

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
William S. & Eleanor Habel :
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 1975 & 1976. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon William S. & Eleanor Habel, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

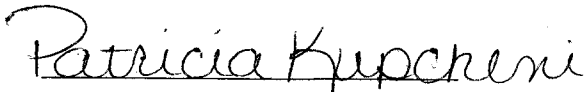
William S. & Eleanor Habel
500 Bay 5th St.
W. Islip, NY 11795

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 October, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
William S. & Eleanor Habel :
for Redetermination of a Deficiency or a Revision :
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Business Tax under Article 23 of the Tax Law for :
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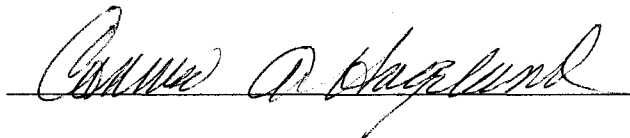
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Jarrett F. Glantz the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

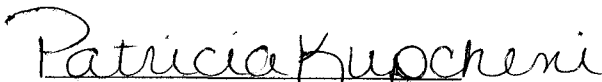
Jarrett F. Glantz
501 Madison Ave.
New York, NY 10022

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 October, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 21, 1983

William S. & Eleanor Habel
500 Bay 5th St.
W. Islip, NY 11795

Dear Mr. & Mrs. Habel:

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Jarrett F. Glantz
501 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WILLIAM S. HABEL and ELEANOR HABEL	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1975	:	
and 1976.	:	

Petitioners, William S. Habel and Eleanor Habel, 500 Bay 5th Street, West Islip, New York 11795 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 1975 and 1976 (File No. 30601).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on January 19, 1983 at 3:15 P.M. Petitioners appeared by Jarrett F. Glantz, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Kevin Cahill, Esq., of counsel).

ISSUE

Whether services rendered by petitioner William S. Habel as a salesman during 1975 and 1976 were those of an employee rather than as an independent contractor.

FINDINGS OF FACT

1. Petitioners, William S. Habel and Eleanor Habel, timely filed New York State Income Tax Resident Returns for the years 1975 and 1976. Petitioners did not file Unincorporated Business Tax Returns for either of the years at issue.

2. On April 4, 1980, the Audit Division issued to petitioner William S. Habel a Notice of Deficiency asserting additional tax due for the years 1975 and 1976 in the total amount of \$5,693.10, plus interest.

3. A Statement of Unincorporated Business Tax Audit Changes dated January 2, 1980, and issued to petitioner William S. Habel, indicated that the additional tax asserted as due equalled \$2,092.31 for 1975 and \$3,600.79 for 1976, plus interest for each year, and explained the basis for the asserted deficiency as follows:

"[t]he income from your activities in advertising is subject to the Unincorporated Business Tax under Article 23 of the New York State Tax Law."¹

4. During the years at issue herein, William S. Habel worked as an advertising salesman for Penny Saver South Shore, Inc. ("South Shore"), located in Bay Shore, New York. Mr. Habel also owned nineteen percent (19%) of South Shore's stock.

5. South Shore assigned North Babylon, New York, and Deer Park, New York, as the territory within which Mr. Habel was allowed to solicit advertising. Mr. Habel could only sell to customers in this territory, was not allowed to sell for any other publications and also had agreed, in the event he ceased working for South Shore, not to work for any other Penny Saver for a period of two (2) years.

6. South Shore would advise Mr. Habel of potential customers in his territory who had called South Shore's offices to inquire about placing advertisements. Mr. Habel would follow up these leads by calling on the customer.

¹ Petitioner Eleanor Habel's name appears on the petition for redetermination and on the Notice of Formal Hearing. However, her name was not included on the Notice of Deficiency, nor does the evidence presented indicate that she was involved in the conduct of an unincorporated business during the years at issue. Accordingly, Eleanor Habel is considered neither a petitioner nor a party to this proceeding.

If the customer placed an advertisement, Mr. Habel was expected to call on this customer each week thereafter to attempt to continue soliciting advertisements from the customer.

7. Advertising contracts and other forms used by Mr. Habel were supplied by South Shore. The cost of the advertisements was set by South Shore (according to rate schedules), and South Shore retained the right of final approval or rejection of the advertisements it would publish. Advertisements had to be turned in by a set deadline each week in order to be included in the publication of South Shore.

8. Mr. Habel was given a desk and a telephone for his use at South Shore's offices. He had no specific required work hours, and generally came to South Shore's offices at 9:00 or 9:30 each morning to pick up messages, and spent the remainder of the day calling on customers. He usually telephoned South Shore's offices at noon to check for messages or leads, and returned to these offices at the end of the day (approximately 4:30 P.M.) to turn in advertisements and checks he had picked up from customers during the day.

9. South Shore provided medical insurance and life insurance plans for Mr. Habel, but did not provide a pension plan or withhold income or Social Security (F.I.C.A.) taxes on behalf of Mr. Habel.

10. Mr. Habel had to be at the printer's office every Friday to check copies of his customers' advertisements for accuracy. He also was required to attend meetings for South Shore's salesmen. These meetings were held with varying frequency, sometimes weekly and sometimes only monthly, with discussions covering such topics as advertising rate changes, the development of new

customers and the type of customers the salesmen should be calling on in accordance with the particular season of the year.

11. Mr. Habel was compensated by South Shore on a commission basis only and received no salary. Mr. Habel was not compensated by South Shore for sick time, and he was expected to schedule vacations during South Shore's slow seasons (the months of January and February, and July and August).

12. Mr. Habel converted a bedroom in his home for use as an office. This office contained some office furniture and fixtures, and an adding machine and typewriter. Mr. Habel kept files at his home office containing back issues of newspapers and copies of advertisements he had previously sold. He used these files as a reference source, in general, and as a convenient means of storing for retrieval advertisements sold previously and sought to be re-run by customers. He received no rent from South Shore for this office. Mr. Habel completed sales sheets, performed some of the clerical work associated with his job and telephoned customers from his home office, but testified that he used his home office mostly as a "file service" and that most advertisements were laid out and calls were made at South Shore's offices.

13. Mr. Habel testified that his business cards and a rubber stamp he used carried the imprint "Penny Saver South Shore, William S. Habel, Account Executive". He did not have any special letterhead on the stationary used in connection with his work.

14. Mr. Habel reported his compensation from advertising sales as business income rather than as wages on his New York State income tax returns. These returns also indicated Mr. Habel's occupation as "S/E" (presumably self-employed).

15. Mr. Habel filed with his returns a schedule of Profit or (Loss) from Business or Profession (Schedule C), on which he reported and deducted expenses incurred in connection with the selling of advertisements. A copy of the Schedule C attached to Mr. Habel's 1976 return reveals income from advertising as well as deductions for such expenses as follows:²

Gross receipts (less returns & allowances)		\$107,307.11
Less: Cost of Goods Sold (contract labor)		<u>31,804.89</u>
Total Income		\$ 75,502.22
Less: depreciation	33.95	
rent on business property	2,400.00	
insurance	480.00	
legal and professional fees	60.00	
T & E	6,332.05	
dues & sub	684.00	
stationery & postage	2,164.00	
supplies	7,064.00	
telephone	3,618.00	
advertising	1,832.00	
gifts to customers	1,435.00	
auto expenses	<u>8,424.00</u>	
Total Deductions		<u>34,527.00</u>
NET PROFIT		<u><u>\$40,975.22</u></u>

16. Mr. Habel's depreciation deduction represents depreciation of the furniture, fixtures and adding machine used at his home office. The deduction for rent on business property is unexplained and presumably represents an expense claimed by Mr. Habel for maintaining his home office. None of the expenses incurred by Mr. Habel in his work were reimbursed by South Shore.

17. The sums deducted on Schedule C as Cost of Goods Sold (contract labor) represents amounts paid by Mr. Habel to his son (William T. Habel) in 1975, and to his son and another individual (William Cruse) in 1976, for the part time performance of messenger and clerical services. This expense totalled \$19,663.00 in 1975, and \$31,804.89 in 1976. No taxes were withheld from the sums paid to these individuals by Mr. Habel, nor was Mr. Habel reimbursed by South Shore

² A copy of Schedule C was not included among the attachments to Mr. Habel's 1975 New York State Income Tax Resident Return submitted in evidence.

for any part of these sums paid. Mr. Habel stated that these individuals were hired by him, were covered by South Shore's medical and life insurance plans, and asserted South Shore had the right to fire these individuals if their work was unsatisfactory.

18. Mr. Habel had a Keogh plan and testified that he filed a Schedule SE (Computation of Social Security Self-Employment Tax) for 1975 and 1976.

19. In addition to his income from selling advertisements, Mr. Habel reported income from South Shore in the amount of \$39,640.59 for 1975 and \$53,744.27 for 1976.³

20. Mr. Habel's title with South Shore was "Sales Manager and Salesman". His title as sales manager was conferred because of his stock ownership in South Shore and because of the number of years he had worked for South Shore. Mr. Habel had just begun to have the authority to hire and fire other salesmen during the years at issue, and did not begin to supervise other salesmen until after the years at issue.

21. South Shore employed approximately six (6) persons to perform clerical work in its offices. These persons were not supervised by Mr. Habel and were paid a salary from which taxes were withheld. No information was provided with respect to the approximately ten (10) other salesmen who, in addition to Mr. Habel, worked for South Shore.

CONCLUSIONS OF LAW

A. That "[i]t is the degree of control and direction exercised by the employer which determines whether the taxpayer is an employee or an independent contractor subject to the unincorporated business tax." Lieberman v. Gallman,

³ This income, as reflected on Mr. Habel's Supplemental Income Schedule (Schedule E, Form 1040) for each year, indicated South Shore as a Small Business Corporation (Internal Revenue Code Subchapter S). The income presumably results from Mr. Habel's ownership of stock in South Shore.

41 N.Y.2d 774, (1977). Regulations of the State Tax Commission in pertinent part provide:

"[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon examination of all the pertinent facts and circumstances of each case." 20 NYCRR 203.10(c) (adopted February 1, 1974).

B. That among the facts and circumstances to be examined are whether petitioner maintained an office, engaged assistants, incurred expenses without reimbursement, and was covered by a pension plan. Also whether the employer withheld State and Federal taxes, Social Security (F.I.C.A.), and other payments on behalf of petitioner, and the amount of control over petitioner's activities exercised by the employer. Raynor v. Tully, 60 A.D.2d 731, (1977), lv. to app. den. 44 N.Y.2d 643 (1978).


C. That notwithstanding the limitation on the territory within which he could solicit advertisements, Mr. Habel was left free to work in the manner he found most successful. He hired and paid assistants, maintained an office, had no taxes or other amounts withheld from his earnings and was not covered by an employer's pension plan. Mr. Habel came to South Shore's offices to pick up leads and to drop off checks and advertisements, but was not required to report at any specific time or to work any specific hours. Mr. Habel incurred substantial expenses for which he received no reimbursement. Furthermore, South Shore did not maintain or exercise sufficient direction and control over Mr. Habel's daily activities (specifically the methods by which he conducted his selling activities) to classify him as an employee rather than as an independent contractor. Accordingly, Mr. Habel is subject to the imposition of unincorporated business tax under Article 23 of the Tax Law for the years at issue.

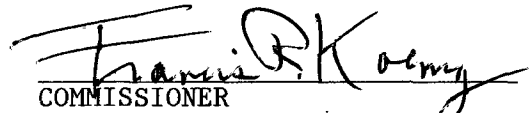
D. That the petition of William S. Habel is hereby denied in all respects and the Notice of Deficiency dated April 4, 1980 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 21 1983


PRESIDENT


COMMISSIONER


COMMISSIONER