

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Louis Hellman

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income & UBT :
under Article 22 & 23 of the Tax Law
for the Years 1968-70, 1973, 1974. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 20th day of February, 1981, he served the within notice of Decision by certified mail upon Louis Hellman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis Hellman
143-19 248th St.
Rosedale, NY 11422

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
20th day of February, 1981.

Garnie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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Louis Hellman :

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Sworn to before me this
20th day of February, 1981.

Annis P. Hagelund

J. Vredenburg

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

February 20, 1981

Louis Hellman
143-19 248th St.
Rosedale, NY 11422

Dear Mr. Hellman:

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
LOUIS HELLMAN	:	DECISION
for Redetermination of Deficiencies or	:	
for Refund of Unincorporated Business Tax	:	
under Articles 22 and 23 of the Tax Law	:	
for the Years 1968, 1969, 1970, 1973 and	:	
1974.	:	

Petitioner, Louis Hellman, 143-19 248th Street, Rosedale, New York 11422, filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1968, 1969, 1970, 1973 and 1974 (File Nos. 16101 and 16877).

A formal hearing was commenced before Neil Fabricant, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on December 6, 1977 at 9:15 A.M. Petitioner appeared by Bertrand Leopold, Accountant. The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

A further hearing for the purpose of concluding this matter was scheduled for July 28, 1980 at 9:15 A.M. at the aforesaid offices of the Commission, and notice thereof was given to petitioner and petitioner's representative. Neither petitioner nor his representative appeared at the continued hearing. The following decision is rendered upon the record as it presently stands.

ISSUES

I. Whether petitioner's income from his activities as a sales representative was subject to unincorporated business tax.

II. Whether the burden of proof on the issue of whether petitioner's income was subject to unincorporated business tax was upon petitioner or upon the taxing authority.

III. Whether, if subject to unincorporated business tax, petitioner was entitled to take as a deduction contributions to a Keogh Plan.

IV. Whether a penalty was properly asserted against petitioner.

FINDINGS OF FACT

1. On June 25, 1973, the Audit Division issued against petitioner, Louis Hellman, a Notice of Deficiency, asserting unincorporated business taxes for the years 1968 through 1970, scheduled as follows:

<u>Year</u>	<u>UBT</u>	<u>Interest</u>	<u>Total</u>
1968	\$ 130.86	\$ 40.78	\$ 171.64
1969	454.30	87.06	541.36
1970	639.72	84.21	723.93
	<u>\$ 1,224.88</u>	<u>\$ 212.05</u>	<u>\$1,436.93</u>

The accompanying Statement of Audit Changes under the same date declared that due to petitioner's failure to substantiate an employer-employee relationship with principals, his income from activities as an independent sales agent was deemed subject to unincorporated business tax.

2. On October 26, 1976, the Audit Division issued against petitioner a Notice of Deficiency, asserting personal income tax and unincorporated business tax for the years 1973 and 1974, scheduled as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
1973	\$ 960.68	\$269.65	\$179.60	\$1,409.29
1974	1,079.64	283.78	138.12	1,501.54
	<u>\$2,039.68</u>	<u>\$553.43</u>	<u>\$317.72</u>	<u>\$2,910.83</u>

The notice indicated that a remittance of \$443.24 had been received, leaving a balance still due of \$2,467.59. Said remittance was submitted in payment of the personal income tax liability exclusive of interest.

The Statement of Audit Changes explained that petitioner's income from "activities as a representative" was subject to unincorporated business tax.

3. For all years at issue herein, petitioner and his wife filed personal income tax returns, indicating business income and no wages subject to withholding taxes for petitioner. On the returns, petitioner indicated his occupation to be "Representative", "Sales Representative" or "Salesman".

For none of the years under consideration did petitioner file an unincorporated business tax return.

4. On a statement attached to his Federal Form 1040, Schedule C for 1968, petitioner indicated his business was "Self-Employed Salesman" and enumerated his various deductions (printing and stationery, entertainment, etc.), including a deduction in the amount of \$590.00 for "Self-Employed Retirement Deduction". A similar Schedule C was filed by petitioner for 1970, reflecting "net profit on self-employment" at \$21,389.43.

5. Petitioner maintained an office at his home which he used solely for storage of records. He employed no assistant.

6. During the course of the hearing, petitioner's representative did not introduce into evidence employment contracts petitioner had with any of his principals; nor did the representative introduce any other evidence as to control and direction exercised over petitioner by principals or as to the arrangements by which petitioner's time was allocated among principals.

CONCLUSIONS OF LAW

A. That the burden of overcoming the unincorporated business tax liabilities rested upon petitioner. Tax Law Sections 689(e), 722. An exemption from taxation "must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption." Savings Bank of New London v. Coleman, 135 N.Y. 231, 234 (1892).

B. That it is the degree of control and direction exercised by the principal which determines whether petitioner is an employee or an independent contractor, e.g., Lieberman v. Gallman, 41 N.Y. 2d 774 (1977). Petitioner failed to present any sworn testimony or evidence establishing the degree of control, if any, over working hours and activities generally found in an employer-employee relationship. Petitioner has thus failed to sustain the burden of showing that his activities as a sales representative did not constitute the carrying on of an unincorporated business within the meaning of section 703(a) of the Tax Law. Matter of Saul Saveth, State Tax Commission, March 15, 1979; Matter of Hyman Adelsberg, State Tax Commission, August 25, 1978.

C. That petitioner's contributions to a Keogh Plan may not be taken as a deduction from unincorporated business gross income. In order to qualify as a deduction for unincorporated business tax purposes, such deduction must be "directly connected with or incurred in the conduct of the business...". Tax Law Section 706.

D. That the penalties asserted against petitioner are sustained. Petitioner did not offer any reason whatsoever for his failure to file unincorporated business tax returns. Tax Law Sections 685, 722.

E. That the petition of Louis Hellman is denied, and the notices of deficiency issued June 25, 1973 and October 26, 1976 are sustained together with such additional penalties and interest as may be lawfully due.

DATED: Albany, New York

FEB 20 1981

STATE TAX COMMISSION

James H. Tuohy
PRESIDENT

Thomas H. Lynch
COMMISSIONER

Francis R. Koenig
COMMISSIONER



Tax Appeals Bureau

Date March 27, 1981

To STC

*Taxpayer's copy returned, no better
address.*

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

February 20, 1981

Louis Hellman
143-19 248th St.
Rosedale, NY 11422

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STATE OF NEW YORK

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DATED: Albany, New York
FEB 20 1981

STATE TAX COMMISSION

James L. Sullivan
PRESIDENT

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COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS

ALBANY, N. Y. 12227

CERTIFIED

No. 545415

MAIL



UNCLAIMED

B/A
Sent

Fwd.

Louis Hellman
143-10 248th St.
Rosedale, NY 11422

53-10 147 Ave

Rosedale NY

11422

