

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

William Felsen :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Unincorporated Business Tax :
under Article 23 of the Tax Law
for the Year 1973. :

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 16th day of May, 1980, he served the within notice of Decision by certified mail upon William Felsen, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Felsen
836 S. Bundy Dr.
Los Angeles, CA 90049

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
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

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

May 16, 1980

William Felsen
836 S. Bundy Dr.
Los Angeles, CA 90049

Dear Mr. Felsen:

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) 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 Petition :
of :
WILLIAM FELSEN : DECISION
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Year 1973. :

Petitioner, William Felsen, 836 S. Bundy Drive, Los Angeles, California 90049, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1973 (File No. 15702).

A small claims 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 September 20, 1979 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether petitioner's activities as a salesman, constituted the carrying on of an unincorporated business, the income of which is subject to the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, William Felsen, filed a New York State Combined Income Tax Resident Return with his wife for 1973 wherein he listed his occupation as "traveling salesman". He did not file an unincorporated business tax return for said year.

2. On October 30, 1974, the Audit Division issued a Statement of Audit Changes wherein it held petitioner's income derived from his sales activities, subject to unincorporated business tax. Additionally, an adjustment was made to petitioner's claimed deduction for miscellaneous business expenses, but this adjustment was not contested and the personal income tax due thereon was subsequently paid. Accordingly, a Notice of Deficiency was issued against petitioner May 24, 1976, asserting unincorporated business tax in the amount of \$449.99, personal income tax of \$120.00, penalty of \$159.75 and interest of \$76.42, for a total due of \$806.16. Said notice indicated "Previous remittance of \$124.20 has been applied against the deficiency" although the remittance appears not to be reflected in the amounts due as stated.

3. Petitioner argued that he was an employee subject to the direction and control of his principals.

4. Petitioner, a commissioned salesman, sold merchandise for two New York principals during 1973 as follows:

- a. Henry A. Enrich & Co., Inc. - Manufacturer of closet accessories and,
- b. Riviera Trading Corp. - Manufacturer of sunglasses and women's hair ornaments.

5. Petitioner's territory for both principals was identical, consisting of Ohio, Michigan, Indiana and Kentucky. He was on the road approximately thirty-two weeks a year, calling on buyers for department stores in his territory, to whom he sold merchandise for both his principals. While on the road, petitioner prepared his own travel itineraries and was required to report to his principal, Riviera Trading Corp. (hereinafter Riviera) on a weekly basis.

6. During 1973, petitioner had an assistant in Detroit and one in Indianapolis. They were hired by Riviera, but were paid by petitioner since Riviera charged his commissions account for their salaries and business expenses.

7. Petitioner was paid by both principals on a commission basis. He received a wage and tax statement from Henry A. Enrich & Co., Inc. (hereinafter Enrich), who withheld income and social security taxes from his compensation. He received \$10,228.70 from Enrich during 1973 which he reported on his return as wages. Petitioner's net compensation from Riviera, after being reduced by the salaries and expenses of his assistants, was \$30,212.00, which was reported on his return as other income. He was issued an information return, form 1099 from Riviera, and no income taxes or social security tax was withheld from this compensation.

8. When petitioner was not on the road, he spent his time at the showrooms of his principals, which were situated near each other. He was not required to spend a specified amount of time in each showroom, but rather devoted time to each as he saw fit.

9. Petitioner's principals did not pay him for vacation or sick leave. He received no pension benefits, workmen's compensation coverage or business expense reimbursement from either principal.

10. Petitioner had no written contract in force during 1973 with either principal.

CONCLUSIONS OF LAW

A. That the term employee is defined as an individual performing services for an employer under an employer-employee relationship. Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished, but also as to the details and means by which that result is accomplished. That is, an employee

is subject to the will and control of the employer, not only as to what shall be done, but as to how it shall be done (20 NYCRR 203.10(b)). That petitioner's principals did not exercise sufficient direction and control over his activities so as to constitute a bona fide employer-employee relationship. This is evidenced by the fact that petitioner controlled his own time, both on the road and in New York, made his own travel itineraries and was required to report only on a weekly basis.

B. That petitioner William Felsen's activities constituted the carrying on of an unincorporated business, and that the income derived therefrom is subject to the imposition of unincorporated business tax within the meaning and intent of sections 701 and 703(a) of the Tax Law.

C. That the petition of William Felsen is denied and the Notice of Deficiency dated May 24, 1976 is sustained together with such penalties and interest as may be lawfully owing.

DATED: Albany, New York

MAY 16 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER