

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edward T. Ross : 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 Year 1975. :

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 Edward T. Ross, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward T. Ross
19 Norfolk Lane
Glen Cove, NY 11542

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.

Daniel Parchuck

James A. Hagedorn
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Edward T. Ross
19 Norfolk Lane
Glen Cove, NY 11542

Dear Mr. Ross:

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	:	
	:	
EDWARD T. ROSS	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1975.	:	

Petitioner, Edward T. Ross, 19 Norfolk Lane, Glen Cove, New York 11542, 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. 36029).

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 13, 1983 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUE

Whether petitioner was an employee exempt from unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Edward T. Ross, and his wife, filed a joint New York State Income Tax Resident Return for 1975. He reported as wages, commissions of \$70,055.37, and an adjustment to income of \$11,933.59.

2. On May 28, 1981, petitioner, Edward T. Ross, filed Form IT-113X, Claim for Credit or Refund of Personal Income Tax and/or Unincorporated Business Tax, for 1975. Prior to petitioner's claim for refund being filed, the Audit

Division had assessed petitioner \$2,701.70 in unincorporated business tax.

Petitioner made a partial payment of \$123.79 on the assessment and he filed the claim for refund for the partial payment.

3. On November 30, 1981, the Audit Division issued a formal Notice of Disallowance of petitioner's claim for refund of the partial payment.

4. During 1975, petitioner was a salesman, compensated on a commission basis, for eight corporations. He received Form 1099-Misc. from each of the following corporations:

<u>Name</u>	<u>Amount</u> ¹
S.P.L.I. (USA) Inc.	\$31,963.44
Keyloun, Inc.	12,819.26
Trillium Lingerie, Inc.	7,922.81
Jeri Morton, Inc.	7,532.45
Jodee Bra, Inc.	6,359.32
Carolaurie Accessories, Ltd.	2,065.14
Washington Knitting Mills, Inc.	734.80
Lisette Lingerie, Inc.	381.09

The income was listed on the forms as commissions and fees to nonemployees.

5. Petitioner conceded that he was liable for unincorporated business tax on the commissions he received from five of the eight corporations. However, he claimed that he is not subject to unincorporated business tax on the commissions he received from S.P.L.I. (USA) Inc., Keyloun, Inc., and Trillium Lingerie, Inc. because he was an employee of each of these corporations.

6. Petitioner was assigned a territory by the three subject corporations which consisted of metropolitan New York, New Jersey, Pennsylvania, Delaware, Maryland and Washington, D.C. He determined his own itinerary. He testified

¹ The commissions total \$69,778.31. No explanation was given for the difference between this amount and the amount petitioner reported as wages on his income tax return (see Finding of Fact #1, supra).

that such corporations were only interested in whether he covered his territory. In general, seventy-five percent of his leads were from customers he solicited. He was required by each of the three corporations to attend four trade shows a year in their New York showrooms. At this time, he would be told how to present their lines and what items to stress and promote. He was in the three corporations' corporate offices no more than six or seven times a year in total. He worked five days a week but he was not required to work any set hours. He set his own vacation schedule. There was no division of his time and effort among the three corporations. S.P.L.I. (USA) Inc. provided Mr. Ross with medical coverage.

7. Petitioner had no written contract with any of the three corporations. No federal or state income taxes were withheld from his commissions. He paid self-employment taxes. He was not covered under a pension plan. The three corporations did not pay unemployment insurance on petitioner. He was not reimbursed for any of his travel or entertainment expenses. He was not specifically prohibited from representing other non-competing corporations.

CONCLUSIONS OF LAW

A. That the performance of services by an individual as an employee shall not be deemed an unincorporated business (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 services are performed has the right to control and direct the individual who performs 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. That is, an employee is subject to

the will and control of the employer not only as to what shall be done, but as to how it shall be done [20 NYCRR 203.10(b)].

C. That whether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case [20 NYCRR 203.10(c)].

D. That the three corporations did not exercise sufficient direction and control over petitioner's activities so as to constitute an employer-employee relationship within the meaning and intent of section 703(b) of the Tax Law. Petitioner's selling activities constituted the carrying on of an unincorporated business in accordance with section 703(a) of the Tax Law and the income derived therefrom is subject to the unincorporated business tax imposed under section 701(a) of the Tax Law.


E. That the petition of Edward T. Ross is denied and the Notice of Disallowance is sustained.

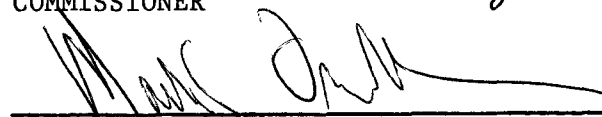
DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER