

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Garry J. Hearn : 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 1974 - 1979. :

---

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Garry J. Hearn, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

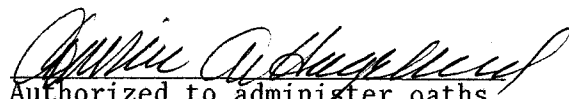
Garry J. Hearn  
193 Menands Rd.  
Loudonville, NY 12211

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  
5th day of October, 1984.

  
\_\_\_\_\_

  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

October 5, 1984

Garry J. Hearn  
193 Menands Rd.  
Loudonville, NY 12211

Dear Mr. Hearn:

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, 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	:	
GARRY J. HEARN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1974	:	
through 1979.	:	

---

Petitioner, Garry J. Hearn, 193 Menands Road, Loudonville, New York 12211, 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 1974 through 1979 (File No. 39205 and 39281).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on December 7, 1983 at 1:15 P.M., with all briefs and documents to be submitted on or before March 1, 1984. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

#### ISSUES

I. Whether the income from petitioner's activities as a branch manager of Kelly Girl Service, Inc. during the years 1974 through 1979 was exempt from unincorporated business tax on the ground that his activities constituted the practice of a profession or, in the alternative, on the ground that he was an employee of Kelly Girl Service, Inc.

II. Whether the income received by petitioner for executing a covenant not to compete was subject to unincorporated business tax.

FINDINGS OF FACT

1. On July 9, 1982, the Audit Division issued two notices of deficiency to Garry J. and Marie S. Hearn.<sup>1</sup> The first Notice of Deficiency asserted a deficiency of New York State unincorporated business tax for the years 1974 through 1976 in the amount of \$5,603.19, plus penalty of \$338.07 and interest of \$3,196.56, for a total amount due of \$9,137.82. The second Notice asserted a deficiency of New York State unincorporated business tax for the years 1977 through 1979 in the amount of \$6,934.01, plus penalty of \$418.39 and interest of \$2,363.70, for a total amount due of \$9,716.10. In each instance, the statement of audit changes explained that Mr. Hearn's income from his activities as a branch manager of Kelly Girl Service, Inc. ("Kelly") was subject to unincorporated business tax. For the year 1979, the Audit Division included as additional income subject to unincorporated business tax, \$20,000.00 which Mr. Hearn received during that year, as consideration for executing a covenant not to compete. The statements of audit changes also explained, in each instance, that the penalty was asserted pursuant to section 685(c) of the Tax Law for underpayment of unincorporated business tax.

2. Mr. and Mrs. Hearn filed New York State income tax resident returns for the years 1974 through 1979. Mr. Hearn did not file a New York State Unincorporated Business Tax Return for any of these years. Mr. Hearn listed his occupation as a branch manager and reported that the preponderance of his income, except for the year 1979, was business income. The return for the year

---

<sup>1</sup> At the hearing, no explanation was provided as to why a deficiency was asserted against Marie S. Hearn and the Audit Division conceded that liability was asserted only against Mr. Hearn. Accordingly, the term "petitioner" as used herein will refer to Garry J. Hearn.

1979 stated that Kelly replaced Mr. Hearn as manager as of January, 1979. Mr. Hearn received annual wage and tax statements from Kelly with the exception of the years 1974 and 1977. During the years in issue, Mr. Hearn filed a federal schedule C, "Profit or (Loss) from Business or Profession". On these schedules, Mr. Hearn listed the principal business activity as a temporary help service and reported, among other things, amounts of gross receipts or sales less certain business expenses such as rent, advertising, travel and entertainment. Petitioner reported an employer identification number each year, except for the year 1976.

3. Kelly was in the business of operating a temporary help employment agency.

4. On October 21, 1961, petitioner Garry J. Hearn entered into a branch manager contract with Kelly. This contract, which was amended by an addendum dated April 25, 1963, remained in effect until petitioner resigned effective December 31, 1978. The contract provided that petitioner was to manage Kelly's branch office in Latham, New York. Petitioner was designated in the contract as the exclusive agent of Kelly in Saratoga, Rensselaer, Albany and Schenectady counties. As a manager of Kelly's branch office in Latham, petitioner's contractual duties included, but were not limited to, providing, at his own expense: suitable office space and necessary furniture and equipment as well as adequate sales and office personnel; advertising and testing for the hiring of employees on Kelly's payroll; soliciting firms and furnishing them with employees on Kelly's payroll; defending, in a proper case, unemployment compensation claims against Kelly; and maintaining manuals, forms, instructions, stationery and correspondence relating to Kelly's business.

5. Petitioner was prohibited by the contract from: conducting Kelly's business from any office other than the Latham office except for recruiting purposes; associating himself in the conduct of Kelly's business with any other person or organization without Kelly's approval; or competing with Kelly within fifty miles of any city in which Kelly might be doing business.

6. Paragraph 11 of the contract with Kelly provided "[n]either the Manager nor any individual whose compensation for services is paid by the Manager is in any way, directly or indirectly, expressly or by implication, to be construed to be an employee of Kelly for any purpose...".

7. The contract gave Kelly the right to terminate petitioner either with or without cause.

8. In accordance with the terms of the addendum, petitioner received fifty percent of the "Gross Margin" accrued on Kelly's books from services performed within petitioner's designated area. In general, the "Gross Margin" was defined as the difference between the billing price to customers and the gross pay of Kelly's employees. The addendum also provided that the "Gross Margin" was to be reduced by one-half of the uncollected accounts.

9. During the periods in issue petitioner also had a second contract with Kelly which was characterized as a Limited Employment Agreement. Under this contract, petitioner was classified as a "Security Officer" and was directed to regulate and control security clearances in his designated area. Petitioner was paid \$1.00 per year for this service.

10. Most of petitioner's time was engaged in recruiting individuals to serve as temporary employees for Kelly. These individuals, who were hired by petitioner on to Kelly's payroll, were required to satisfy Kelly's skill requirements. The temporary employees were paid directly by Kelly at wage

rates set by Kelly. Kelly withheld taxes from the wages of the temporary employees.

11. Petitioner also would call on Kelly's customers to determine if there were personnel problems. He decided how often these visits were necessary. However, Kelly would induce him to make these visits if he did not do so of his own volition.

12. In addition, petitioner developed new business for Kelly, assigned temporary employees to Kelly customers' offices and attempted to collect on Kelly's past due accounts.

13. Wage and tax statements were issued to Mr. and Mrs. Hearn because, on occasion, they would accept temporary employment when a Kelly employee was unavailable. During these occasions, Kelly would issue a paycheck to Mr. or Mrs. Hearn in the same manner as a check would be issued to other employees. The amount of income reported as wages was relatively small compared to the amount of income reported as business income.

14. Petitioner was responsible for and paid the rent on Kelly's office in Latham. He was also responsible for the hiring and salary of the office personnel. In practice, petitioner paid Kelly who, in turn, paid his office personnel. Petitioner also paid for the office telephone which was listed in Kelly's name.

15. Kelly allocated a certain amount of money to petitioner for local advertising. Petitioner decided in what publications the advertising would be placed and its frequency. If petitioner exceeded the amount budgeted by Kelly for advertising, he would pay the excess from his own resources.

16. Kelly issued a detailed manual which petitioner was expected to follow. The manual was designed to explain the establishment and operation of

a Kelly office, specifying the forms to be used, the operational methods to be followed and the controls to be utilized from the time a customer's order was received until the invoice was paid and the commissions were remitted.

17. During the years in issue, petitioner made contributions to a Keogh plan for self-employed individuals and considered himself self-employed for federal tax purposes. Taxes were not withheld from the commission income received by petitioner.

18. Petitioner was not required to work a set number of hours. However, the demands of the business required that he work at least forty hours a week.

19. Petitioner attended Siena College in Loudonville, New York from 1941 until 1943. While at Siena College, he majored in economics. Petitioner had to leave college before completing the requirements for a degree because of military obligations. On February 27, 1943, petitioner entered into active service in the Army Air Force. Petitioner worked as a personnel consultant assistant while in the military service. The military description of this position involved, among other things, the administration and evaluation of psychological, minimum literacy and other individual and group tests.

20. From 1970 through 1971, petitioner served as president of the Capital District Personnel Association, Inc. ("Personnel Association"). The purpose of this organization was, among other things, to provide a forum for the exchange of ideas and experience in personnel operations in order to keep its members abreast of developments in the personnel field. From 1977 through 1978, petitioner served as the chairman of the public relations committee of the Personnel Association. Petitioner was also an active member of the Administrative Management Society.



21. During the periods in issue, petitioner participated in career seminars involving the skills needed to satisfy Kelly's career requirements.

22. On December 14, 1978, petitioner and his wife entered into an agreement whereby petitioner would cease to become a branch manager as of the close of business on December 31, 1978. This agreement contained a covenant not to compete with Kelly for a period of six years. As consideration for the covenant petitioner was to receive \$20,000.00 a year for a period of four years and \$25,000.00 a year for the last two years of the contract. Petitioner worked for Kelly on a part-time basis during the month of January introducing the new manager to Kelly's customers.

23. On two previous occasions, petitioner has had hearings before the State Tax Commission regarding his liability. In Matter of Garry J. Hearn, State Tax Commission, May 3, 1972, the State Tax Commission held that petitioner's income as a branch manager of Kelly was subject to unincorporated business tax for the years 1965 through 1967. In Matter of Garry J. Hearn, State Tax Commission, April 14, 1977, the State Tax Commission reached the same conclusion with respect to the years 1968 through 1973. Petitioner argued that the first decision should not be followed since he was unaware that only the evidence submitted at the hearing would be considered. Petitioner also argued that the second decision should not be followed since his counsel, at that hearing, did not present his case in the manner petitioner desired.

#### CONCLUSIONS OF LAW

A. That the term "other profession" within the meaning of section 703(c) of the Tax Law requires a showing that "the service rendered...requires knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study." (Matter of Koner v. Procaccino,

39 N.Y.2d 258, 262, citing People ex rel. Tower v. State Tax Comm., 282 N.Y. 407, 412). The final question is whether the activities of the taxpayer constituted a commercial or business enterprise or the practice of a profession (Matter of Koner v. Procaccino, supra). Petitioner's activities, although requiring specialized knowledge and experience, involved the conduct of business itself and not the practice of a profession within the meaning and intent of section 703(c) of the Tax Law.

B. That the income received by petitioner Garry J. Hearn as a branch manager for Kelly Girl Service, Inc. during the years 1974 through 1979 arose from the conduct of petitioner's business of operating a temporary help employment agency and not compensation as an employee exempt from unincorporated business tax. Accordingly, the income derived from petitioner's activities of being a branch manager of Kelly Girl Service, Inc. was subject to unincorporated business tax in accordance with section 703 of the Tax Law (Matter of Garry J. Hearn, State Tax Commission, April 14, 1977, proceeding dsmd. \_\_\_ A.D.2d \_\_\_, October 13, 1981 (proceeding deemed abandoned pursuant to 22 NYCRR 800.12 and 22 NYCRR 800.19); Matter of Garry J. Hearn, State Tax Commission, May 3, 1972, determination confirmed, \_\_\_ A.D.2d \_\_\_, 364 N.Y.S.2d 816). It is noted that the conclusion that petitioner was not an employee of Kelly is supported by the facts that: Kelly did not consider him an employee; that taxes and social security were not withheld from petitioner's income as a branch manager; and that petitioner had a Keogh plan for self-employed individuals. In addition, it is noted that no evidence was presented that petitioner was subject to the periodic supervision and control which is normally exercised over an employee (see e.g., Matter of Edgar J. Miller, State Tax Commission, May 25, 1984).

C. That the income derived from the covenant not to compete constituted the surrender of an intangible asset arising from the liquidation of his business of operating a temporary help employment agency. Accordingly, the Audit Division properly included this income in determining income for the year 1979 (Tax Law §705[a]; Matter of Raymond Krinsky and Sylvia Krinsky, State Tax Commission, November 9, 1979).

D. That, in view of footnote "1", the notices of deficiency are modified by deleting the liability asserted against Marie S. Hearn.

E. That the petition of Garry J. Hearn is granted to the extent of Conclusion of Law "D" and is, in all other respects, denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER