

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

HERBERT SHUVALL

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of **Unincorporated Business** :
Taxes under Article(s) 23 of the :
Tax Law for the Year(s) ~~xxx Decision(s)~~ :
1967, 1968, 1969, 1970, 1971, 1972 and 1973

State of New York
County of Albany

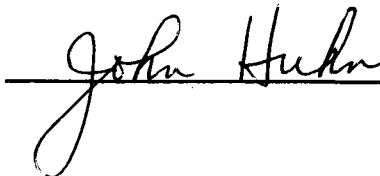
John Huhn, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 13 day of October, 1978, she served the within
Notice of Decision by (certified) mail upon Herbert Shuval1
~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Herbert Shuval1
7905 East Drive
North Bay Village, Florida 33141
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 ~~(representative of)~~
~~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

13 day of October, 1978.







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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

October 13, 1978

Herbert Shurvali
7905 East Drive
North Bay Village, Florida 33141

Dear Mr. Shurvali:

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 ~~(9)~~ **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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

JOSEPH CHYRTWATT
HEARING EXAMINER

~~For Return to Representative~~

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HERBERT SHUVALL	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1967, 1968, 1969, 1970, 1971,	:	
1972 and 1973.	:	

Petitioner, Herbert Shuvall, 7905 East Drive, North Bay Village, Florida 33141, 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 1967 through 1973 (File Nos. 13409 and 13410).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 27, 1977 at 1:15 P.M. Petitioner appeared pro se and by Eugene O. Cobert, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether petitioner's sales activities during the years 1967 through 1973 constituted the carrying on of an unincorporated business.

II. Whether income received from Velva Sheen Manufacturing Corporation, Jem Athletic Manufacturing Corporation and Hialeah Jacket Corporation constituted compensation derived from the performance of services as an employee, exempt from the imposition of unincorporated business tax.

III. Whether "other income" reported by petitioner on his New York State personal income tax returns for 1972 and 1973 was business income subject to unincorporated business tax.

IV. Whether petitioner may allocate income earned without New York State for unincorporated business tax purposes.

FINDINGS OF FACT

1. Petitioner timely filed New York State personal income tax returns for 1967, 1968, 1969 and 1970. He did not file unincorporated business tax returns for said years. The Income Tax Bureau contended that petitioner's sales activities constituted the carrying on of an unincorporated business and the income derived therefrom was subject to unincorporated business tax. A Notice of Deficiency was issued February 26, 1973 against petitioner asserting unincorporated business tax for 1967 through 1970 in the amount of \$8,153.90, plus \$1,599.61 in interest, for a total due of \$9,753.51.

2. Petitioner timely filed New York State personal income and unincorporated business tax returns for 1971, 1972 and 1973. He included salary income for 1971, 1972 and 1973 in his personal income tax returns, as well as "other income" for 1972 and 1973, which he did not include in his unincorporated business tax returns. The Income Tax Bureau contended that the salary income and "other income" were business-connected and, therefore, subject to unincorporated business tax. Accordingly, a Notice of Deficiency was issued March 31, 1975 for \$4,036.18 in unincorporated business tax, plus \$532.07 in interest, for a total due of \$4,568.25.

3. During the years 1967 through 1972, petitioner sold non-competing items to college bookstores for Velva Sheen Manufacturing Corporation ("Velva Sheen"), Jem Athletic Manufacturing Corporation ("Jem") and several other principals. During 1973 petitioner sold items to the same outlets for Velva Sheen and Hialeah Jacket Corporation ("Hialeah"). All of petitioner's principals permitted him to sell for others. He covered the same territory for all principals. There was no agreement between principals as to the division of petitioner's time. Petitioner was a resident of New York State during the years at issue. He did not have a business office outside New York State. He did his clerical work in motel rooms or in his home.

4. Petitioner's largest source of income was derived from Velva Sheen, for whom he sold sportswear (such as T-shirts and sweatshirts imprinted with a college name). Petitioner was not reimbursed for expenses. He contended that his commissions were at a 10% rate rather than the industry rate of 7%, in order to compensate him for expenses. Velva Sheen assigned two salesmen to petitioner's territory. The salesmen sold to college bookstores and other outlets. Velva Sheen paid 10% commissions to petitioner for sales made by the two salesmen in college bookstores. Petitioner paid 7% to the salesmen and retained 3% of the commissions. Petitioner reported commissions that he paid on Federal Schedule "C" in the amount of \$29,658.00 for the year 1971, \$11,567.00 for 1972 and \$5,949.00 for 1973. Velva Sheen did not withhold income taxes or social security from petitioner's compensation, nor did it provide him with any fringe benefits.

5. In 1967 petitioner performed services for Jem as a commission salesman of outerwear. In 1968 he purchased 1/3 of the corporation and was compensated on a salary basis. However, he continued to sell for other principals, as well as Jem. No wage and tax statements from Jem were submitted with petitioner's New York State personal income tax returns for the years 1967 through 1970. The only pre-payments of tax on said returns were

estimated tax for each year. Petitioner received wage and tax statements from Jem for 1971 and 1972 which indicated that income taxes and social security taxes were withheld from his compensation. Petitioner did not report the compensation received from Jem during the years 1971 and 1972 for unincorporated business tax purposes. Petitioner was not reimbursed for expenses by Jem. Jem ceased operations in 1972.

6. Petitioner owned a one-half interest in Hialeah in 1973. He performed services as a salesman and was issued a wage and tax statement for said year which indicated that income taxes and social security taxes were withheld from his compensation. Petitioner did not report this compensation for unincorporated business tax purposes. Petitioner was not reimbursed for expenses.

7. In 1972 petitioner terminated his retirement plan and received proceeds in the amount of \$13,884.00. In 1973 the Jem retirement plan was terminated and petitioner received proceeds in the amount of \$1,300.00.

CONCLUSIONS OF LAW

A. That petitioner, Herbert Shuvall, was engaged in the carrying on of an unincorporated business during the years 1967, 1968, 1969, 1970, 1971, 1972 and 1973. All income derived therefrom (including the income received from Velva Sheen, Jem and

Hialeah) was subject to unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law.

B. That the services performed by petitioner, Herbert Shuvall, for Velva Sheen, Jem and Hialeah constituted part of a business regularly carried on; thus, the income from said services was not exempt from unincorporated business tax in accordance with the meaning and intent of section 703(b) of the Tax Law.

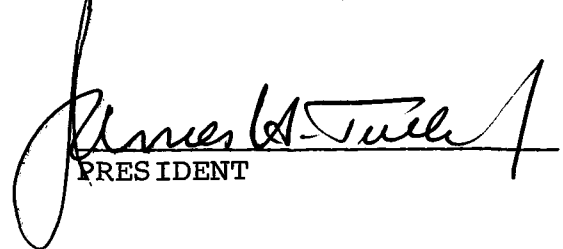
C. That petitioner, Herbert Shuvall, had no regular place of business outside New York State and all income was allocable to New York State in accordance with the meaning and intent of section 707(a) of the Tax Law.

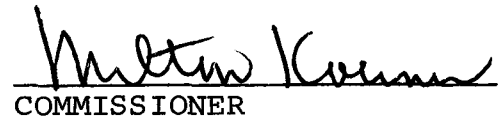
D. That "other income" in the amount of \$13,884.00 for 1972 and \$1,300.00 for 1973 was not required to be included in business gross income in accordance with the meaning and intent of section 705 of the Tax Law. The Income Tax Bureau is hereby directed to so modify the Notice of Deficiency issued March 31, 1975.

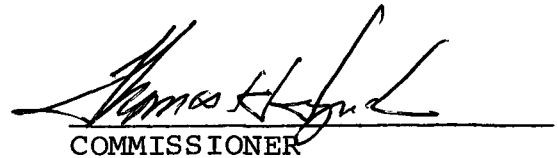
E. That the petition of Herbert Shuvall is granted only to the extent indicated in Conclusion of Law "D," above, and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
October 13, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER