

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stanley Feder :
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 1978 & 1979. :
:

State of New York :

SS.:

County of Albany :

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 14th day of March, 1985, he served the within notice of Decision by certified mail upon Stanley Feder, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley Feder
200 East 30th Street
New York, NY 10016

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
14th day of March, 1985.

David Parchuck

James A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stanley Feder :
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 1978 & 1979. :
:

AFFIDAVIT OF MAILING

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

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 14th day of March, 1985, he served the within notice of Decision by certified mail upon David Lieblich, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Lieblich
2069 E. 60th St.
Brooklyn, NY 11234

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 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
14th day of March, 1985.

David Parchuck

James A. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 14, 1985

Stanley Feder
200 East 30th Street
New York, NY 10016

Dear Mr. Feder:

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: Petitioner's Representative
David Lieblich
2069 E. 60th St.
Brooklyn, NY 11234
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
STANLEY FEDER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1978	:	
and 1979.	:	

Petitioner, Stanley Feder, 200 East 30th Street, New York, New York 10016, 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 1978 and 1979 (File No. 39797).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 21, 1984 at 10:45 A.M. Petitioner appeared by David Lieblich, CPA. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner's activities as a salesman constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Stanley Feder (hereinafter "petitioner") filed a joint New York State Income Tax Resident Return with his wife, Lenore Feder, for the year 1978. For taxable year 1979, petitioner filed a New York State Income Tax Resident Return under filing status "married filing separate returns (on separate forms)". On said returns petitioner reported his occupation as "salesman" (1978) and "outside salesman" (1979). His net commission income (gross commissions less

expenses) of \$26,263.00 and \$32,807.00 respectively, was reported on each return as "other income". Petitioner did not file an unincorporated business tax return for either year at issue herein.

2. On October 5, 1981, the Audit Division issued a Statement of Audit Changes to petitioner wherein his net commission income reported for each year at issue was held subject to unincorporated business tax. Accordingly, a Notice of Deficiency was issued against petitioner on July 9, 1982 asserting unincorporated business tax for said years of \$1,839.47, penalties of \$689.80, plus interest of \$501.91, for a total due of \$3,031.18. Said penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of Article 22 of the Tax Law, as incorporated into Article 23 of the Tax Law by Section 722(a), for failure to file 1978 and 1979 unincorporated business tax returns and failure to pay the tax determined to be due, respectively.

3. During the years at issue, petitioner was a salesman for Fitwel Dress Co., Inc. ("Fitwel"), 35 Kneeland Street, Boston, Massachusetts 02111. Fitwel was a manufacturer of ladies sportswear. Petitioner sold Fitwel's product line to major department stores and specialty stores throughout the country. He was not assigned a specific territory.

4. Petitioner argued that his activities engaged in for Fitwel constituted services rendered as an employee and as such his income derived therefrom is exempt from the imposition of unincorporated business tax.

5. Petitioner's selling activities were carried on, for the most part, at Fitwel's showroom located at 1407 Broadway, New York City. Petitioner reported to the showroom on a daily basis and spent approximately nine or ten hours each day engaged in selling activities at the showroom on behalf of Fitwel. He

spent little time on the road since the bulk of his clients came to the showroom to view Fitwel's product line and place purchase orders.

6. Petitioner was compensated by a \$700.00 guaranteed weekly draw against commissions. His actual commission rate was not specified. Fitwel reported petitioner's commissions for each year at issue on a Federal form 1099 Misc. For 1978, Fitwel characterized payments to petitioner of \$32,000.00 as "Commissions and fees to non-employees". For 1979, Fitwel characterized payments to petitioner of \$38,900.00 as "other fixed or determinable income." The source of such income was reported as "commission".

7. Petitioner's reported net commission income from Fitwel of \$26,263.00 (1978) and \$32,807.00 (1979) was computed as follows:

	<u>1978</u>	
Commission Income		\$32,000.00
Less: "Travel and other business expenses incurred"		<u>\$ 5,737.00</u>
Net Commission Income		\$26,263.00

	<u>1979</u>	
Commission Income		\$38,900.00
Less: "Selling expenses	\$5,059.00	
Automobile expenses,		
tolls, fares & parking	537.00	
Telephone	<u>497.00"</u>	
Total Expenses		<u>6,093.00</u>
Net Commission Income		\$32,807.00

8. Petitioner alleged that Fitwel paid the rent and telephone expenses attributable to the showroom at 1407 Broadway. When questioned as to where the telephone expenses claimed on his 1979 return were incurred, he replied "I guess from home".

9. Petitioner was reimbursed for a portion of his expenses, however, his description of the type of expenses reimbursed was quite vague. When questioned as to the nature of the selling expenses claimed on his 1979 return, petitioner

replied that they were attributable to "cab fares, lunches, you know, that type of stuff".

10. Petitioner was given leads by Fitwel. He also developed clients through personal solicitation.

11. In addition to petitioner, one other individual worked at the showroom at 1407 Broadway. Petitioner claimed that this individual was neither a sales person nor his subordinate. However, petitioner testified with respect to this other individual that "I had an account directory, you know, its a big country, I couldn't get to everybody. All the people that I was not able to get to, he did."

12. Petitioner did not recall whether he had entered into a written agreement or employment contract with Fitwel. Furthermore, he was unsure whether he was specifically prohibited from selling products for other principals.

13. Petitioner alleged that he reported to Arthur Gluck, whom he described as the "owner" of Fitwel, two or three times per day and that Mr. Gluck would visit the showroom at 1407 Broadway "every couple of weeks and spend a few days". He further alleged that the Internal Sales Manager visited the showroom every Tuesday, Wednesday and Thursday. Petitioner's description of the direction and control exercised by these individuals over his activities was vague.

14. All orders placed by petitioner were subject to acceptance by Fitwel's home office in Boston.

15. Fitwel did not withhold Federal, State or City personal income taxes from petitioner's compensation.

16. Petitioner received no fringe benefits, usual to the status of an employee, from Fitwel.

17. Petitioner filed a Federal Schedule SE for each year at issue and paid the self-employment taxes computed to be due thereon.

18. Petitioner's 1978 Federal tax return was audited by the Internal Revenue Service. As the result of such audit, an adjustment of \$716.00 was made to his claimed business expenses of \$5,737.00. Petitioner did not report said federal audit change to New York State.

19. Petitioner offered no documentary evidence to support his contention that he was an employee of Fitwel.

20. During the hearing held herein, the Audit Division asserted a deficiency for personal income tax purposes and a greater deficiency for unincorporated business tax purposes based on the aforestated unreported federal audit change.

CONCLUSIONS OF LAW

A. That it 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. (Matter of Liberman v. Gallman, 41 N.Y.2d 774). Furthermore, "[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all pertinent facts and circumstances of each case". 20 NYCRR 203.10(c).

B. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of Article 22 of the Tax Law, as incorporated into Article 23 by section 722(a), to show that the degree of direction and control exercised by Fitwel over his day-to-day activities was sufficient for the existence of a relationship of employer-employee. Accordingly, petitioner's sales activities did not constitute services rendered as an employee of Fitwel within the meaning and intent of section 703(b) of the Tax Law.

C. That petitioner's sales activities constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to unincorporated business tax pursuant to section 701(a) of the Tax Law.

D. That section 689(d)(1) of Article 22 of the Tax Law provides that:

"--If a taxpayer files with the tax commission a petition for redetermination of a deficiency, the tax commission shall have power to determine a greater deficiency than asserted in the notice of deficiency and to determine if there should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefore is asserted at or before the hearing under the rules of the tax commission."

E. That section 659 of the Tax Law provides, in pertinent part, that:

"--If the amount of a taxpayer's federal taxable income or federal items of tax preference reported on his federal income tax return for any taxable year... is changed or corrected by the United States internal revenue service or other competent authority... the taxpayer... shall report such change or correction in federal taxable income... within ninety days after the final determination of such change..."

F. That section 683(c)(1) of the Tax Law provides, in pertinent part, that:

"The tax may be assessed at any time if --

(C) the taxpayer or employer fails to comply with section six hundred fifty-nine in not reporting a change or correction increasing his federal taxable income or federal items of tax preference as reported on his federal income tax return..."

G. That sections 689(d)(1), 659 and 683(c)(1)(C) of the Tax Law are incorporated into Article 23 by section 722(a).

H. That the petition of Stanley Feder is denied.

I. That the Notice of Deficiency issued July 9, 1982 is to be increased to reflect the additional tax liability due for both personal income tax and

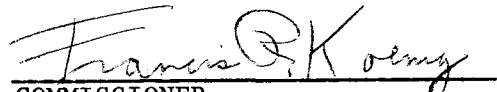
unincorporated business tax purposes based on the unreported federal audit changes made to petitioner's claimed 1978 business expenses.


DATED: Albany, New York

MAR 14 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CLAIM CHECK
NO.

719563

☐ HOLD

DATE

3/19/85

STATIC

2ND NOTICE

3-25

RETURN

4-3

Delivered
Post Office

CERTIFIED

P 693 164 638

MAIL

Stanley Feder
200 East 30th Street
New York, NY 10016

RETURNED TO
SENDER

Unclaimed
Attempted
Insufficient address
No such street
No such office in state
Do not re-mail in this envelope

Under
Attempt
Insufficient
No such office in state
Do not re-mail in this envelope



REQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request <i>4/10/85</i>
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition <i>S. C. - Dec. - 3/14/85</i>
Name <i>Stanley Feder</i>	
Address <i>200 East 30th Street</i> <i>New York, N. Y. 10016</i>	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	<i>Unclaimed</i>

Searched by <i>DP</i>	Section	Date of Search <i>4/10/85</i>
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PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

For Appellate Bureau
Room 101 - Bldg. 12
State Capitol
Albany, New York 12231

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Room 101 - Bldg. 12
State Capitol
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STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

March 14, 1985

Stanley Feder
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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
David Lieblich
2069 E. 60th St.
Brooklyn, NY 11234
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
STANLEY FEDER	:	DECISION
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CONCLUSIONS OF LAW

A. That it 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. (Matter of Liberman v. Gallman, 41 N.Y.2d 774). Furthermore, "[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all pertinent facts and circumstances of each case". 20 NYCRR 203.10(c).

B. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of Article 22 of the Tax Law, as incorporated into Article 23 by section 722(a), to show that the degree of direction and control exercised by Fitwel over his day-to-day activities was sufficient for the existence of a relationship of employer-employee. Accordingly, petitioner's sales activities did not constitute services rendered as an employee of Fitwel within the meaning and intent of section 703(b) of the Tax Law.

C. That petitioner's sales activities constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to unincorporated business tax pursuant to section 701(a) of the Tax Law.

D. That section 689(d)(1) of Article 22 of the Tax Law provides that:

"--If a taxpayer files with the tax commission a petition for redetermination of a deficiency, the tax commission shall have power to determine a greater deficiency than asserted in the notice of deficiency and to determine if there should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefore is asserted at or before the hearing under the rules of the tax commission."

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F. That section 683(c)(1) of the Tax Law provides, in pertinent part, that:

"The tax may be assessed at any time if --

(C) the taxpayer or employer fails to comply with section six hundred fifty-nine in not reporting a change or correction increasing his federal taxable income or federal items of tax preference as reported on his federal income tax return..."

G. That sections 689(d)(1), 659 and 683(c)(1)(C) of the Tax Law are incorporated into Article 23 by section 722(a).

H. That the petition of Stanley Feder is denied.

I. That the Notice of Deficiency issued July 9, 1982 is to be increased to reflect the additional tax liability due for both personal income tax and

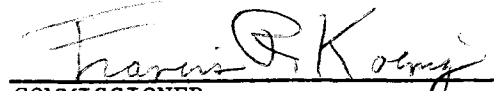
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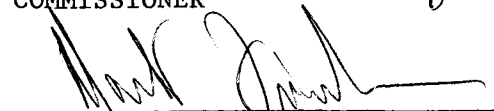
DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1985


PRESIDENT


COMMISSIONER


COMMISSIONER