

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

JOSEPH KRIEGER AND SALLY KRIEGER

DECISION

for Redetermination of Deficiencies or for
Refunds of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Years 1972
and 1973.

Petitioners, Joseph Krieger and Sally Krieger, 322 East 57th Street, New York, New York 10022, filed petitions for redetermination of deficiencies or for refunds of unincorporated business tax under Article 23 of the Tax Law for the years 1972 and 1973 (File No. 58330).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 21, 1986 at 10:45 A.M., with all briefs to be submitted by December 21, 1986. Petitioners appeared by Stephen A. Bleyer, CPA. The Audit Division appeared by John E. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether petitioner Joseph Krieger timely filed a claim for credit or refund of unincorporated business tax paid for the year 1973.

11. Whether, for the years at issue, petitioner Joseph Krieger's activities for certain corporations engaged in the production of men's clothing constituted the carrying on of an unincorporated business, thereby subjecting the income earned therefrom to unincorporated business tax pursuant to Article 23 of the Tax Law.

FINDINGS OF FACT

1. On April 22, 1976, the Audit Division issued to petitioner Joseph Krieger a Statement of Audit Changes for the year 1973 asserting unincorporated business tax due in the amount of \$2,843.23, plus penalties asserted pursuant to section 685(a)(1), (2) of the Tax Law and interest, for a total amount due of \$3,693.19. Petitioner Joseph Krieger did not file an unincorporated business tax return for 1973. The Statement of Audit Changes explained to petitioner that the income from his activities as a sales representative was subject to the unincorporated business tax and that since the amount reported as wages was interrelated with the income reported as other income, it, too, was subject to the unincorporated business tax.

2. On May 16, 1976, petitioner mailed a check to the Department of Taxation and Finance in the amount of \$3,693.19 as payment of the amounts of unincorporated business tax, penalties and interest asserted to be due in the Statement of Audit Changes issued to petitioner for the year 1973. It is petitioner Joseph Krieger's position that, due to the fact that he was, at that time, engaged with the Internal Revenue Service and the Department of Taxation and Finance in a matter involving a partnership in which he was a member, i.e., M & M Partnership, he thought that the amounts claimed to be due on the Statement of Audit Changes for 1973 related to the partnership and that, had he known and understood that said statement referred to the assertion, by the Audit Division, that unincorporated business taxes were due on his activities in 1973, said payment would not have been made.

3. On January 20, 1982, a Claim for Credit or Refund of Personal Income Tax and/or Unincorporated Business Income Tax in the amount of \$3,693.19 for

Joseph and Sally Krieger.¹ The Audit Division contends that this claim for credit or refund was not timely filed and must, therefore, be denied.

4. On March 28, 1977, the Audit Division issued to petitioner Joseph Krieger a Statement of Audit Changes for the year 1972 asserting unincorporated business tax due in the amount of \$2,410.38, plus penalties pursuant to section 685(a)(1), (2) and interest, for a total amount due of \$4,245.40. Petitioner Joseph Krieger did not file an unincorporated business tax return for 1972. The Statement of Audit Changes provided the same explanation as set forth in Finding of Fact "1", supra. Also, on March 28, 1977, the Audit Division issued to petitioner Joseph Krieger a Notice of Deficiency for the year 1972 in the same amount as set forth in the Statement of Audit Changes. Petitioners thereafter received from the Department of Taxation and Finance a Voucher for Income Tax Refund which advised that the amount of \$5,586.27 from a total overpayment of \$5,808.65 from their 1979 New York State personal income tax return had been applied to the 1972 assessment. On January 20, 1982, the Department of Taxation and Finance received from Joseph and Sally Krieger a Claim for Credit or Refund of Personal Income Tax and/or Unincorporated Business Income Tax in the amount of \$5,586.27 for the year 1972. On November 26, 1984, the Audit Division issued to petitioners a notice of disallowance in full of their claim for refund for 1972. Sally Krieger is apparently a party to this proceeding solely by virtue of the fact that a portion of her 1979 personal

1 It should be noted that, for the year 1973, Joseph and Sally Krieger filed a combined income tax return. In addition, the Statement of Audit Changes was issued to Joseph Krieger solely and asserted that his activities were subject to the unincorporated business tax. The claim for refund was erroneously filed in the name of Joseph and Sally Krieger. Sally Krieger

income tax overpayment was applied to the 1972 assessment. Hereinafter, all references to petitioner shall refer only to Joseph Krieger.

5. For the year 1972, petitioner was an officer and fifty percent shareholder of American Sportswear, Inc. ("American"), Arreta Hall Manufacturing Co., Inc. ("Arreta Hall") and Tarra Hall Clothiers, Inc. ("Tarra Hall"), each of which was a New York corporation. From each corporation, petitioner received a wage and tax statement which indicated that Federal, State, City and FICA taxes had been withheld from his wages. In addition, for 1972, petitioner received the sum of \$13,203.00 from Hartz and Company, Inc. ("Hartz") of Union Bridge, Maryland, although a Form 1099 was issued by Union Bridge Manufacturing Corporation ("Union Bridge"), a wholly-owned subsidiary of Hartz. The primary function of each corporation and petitioner's duties with each were as follows:

(a) American was a contracting company which made men's jackets for Tarra Hall. Petitioner was the president of this corporation. Petitioner would go to American's factory in Brooklyn approximately two or three times per week to see that the factory manager was properly operating the factory. Petitioner and Abraham Cohen, also an officer and fifty percent shareholder, hired the factory manager and had the authority to fire him. For the year 1972, petitioner received a wage and tax statement indicating that he had received wages of \$6,125.00.

(b) Arreta Hall was also a contracting company which made men's jackets for Tarra Hall. Petitioner was its president. He and Abraham Cohen would also go to Arreta Hall's factory in New York City approximately two or three times per week to see that the factory manager was properly operating the factory. Petitioner and Mr. Cohen had the authority to hire and fire the

factory manager. For the year 1972, petitioner received a wage and tax statement indicating that he had received wages of \$16,500.00.

(c) Tarra Hall was the parent company of American and Arreta Hall. Tarra Hall was involved in the merchandising, marketing and styling of men's clothing. Petitioner was the vice-president and a fifty percent shareholder along with Abraham Cohen. Approximately thirty people worked at Tarra Hall. Petitioner had the authority to hire and fire these employees. For the year 1972, petitioner received a wage and tax statement indicating that he had received wages of \$18,200.00.

(d) Union Bridge was the contract company for its parent corporation, Hartz. Petitioner, Abraham Cohen and Stanley Hartz each owned one-third of the shares of Hartz. Petitioner was not an officer of Hartz because of a market agreement which Tarra Hall and Arreta Hall had with the Amalgamated Clothing Workers of America and the New York Joint Board. The provisions of this agreement prohibited petitioner from manufacturing garments or causing them to be manufactured in a factory other than in his existing factories. Because his being a shareholder and his receiving compensation from Hartz would have been in violation of the market agreement, petitioner received a Form 1099 from Union Bridge which indicated that, for the year 1972, he had received the sum of \$13,203.00 from Union Bridge as a fee for consulting services. Petitioner went to the Maryland offices of Hartz approximately once every two months.

6. For the year 1973, petitioner's titles, ownership and duties for the various corporations was the same as in 1972. He received wage and tax statements indicating that he had received wages in the sums of \$8,425.00 from American, \$16,758.99 from Arreta Hall, \$18,200.00 from Tarra Hall and \$5,310.67 from

Andrew Lloyd, Ltd., a New York corporation which was in operation for approximately three or four months during the year for the purpose of making vests for three-piece suits. Andrew Lloyd, Ltd. was also owned equally by petitioner and Abraham Cohen. Petitioner would visit Andrew Lloyd, Ltd.'s factory, on occasion, during the fall season to see that the vests were being made on time. As in 1972, petitioner again received a Form 1099 indicating that he had received consulting fees from Union Bridge. For 1973, these fees amounted to \$13,250.00.

7. As of 1973, petitioner had been involved in the men's clothing industry for approximately thirty years. For said years, petitioner worked primarily from offices located at Tarra Hall and at Hartz. He was reimbursed by the various companies for the business expenses incurred by him. On his tax returns for said years, petitioner claimed no deductions for unreimbursed business expenses. Petitioner did not file a Federal Schedule C for the years at issue. Petitioner had the authority to sell to whomever he wished and had the authority to travel wherever and whenever he chose. Petitioner received separate, weekly checks from each of the corporations which provided him with compensation. The amounts received from these corporations were determined by agreement between petitioner and Abraham Cohen. On occasion, each would withdraw from these corporations sums of money in addition to weekly salary payments.

CONCLUSIONS OF LAW

A. That section 687(a) of the Tax Law, the provisions of which are specifically incorporated for purposes of the unincorporated business tax by section 722(a) of the Tax Law, provides, in pertinent part, as follows:

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid."

B. That petitioner never filed an unincorporated business tax return for the year 1973. He did, however, pay unincorporated business tax, penalty and interest for 1973 in May of 1976. He did not file a claim for refund or credit of these amounts until January 20, 1982. His claim for refund or credit was, therefore, untimely and the Audit Division properly denied petitioner's claim for refund or credit of unincorporated business tax, penalties and interest paid for the year 1973.

C. That section 703(b) of the Tax Law provides:

"The performance of services by an individual as an employee or as an officer or director of a corporation, society, association, or political entity, or as a fiduciary, shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual."

D. That "[t]he clear purpose of the proviso in subdivision (b) is to prevent an individual entrepreneur from sheltering from the unincorporated business tax income which derives from the conduct of his unincorporated business in the form of salaries for services as an employee or officer of the corporate entities, in a situation where the corporate entities exist primarily to advance the business purposes of the unincorporated entity and do not have an independent and unrelated business purpose." (Naroff v. Tully, 55 AD2d 755, 756).

E. That former 20 NYCRR 203.10(b) provides, in pertinent part, as follows:

"Where he, however, performs services for two or more persons or entities, without a clear division of time, such an individual would ordinarily not be an employee but rather an independent contractor or agent with respect to both such persons or entities, since neither person nor entity could be said to control him."

F. That former 20 NYCRR 203.10(d) provides, in pertinent part, as follows:

"Where the individual rendering personal services as an employee, officer, director or fiduciary is also actively engaged in his own independent business, without a clear division of time, or where the compensation received bears no reasonable relationship to the services performed for such employer or principal but includes compensation for services performed in the individual's independent business, such services will be deemed to constitute part of an unincorporated business regularly carried on by the individual."

G. That petitioner was a fifty percent shareholder and an officer (president or vice-president) of each of the New York corporations (American, Arreta Hall, Andrew Lloyd, Ltd. and Tarra Hall). He was a one-third shareholder of the parent corporation of Union Bridge, the Maryland corporation from which he received a consulting fee. He had no office, but rather performed services at the various corporations at times of his own choosing; he had no superior who directed his activities or to whom he reported. While income and social security taxes were withheld from the amounts paid to him by the New York corporations, it was petitioner and his partner, Abraham Cohen, who determined the amounts paid to them by these corporations. Furthermore, petitioner failed to establish any relationship between the time devoted to each corporation and the amounts of payments received from each. He is not, therefore, entitled to the exemption from unincorporated business tax provided in section 703(b) of the Tax Law by reason of his having been an employee or officer or director of these corporations, since the services rendered for each clearly constitute part of the conduct of a men's clothing business regularly carried on by petitioner.

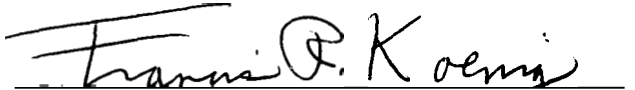
H. That the petitions of Joseph Krieger and Sally Krieger for refunds of unincorporated business **tax** for the years 1972 and 1973 are denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1987


PRESIDENT


COMMISSIONER


COMMISSIONER