

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Murray & Susan Gold :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Personal Income Tax & UBT :  
under Article 22 & 23 of the Tax Law  
for the Year 1973. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of November, 1980, he served the within notice of Decision by certified mail upon Murray & Susan Gold, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray & Susan Gold  
556 Saddle Ridge Rd.  
Woodmere, NY 11598

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  
14th day of November, 1980.

Ruth A. Bank

Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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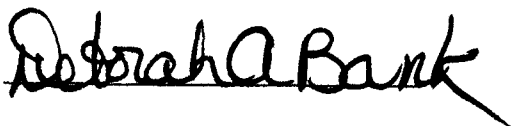
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of November, 1980, he served the within notice of Decision by certified mail upon Ward Wolff the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

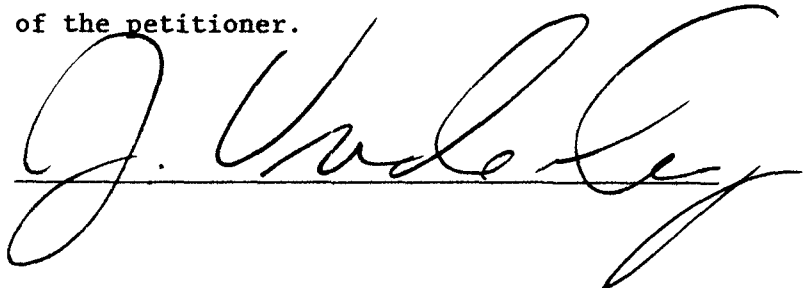
Mr. Ward Wolff  
3000 Marcus Ave.  
Lake Success, NY 11040

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  
14th day of November, 1980.





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

November 14, 1980

Murray & Susan Gold  
556 Saddle Ridge Rd.  
Woodmere, NY 11598

Dear Mr. & Mrs. Gold:

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 Laws 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  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Ward Wolff  
3000 Marcus Ave.  
Lake Success, NY 11040  
Taxing Bureau's Representative

## STATE TAX COMMISSION

1. Petitioners, Murray Gold and Susan Gold, timely filed a joint New York State Income Tax Resident Return for the year 1973, on which net business

income of \$23,544.89 was reported. Petitioner Murray Gold did not file an unincorporated business tax return for the year 1973 in accordance with his tax preparer's advice.

2. On March 28, 1977, the Audit Division issued a Notice of Deficiency against the petitioners in the sum of \$1,338.93 for the year 1973, along with an explanatory Statement of Audit Changes, on which:

- (a) Additional personal income tax of \$62.72 was due based on unreported Federal audit changes. This amount was conceded and paid, together with such interest lawfully due and is not at issue.
- (b) Income derived from petitioner's activities during 1973 as a traveling salesman was held subject to unincorporated business tax.
- (c) Penalties were imposed pursuant to sections 685(a) (1) and 685(a) (2) of the Tax Law.

3. Petitioner Murray Gold was retained as a salesman in 1968 by Grillmaster, Inc. (Grillmaster), a corporation located in the City and State of New York. At such time, petitioner was compensated on a fixed salary subject to the withholding of payroll taxes and the reimbursement of selling expenses. In addition, petitioner was provided with hospitalization insurance and an annuity plan, the cost of which was shared by petitioner and Grillmaster.

4. In 1970, Grillmaster changed petitioner's form of compensation from a salary basis to a commission basis, without the withholding of payroll taxes and without reimbursement of selling expenses. However, petitioner's duties and activities remained unchanged.

5. Although petitioner's primary activity was selling, he was also required to service accounts, investigate complaints, collect overdue bills and attend trade shows. The booths at the trade shows were paid for and operated by Grillmaster.

6. Petitioner Murray Gold was forbidden from representing or selling for other firms. The income at issue was earned solely from commissions paid by Grillmaster during the year 1973.

7. Petitioner was required to spend every other week on the road selling, obtaining new clients and investigating complaints. Grillmaster provided petitioner Murray Gold with an itinerary, which he was required to follow. His visits and the results therefrom were required to be reported to Grillmaster on a daily basis. Subsequently, it was changed to twice a week when the cost of daily telephone calls became prohibitive.

8. Every other week, petitioner was required to be at the office where he attended sales meetings and assisted in shipping merchandise to clients. While in the office, petitioner was provided with samples, catalogs and price lists which were paid for by Grillmaster.

9. Petitioner was annually granted two weeks off for vacation to be taken at his discretion. However, prior approval by Grillmaster was required and petitioner could not take the two weeks consecutively or during the busy season.

10. Petitioner was provided with hospitalization insurance and an annuity plan during the year 1973, the cost of which was shared by petitioner and Grillmaster.

11. Petitioner Murray Gold paid self-employment taxes and contributed to a self-retirement plan (Keogh Plan) during the year 1973.

#### CONCLUSIONS OF LAW

A. That sufficient direction and control were exercised by Grillmaster, Inc. during the year 1973 so as to cause petitioner Murray Gold to become its employee within the meaning and intent of section 703(b) of the Tax Law and,

accordingly, the income derived therefrom is not subject to the unincorporated business tax.

B. That the issue of the penalties imposed under section 685(a)(1) and 685(a)(2) of the Tax Law is moot by virtue of paragraph "A" of this decision.

C. That the petition of Murray Gold and Susan Gold is granted to the extent provided in paragraphs "A" and "B" of this decision.

D. That the Audit Division is hereby directed to modify accordingly the Notice of Deficiency issued March 28, 1977; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 14 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER