

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Samuel Hersh :  
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 Years 1972 & 1973. :

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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 23rd day of October, 1981, he served the within notice of Decision by certified mail upon Samuel Hersh, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

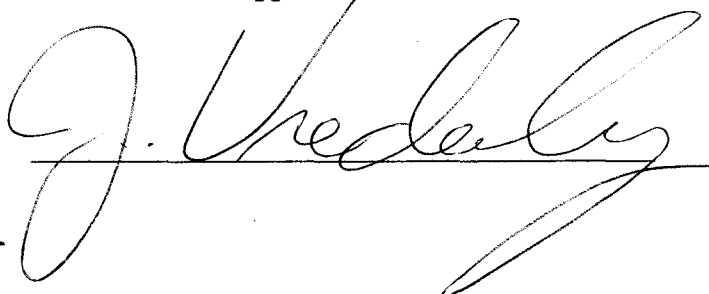
Samuel Hersh  
86 W. 12th St.  
New York, NY 10011

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  
23rd day of October, 1981.





STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Samuel Hersh :

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 Years 1972 & 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 23rd day of October, 1981, he served the within notice of Decision by certified mail upon Irving Kornblum the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Irving Kornblum  
15 Park Row  
New York, NY 10038

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 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  
23rd day of October, 1981.

*Annice A. Waples*

*J. Vredenburg*

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

October 23, 1981

Samuel Hersh  
86 W. 12th St.  
New York, NY 10011

Dear Mr. Hersh:

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  
Irving Kornblum  
15 Park Row  
New York, NY 10038  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
SAMUEL HERSH	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1972	:	
and 1973.	:	

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Petitioner, Samuel Hersh, 86 West 12th Street, New York, New York 10011, 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 1972 and 1973 (File No. 20089).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 5, 1981 at 1:15 P.M. Petitioner Samuel Hersh appeared with Irving Kornblum, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether petitioner's activities as a shoe salesman constituted the carrying on of an unincorporated business, thereby subjecting the income derived from said activities to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Samuel Hersh, and his spouse, Mildred Hersh, timely filed separate New York State personal income tax returns for the years 1972 and 1973 on combined forms IT-208. Unincorporated business tax returns were filed by Mildred Hersh for the years 1972 and 1973 with respect to the income earned

from her activities as an insurance broker. No unincorporated business tax returns were filed by petitioner Samuel Hersch reporting the income earned from his activities as a salesman.

2. Petitioner's 1972 personal income tax return reported business income from his activities as a salesman of \$17,692.00. His 1973 personal income tax return reported no business income, however, wage income of \$30,414.00 was shown. There were no wage and tax statements attached to said return supporting reported wage income of \$30,414.00.

3. On May 23, 1977 the Audit Division issued against petitioner a Notice of Deficiency, asserting unincorporated business tax for the years 1972 and 1973 of \$1,626.22, together with interest. Said Notice of Deficiency was based on an explanatory Statement of Audit Changes, dated August 15, 1975, wherein the Audit Division held that "[T]he income from your activities as an independent salesman is subject to the unincorporated business tax". Net income held subject to unincorporated business tax consisted of the business income reported on the 1972 return (\$17,692.00), and the wage income reported on the 1973 return (\$30,414.00).

4. During the years at issue petitioner, a footwear salesman working on a straight commission basis, received commission income from the following principals in the amounts indicated:

<u>Principal</u>	<u>1972</u>	<u>1973</u>
Kork-Ease	\$18,958.41	\$36,887.78
Fraser Shoe	3,013.71	2,626.31
Perfect Poise	315.99	914.73
Charles Davis (consulting fee)	-0-	2,233.36
Boot-Ster	6,214.44	1,240.27
TOTAL	\$28,502.55	\$43,902.45

5. Petitioner maintained an office/showroom in the "shoe district" of New York City at 86 West 12th Street where he met with buyers on Wednesday of each

week. The office/showroom remained empty for the other four days of the work week unless a buyer requested an appointment on a day other than Wednesday. Petitioner did not have any employees, however, he did utilize an answering service. The expense of maintaining the office/showroom was borne solely by petitioner until some undetermined time in 1973, when Kork-Ease began reimbursing petitioner \$25.00 toward the \$135.00 monthly rental.

6. Petitioner was furnished samples by his respective principals, however, no reimbursement was received for any other expenses incurred in his selling activities. The following chart indicates the nature of the expense incurred and the amount:

<u>EXPENSE</u>	<u>1972</u>	<u>1973</u>
Travel, Hotel, Meals, Tips	\$ 3,800.00	\$ 4,672.00
Auto Expenses	2,020.00	2,401.00
Local Transportation	320.00	220.00
Telephone & Answering Service	700.00	1,015.00
Postage, Stationery & Sundry	1,124.00	2,234.00
Showroom Rent	1,647.00	1,746.00
Use of Home Office	1,200.00	1,200.00
TOTAL	\$10,811.00	\$13,488.00

The amount of wage income as reported on petitioner's 1973 return (\$30,414.00) was computed by deducting from gross commissions (\$43,902.00) the total amount of expenses incurred (\$13,488.00).

7. Federal, New York State, New York City and Social Security taxes were not withheld from the commissions earned by petitioner nor was disability or unemployment insurance deducted. Petitioner did not have written contracts with any of his principals and he testified that he maintained no set work schedule; sometimes working three hours a day and sometimes ten hours a day.

8. For years prior to 1972 petitioner considered Boot-Ster as his primary principal, however, as the Boot-Ster line became more and more difficult to

sell, he began concentrating on the Kork-Ease line. Effective January 9, 1973 Boot-Ster removed petitioner as their sales representative because of dwindling sales in the New York area and due to the fact that the majority of petitioner's time and effort was being absorbed by his other line.

9. Both Kork-Ease and Boot-Ster restricted petitioner's sales territory to New York, New Jersey and Connecticut. Petitioner had no control over sales prices or credit terms and was required by Kork-Ease and Boot-Ster to meet sales quotas and attend sales meetings. Petitioner contacted Boot-Ster by telephone on a daily basis and would visit the Kork-Ease factory at least twice a week. There is no credible evidence to support that petitioner, Samuel Hersch, was under the direction and control of his principals, with respect to the manner in which customers were solicited.

#### CONCLUSIONS OF LAW

A. That petitioner's principals lacked sufficient direction and control over the manner in which he attempted to solicit business and, accordingly, petitioner can not be considered an employee within the meaning and intent of subsection (b) of section 703 of the Tax Law (Matter of Minkin v. State Tax Commission, 60 A.D.2d 420; Matter of Liberman v. Gallman, 41 N.Y.2d 774).

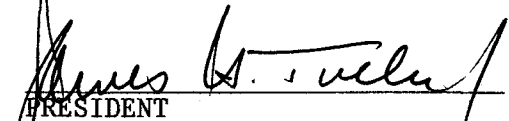
B. That petitioner's activities as a shoe salesman constituted the carrying on of an unincorporated business within the purview of section 703(a) of the Tax Law and, therefore, the income derived from said activities is subject to unincorporated business tax.

C. That the petition of Samuel Hersh is denied and the Notice of Deficiency issued May 23, 1977 is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

OCT 23 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER