

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Fred Edelman : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1971 - 1974. :

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Fred Edelman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

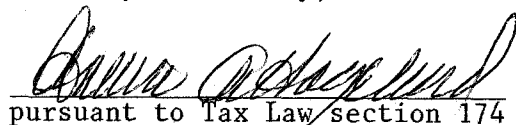
Fred Edelman
120 Elaine Dr.
Oceanside, NY 11572

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
18th day of January, 1984.




pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Fred Edelman
120 Elaine Dr.
Oceanside, NY 11572

Dear Mr. Edelman:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FRED EDELMAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1971	:	
through 1974.	:	

Petitioner, Fred Edelman, 120 Elaine Drive, Oceanside, New York 11572 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 1971 through 1974 (File No. 34342).

A small claims hearing was held before Anthony J. Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 14, 1983 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner, a salesman and stylist, was an employee not subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Fred Edelman, with his wife timely filed a joint New York State Income Tax Resident Return for 1971. He timely filed with his wife New York State combined income tax returns for 1972, 1973 and 1974. During the years at issue petitioner was a salesman and stylist, compensated on a commission

basis, for three corporations. He did not file unincorporated business tax returns.

2. On March 2, 1976, the Audit Division issued a Statement of Audit Changes to petitioner stating in part that:

"Information on file, indicates you are subject to the unincorporated business tax on income, other than Tara (sic) Hall Clothiers, Inc., reported as wage and salary income. Income subject to unincorporated business tax is computed as follows:

	<u>1971</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>
Total income reported				
as wages	\$60,490.56	\$66,122.12	\$54,304.74	\$38,704.19
Income from Tara Hall				
Clothiers, Inc.	<u>29,000.00</u>	<u>36,700.00</u>	<u>24,950.00</u>	<u>13,200.00</u>
Income subject to Unincor-				
porated business tax	\$31,490.56	\$29,422.12	\$29,354.74	\$25,504.19

The amounts claimed each year as adjustments have been reduced by \$2,500.00 as these adjustments appear to include payments to a self-employment retirement plan. The remainder have been considered business expenses and are prorated...

Section 685(a)(1) and (a)(2) penalty is assessed for failure to file unincorporated business tax returns for the above years."

Accordingly, on June 8, 1981, the Audit Division issued a Notice of Deficiency to petitioner asserting additional tax due of \$3,069.37¹, penalty of \$3,110.51, interest of \$515.99 for a balance due of \$6,695.87.

3. During the years at issue petitioner was a salesman and stylist for Tarra Hall Clothiers, Inc. (Tarra), Hartz & Co., (Hartz) and Regulated Cottons, Inc., (Regulated). He received a wage and tax statement for each year from Tarra on which federal income tax, state income tax and F.I.C.A. tax were withheld from his income. He received forms 1099-Misc from Hartz and Regulated for each year.

¹ Included in the additional tax due of \$3,069.37 is \$94.08 of personal income tax due for 1973. This was assessed based on a Federal audit of petitioner's federal tax return. Petitioner did not protest the assessment of the personal income tax.

4. Tarra was owned by Joseph Krieger and Abraham Cohen. Mr. Krieger and Mr. Cohen owned two-thirds of the stock of Hartz and they also had a financial interest in Regulated. Petitioner did not know whether Mr. Krieger and/or Mr. Cohen were officers of Hartz and/or Regulated or whether they were employed by Hartz and/or Regulated in any capacity. He alleged that he only reported to Mr. Krieger and Mr. Cohen and that when they invested in Hartz and Regulated, the salesmen of Tarra would carry each of the other lines under their direction.

5. Petitioner had a Keogh Plan (self-employment retirement plan) during the years at issue. For 1974, petitioner deducted \$200.00 for payments made to said plan. He was not covered by Unemployment Insurance or Workers' Compensation by Hartz or Regulated. Petitioner alleged that they did not provide this coverage because it was provided by Tarra. Besides his selling activities, petitioner also selected fabrics and styled suits and sport jackets for the corporations. Petitioner stated that he was allowed to make all the money he could and they left him alone because they benefited from it.

6. No issue was raised in reference to the penalties imposed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law. However, it is noted that the penalty amount shown on the Notice of Deficiency (\$3,110.51) is in excess of 100 percent of the tax upon which it is based (\$2,975.29).

CONCLUSIONS OF LAW

A. That the performance of services by an individual as an employee is not deemed an unincorporated business pursuant to section 703(b) of the Tax Law.

B. That the term employee means 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 to be accomplished [20 NYCRR 203.10(b)].

C. That sufficient direction and control were not exercised over petitioner by Hartz and Regulated as to create an employer-employee relationship within the meaning and intent of section 703(b) of the Tax Law. Therefore, the income derived from Hartz and Regulated is subject to unincorporated business tax imposed by section 701(a) of the Tax Law.

D. That the Audit Division is directed to recompute petitioner's business expenses for 1974, since petitioner only claimed \$200.00 instead of \$2,500.00 as a payment to his self-employment retirement plan.

E. That the penalty amount shown on the Notice of Deficiency exceeds the combined maximum penalty percentage (47½%) provided by sections 685(a)(1), (a)(2) and (a)(4) of the Tax Law (see Finding of Fact "6"). Accordingly, the Audit Division is directed to recompute the penalty amount in accordance with said sections.

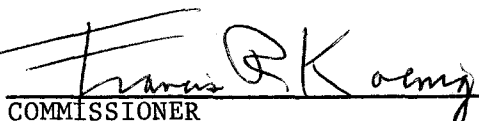
F. That the petition of Fred Edelman is granted to the extent indicated in Conclusions of Law "D" and "E" supra, and in all other respects denied and the Notice of Deficiency is sustained as modified by the Audit Division.

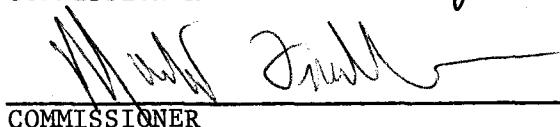
DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER