

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 Year 1975.

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 21st day of May, 1982, 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
21st day of May, 1982.

Gennie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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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 21st day of May, 1982, 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
21st day of May, 1982.

Annex A. Hageman

J. Vredenburg

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

May 21, 1982

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

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

In the Matter of the Petition
of
SAMUEL HERSH
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1975.

DECISION

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 year 1975 (File No. 27698).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on August 24, 1981 at 9:15 A.M. Petitioner Samuel Hersh appeared with Irving Kornblum, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the income derived from petitioner's activities is subject to the unincorporated business tax.

FINDINGS OF FACT

1. Petitioner Samuel Hersh and Mildred Hersh, his wife, timely filed a New York State Combined Income Tax Return for the year 1975, on which petitioner reported "salary" income of \$24,833.00 which consisted of gross receipts of \$45,290.00, less business deductions of \$20,457.00, pursuant to a Federal Schedule C (Profit or (Loss) From Business or Profession) filed for Federal

income tax purposes. Petitioner did not file an unincorporated business tax return for the year 1975.

2. On February 11, 1977 petitioner filed a notice of change in taxable income (IT-115) pursuant to section 659 of the Tax Law, on which he reported Federal audit adjustments and paid an additional amount due with interest.

3. On April 5, 1979 the Tax Compliance Bureau issued a Notice of Deficiency for the year 1975 for \$874.00 plus interest, along with an explanatory Statement of Audit Changes, on which petitioner's income from his activities as a Manufacturer's Representative was held subject to the unincorporated business tax.

4. Petitioner Samuel Hersh was retained by Kork-Ease, Inc. (Kork-Ease) as a salesman, and as its sales manager. He was compensated on a commission basis, without the withholding of any payroll taxes, and without reimbursement of selling expenses. Petitioner received a 6 percent commission from his activities as a salesman, and a $\frac{1}{2}$ percent override commission from his activities as the sales manager.

5. Petitioner's activities as a salesman were restricted by Kork-Ease to the states of New York, New Jersey, and Connecticut, in addition to two special accounts in Washington, D.C. Petitioner's activities as a sales manager included the maintenance of an office and showroom, at his own expense, where he displayed samples, met with clients, and hired, as well as supervised, other salesmen. Although hired and supervised by petitioner, the other salesmen received their commissions directly from Kork-Ease.

6. Petitioner represented and sold for two other firms during the year 1975 with the knowledge and consent of Kork-Ease, provided it did not "unduly interfere" with his activities as its salesman. Petitioner actively sought

to sell for other firms during such times when his commission income from Kork-Ease was not sufficient.

7. Kork-Ease did not provide petitioner with unemployment benefits or a pension plan. Petitioner maintained and contributed to a retirement plan (Keogh Plan) during the year 1975, and paid self-employment taxes.

8. Petitioner contended that he was an employee who was required to report his activities to Kork-Ease, and to service overdue accounts without compensation. Credible documentary evidence was not submitted establishing his contentions.

CONCLUSIONS OF LAW

A. That sufficient direction and control was not imposed by Kork-Ease, Inc. so as to cause petitioner Samuel Hersh to become its employee within the meaning and intent of section 703(b) of the Tax Law. Notwithstanding his contention that he was an employee, petitioner Samuel Hersh maintained, occupied and utilized an office (and showroom) in connection with his selling activities for more than one principal during the year 1975 and the income derived therefrom would nevertheless be subject to the unincorporated business tax in accordance with the meaning and intent of section 703(f) of the Tax Law and 20 NYCRR 203.14.

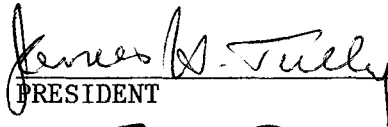
B. That the commission income received by petitioner Samuel Hersh was income from his regular business of selling and constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law, and is subject to the unincorporated business tax pursuant to section 701 of the Tax Law.


C. That the petition of Samuel Hersh is denied and the Notice of Deficiency issued April 5, 1979 for the year 1975 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

MAY 21 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER