penalties, and interest accrued to November 25, 1960, as follows:

Year	*Commission*	*Taxes, Penalties and Interest*
1957	$ 9,757.00	$ 86.31
1958	11,463.00	102.48
1959	11,299.00	95.23
1960	11,515.00	88.17

being a total of taxes, penalties and interest due as of November 25, 1960, in the amount of $372.19, upon which total interest continues to accrue from November 25, 1960, until said taxes, penalties and interest are paid.

(4) During each of the years 1957, 1958, 1959 and 1960 the said John B. Manzer was a commission merchant as that term is defined in Section 58-293 of the Code of Virginia, and the gross commissions earned by him during each of said years are subject to the tax imposed by said Code section. The exemptions set forth in said Code section are not applicable to the commissions earned by the applicant, John B. Manzer, or to the tax assessed thereon.

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ORDER

This matter came on to be heard upon the petition of John B. Manzer for relief from an assessment of state license tax as a commission merchant for the calendar years 1957, 1958, 1959, and 1960, upon the answer of the State Tax Commissioner filed by Kenneth C. Patty, Assistant Attorney General, upon the motion filed by Downing L. Smith, Commonwealth's Attorney of Albemarle County, asking that the Director of Finance of Albemarle County be dismissed as a party since the assessments in question were made by the State Department of Taxation and not by any local official, and upon the evidence heard *ore tenus,* and was argued by counsel, the Department of Taxation being represented by D. Gardiner Tyler, Assistant Attorney General, designated by the State Tax Commissioner to represent him in the matter.

And it appearing to the court that during the years in question the petitioner was exempted from the requirement of obtaining a state revenue license as a commission merchant by the provisions contained in the second paragraph of Section 58-293 of the Code of Virginia which exclude from the scope of this tax "any person who on commission sells merchandise by sample, circular, or catalogue, where the merchandise subsequently delivered is not samples, who has no office, display room, store, or other definite place of business

in the State, who has no stock of merchandise in his custody or possession or under his control at any time during the year, and who employs no person"; that the assessments in question were made by the State Department of Taxation and not by any commissioner of the revenue; and that the applicant is erroneously charged with a license tax, the erroneous assessment of which was not caused by the wilful failure or refusal of the applicant to furnish the tax-assessing authority with the necessary information, as required by law,

page 7 } It is ADJUDGED, ORDERED, and DECREED that the assessment of the state license tax as a commission merchant against John B. Manzer for the years 1957, 1958, 1959, and 1960 in the amount of $372.19, including penalties and interest to November 25, 1960, be exonerated in full and that the Clerk of this Court certify copies of this order to the State Tax Commissioner and to the Comptroller in accordance with the provisions of Section 58-1134 of the Code of Virginia.

It is further ordered that the judgment is suspended for a period of sixty days from the date hereof, and should the State Tax Commissioner note an appeal to the Supreme Court of Appeals of Virginia, the judgment is further suspended until that Court enters its judgment.

To all of which the State Tax Commissioner excepted, on the ground that the decision was contrary to the law and the evidence.

Enter.

LYTTELTON WADDELL

Date: 11/12/65.

We ask for this:

ROBERT M. MUSSELMAN
Atty. for John B. Manzer

Seen and objected to and exception noted.

D. GARDINER TYLER
Counsel for State Tax
Commissioner.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Honorable Eva Maupin, Clerk of the Circuit Court of Albemarle County:

The Commonwealth of Virginia, acting by and through the State Tax Commissioner, hereby gives notice of appeal from the final judgment entered in this case on November 12, 1965, and sets forth the following assignments of error:

1. That the court erred in exonerating the applicant (John B. Manzer) from the payment of taxes assessed against him under Section 58-293, Code of Virginia (1950) as amended.
2. That the court erred in construing the word "office" in said section (58-293) to mean that an actual sale of merchandise must be made in said office before tax liability attaches.
3. That the court erred in not ruling that the applicant was estopped to deny that he had an office; the uncontradicted evidence showed that he represented on his income tax returns that he had an office at his home, deducting the expense of same pursuant to Section 58-81 of the Code.

page 11 } 4. That the court erred in not holding that the applicant had a definite place of business in the State of Virginia within the meaning of Section 58-293, Code of Virginia (1950) as amended.

5. That the judgment of the court is contrary to the law and evidence.

COMMONWEALTH OF VIRGINIA
EX REL OF C. H. MORRISSETT, STATE TAX COMMISSIONER
By D. GARDINER TYLER
Assistant Attorney General.

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JOHN B. MANZER,
appearing as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Musselman:

Q. Give your name, address, and occupation.

A. John B. Manzer, Crozet, Virginia. I call myself a manufacturers' representative.

Q. Would you tell the Court the nature of your work, whom you represent, and the type of work you do for them?

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A. I represent at present Virginia Metalcrafters, Ellis and Squires, and Country Prints. Simply, I get in my car with my briefcase and call on customers in Virginia, Maryland, Deleware, and Washington. I go there and tell them how to sell the product, how to merchandise it, how to display it; and I get, on occasion, orders, but most of the orders go from the customer directly to the companies. The companies send them—I see nothing of the merchandise on the basis of delivery, credit standing, shipment of material or collecting the money for it—I have no jurisdiction over any part of that operation, other than the order. And for this, I work strictly on a commission basis from which I deduct my traveling and lodging expense with no remuneration or extra money from these companies. I do it entirely on my own.

Q. How much of the time do you travel?

A. Well, I'd say I travel an average of three or four days a week, average. I travel wherever, really, I want to in that territory, wherever I think I can do the most good.

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Q. Do you have any contact with your customers from your residence? Do they call on you there?

A. They don't call on me in person. I have talked to them on the telephone and actually call them once in a while.

Q. Is that a substantial part of your activity?

A. No. Very little. It may be an emergency where they might want something.

John B. Manzer.

* * * * *

Q. Are the answers to these questions applicable to the years we're discussing, 1957 through 1960? Has there been any change in your relationship from then until now?

A. No, sir.

Q. On your tax returns I believe you claimed an expense for costs of an office at home. Could you explain

page 7 } what you meant by this item? What its nature was?

A. Well, I have to have a place to keep my records. I have the—the room where I put them is the porch. I have a file and a desk and a lamp and telephone, and I have to have some place to keep these things. I don't know whether that would be an office or what.

Q. Was this the arrangement that existed during the years in question?

A. Yes. I've always had this.

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CROSS EXAMINATION

By Mr. Tyler:

Q. Mr. Manzer, I hand you herewith this tax return for 1958 and ask you to identify it. Is that a copy of your tax return?

A. I believe so, sir. That's my signature.

Mr. Tyler: We ask that this be filed as *Commonwealth's Exhibit Number One.*

Note: The said copy of tax return was marked *Commonwealth's Exhibit Number One.*

Q. Mr. Manzer, I show you a document that purports to be your State income tax for 1959, and ask you to identify it. Is that yours?

A. That's my signature.

John B. Manzer.

Mr. Tyler: I ask that it be filed as *Commonwealth's Exhibit Number Two.*

Note: The said copy of tax return was marked *Commonwealth's Exhibit Number Two.*

Q. I hand you a document which purports to be the Virginia State Income Tax made by you in 1960. Is that yours?
A. Yes, sir.

Mr. Tyler: I ask that it be filed as *Common-*
page 9 } *wealth's Exhibit Number Three.*

Note: The said copy was marked as *Commonwealth's Exhibit Number Three.* Mr. Tyler then handed *Commonwealth's Exhibits One, Two and Three* to Mr. Musselman, who examined and returned them.

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Q. Would you amplify further just what records you keep at home? What work you do at home in connection with your job?
A. Well, I would come in, say, Friday or Thursday, whichever day it would be, the work that I would do that day, the orders—or, these are not always orders, they are requests for catalogues, complaints, of course, and requests for adver-
tising material, that sort of thing—well, when I
page 12 } get in, then I sit down—I might make notes all
week that don't pertain to an order, just requests for various things—and then when I get in, I would sit and do this. Of course, there's also a lot of letter writing, which I do by hand, and then I get a great deal of follow-up things from various clients, which I have to sort out and write down on the customer lists. And—do you want more? I don't know what else—
Q. Can you estimate how much time in an average week you spend in this sort of activity in your home?
A. I would say I'd take a day, and that's usually on Satur-

day or Sunday; whenever I can get to it. I don't think it would be more than a day. Maybe part of a day.

Q. Do I understand you to say that you do not have a typewriter? You don't type your letters?

A. No, I don't type my letters. I write them.

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R. E. WILLIAMS,

called as a witness by and on behalf of the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Tyler:

Q. What is your name, and where are you employed?

A. R. E. Williams, employed by the Virginia Department of Taxation.

Q. How long have you been employed there?

A. I went to work in 1932 and retired June 30, 1963, and I was called back as a part-time agent in April of this year.

Q. Were you employed by the Virginia Department of Taxation during the years of 1958 through 1960?

A. I was.

Q. In what capacity?

A. Auditor.

Q. Did you have occasion to audit the joint
page 14 } State income tax returns made by John B. and Cecelia W. Manzer for the year 1958?

A. For the calendar year of 1958; yes, sir.

Q. When did you do that work, Mr. Williams? Do you recall?

A. I called Mr. Manzer—

Q. When was it, now?

A. It was November of 1960.

Q. What did you do in that connection, as auditor of the tax returns?

A. I called on Mr. Manzer and we went over the return for 1958 and made some adjustment in the expenses that were

claimed, and we talked a little while and I asked him the precise nature of his business, and he told me he sold merchandise on a commission basis. So we discussed that for a little while, *particuarly* with respect to whether or not he carried an inventory of merchandise, and he said he did not. So I asked him if he had an office, and he said, "Yes, my office is in my home." And he invited me to see his office, and I looked at his office and made the remark, something like this, "This is a nice arrangement." I thought at the time, "I wish I had one in my home." And Mr. Manzer said, "Yes, it's very convenient for customers who come here to see me, and I keep my records here and I do a certain amount of entertaining here."

page 15 } The Court: A certain amount of what?
Mr. Williams: Entertaining.

(Resuming): So I told Mr. Manzer that, in my opinion, he was liable for a commission merchant's license, and that we would have to compute the license for '57, '58, '59, and '60. That's license tax, and I did that after I returned to Richmond, on the basis of the commission reported in the schedule attached to his return. We had discussed that and he said that his commission was reported. I had gone through the '58 return.

The Court: I understand that the amount of the tax is agreed upon.

Mr. Tyler: Yes, sir. That's not disputed.

By Mr. Tyler (Resuming):

Q. Mr. Williams, you made a report on this audit, did you not, to the Department?

A. Yes, sir.

Q. Did you furnish Mr. Manzer a copy of that audit?

A. I did.

Q. I hand you herewith a document that purports to be such a report and ask you to identify it.

A. Yes. This is a copy of the report.

Mr. Tyler: I ask that this be filed as *Commonwealth's Exhibit Number Four.*

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R. E. Williams.

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By Mr. Tyler (Resuming):

Q. We have one more question: When you interviewed Mr. Manzer and talked with him concerning his tax affairs, did he indicate to you or give you any reason to believe that he did anything else except selling on a commission for these companies? Did he have any other occupation?

A. No, he didn't. He led me to the impression that that was his business, that he had no other income, and the income returns showed that he had no other business.

Mr. Tyler: That's all.

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The Court: General examples, some types of people who are exempt, that I might know about. It's all right, if you don't know.

Mr. Tyler: Go ahead and tell him.

Mr. Williams: Before the section was amended, in 1954, I believe, there was a question of whether or not a man who starts out and just calls on people and was a salesman, he had no office, but traveled—he was a salesman and he was getting a commission—well, it could be a question that if a man who sold merchandise for a merchant inside his store might be a commissioned merchant. All those things came up. So that section was amended to clarify that class of business. A person who was a salesman, who had no office—the Department has always used this—whether there's an office connected with his business. And as I say, I felt—

The Court: I understand now. Let me see the statute, please.

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A Copy—Teste:

H. G. TURNER, Clerk.

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