

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Benedict C. Cirino

:  
:  
: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Personal Income :  
& UBT under Article 22 & 23 of the Tax Law for the :  
Years 1976 - 1978. :

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 12th day of October, 1982, he served the within notice of Decision by certified mail upon Benedict C. Cirino, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Benedict C. Cirino  
45 Isabelle Rd.  
Cheektowaga, NY 14225

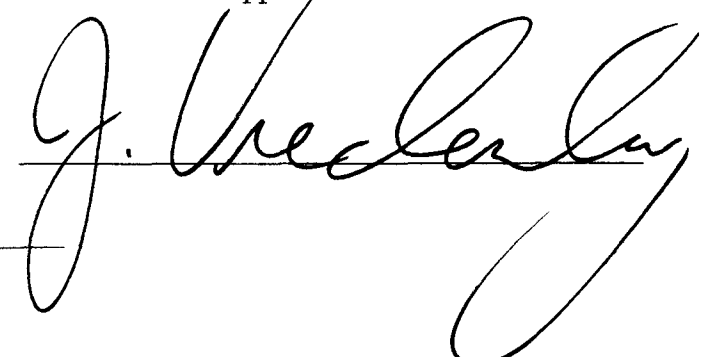
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
12th day of October, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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of  
Benedict C. Cirino

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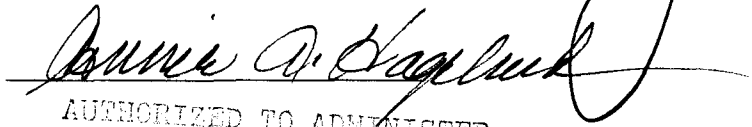
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Patrick J. Baker the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

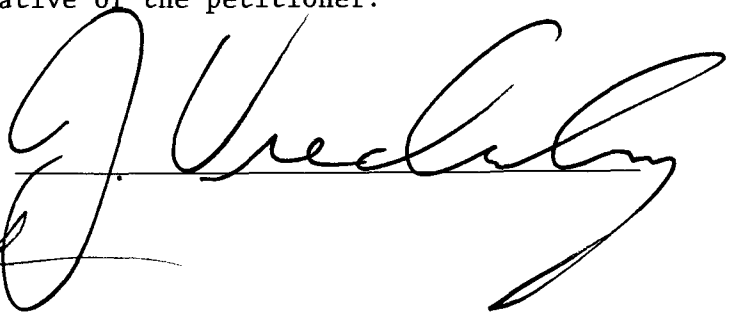
Patrick J. Baker  
Boreanaz, Ne Moyer & Baker  
736 Brisbane Bldg.  
Buffalo, NY 14203

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  
12th day of October, 1982.

  
ANNUALIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



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

October 12, 1982

Benedict C. Cirino  
45 Isabelle Rd.  
Cheektowaga, NY 14225

Dear Mr. Cirino:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Patrick J. Baker  
Boreanaz, Ne Moyer & Baker  
736 Brisbane Bldg.  
Buffalo, NY 14203  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
BENEDICT C. CIRINO	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of	:	
the Tax Law for the Years 1976, 1977 and 1978.	:	

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Petitioner, Benedict C. Cirino, 45 Isabelle Road, Cheektowaga, New York 14225, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1976, 1977 and 1978 (File Nos. 31122 and 31566).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on December 17, 1981 at 2:45 P.M. Petitioner Benedict C. Cirino appeared with Patrick J. Baker, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Anna D. Colello, Esq., of counsel).

ISSUES

I. Whether the activities engaged in by petitioner as a delivery salesman constituted the carrying on of an unincorporated business.

II. Whether penalties pursuant to sections 685(a)(1), 685(a)(2) and 685(c) of the Tax Law were properly imposed.

FINDINGS OF FACT

1. Petitioner, Benedict C. Cirino, timely filed joint New York State income tax returns with his wife for the years 1976, 1977 and 1978. For each of the taxable year petitioner filed a Federal Form 1040 Schedule "C", Profit

or (Loss) from Business or Profession reporting sales income and claiming deductions for business expenses. Petitioner's New York State returns bear the following occupations: For the year 1976 it was "self employed". For 1977 the entry for occupation was showing "self employed" which was crossed out and "Pepsi Cola Distributor" was substituted. For 1978 the occupation reported was "delivery". For each of the years at issue, petitioner's New York State returns had no entries for state tax withheld or state estimated tax paid.

2. On February 5, 1980, the Audit Division issued a Statement of Audit Changes to petitioner wherein it held that "[U]pon review of the Schedule C, Form 1040 attached to your returns for the above tax years, you are considered to be self-employed. Therefore, the income you receive from your sales activities (Namely, Delivery of Soft Drinks), is subject to the New York State Unincorporated Business Tax Law." That "section 685(c) penalty has been imposed for failing to pay estimated tax on personal and unincorporated business taxable income. Also, penalty has been imposed for failure to file unincorporated business tax returns." Accordingly, two Notices of Deficiency were issued against petitioner on March 13, 1980. One Notice of Deficiency for 1976 and 1977 asserted unincorporated business tax of \$1,144.79, plus penalty and interest of \$583.70. The other Notice of Deficiency for 1978 asserted unincorporated business tax of \$681.83, plus penalty and interest of \$330.18.

3. Petitioner Benedict C. Cirino has been a Pepsi Cola distributor for Pepsi Cola Buffalo Bottling Corporation (Pepsi) for over fifteen years prior to the years at issue. He is assigned a specific territory with specific accounts, which were subject to change at the sole discretion of Pepsi. All credit sales were subject to the approval of Pepsi which made up over ninety percent of the petitioner's route. Pepsi would bill credit customers directly.

4. Petitioner, who was compensated on a commission basis, was prohibited from selling for any other principals. He was not reimbursed for ordinary and necessary business expenses incurred since the company felt that the commission rate paid was sufficiently high enough for petitioner to personally pay for such expenses.

5. Petitioner was required to purchase his Pepsi truck, which he used on his route, through Pepsi. The petitioner was required to keep the truck's appearance and safety to the standards set by Pepsi. Petitioner was also required to buy a Pepsi uniform and wear it when on duty.

6. The pricing of the soft drinks to the stores on the petitioner's route was set by Pepsi which the petitioner could not deviate from. The petitioner had to turn in his route book to Pepsi each night.

7. Petitioner was required to be at the Pepsi loading docks at a specific time each morning. He was required to report to his supervisor on a daily basis.

8. Petitioner was allowed time off for vacation to be taken at his discretion. However, prior approval by Pepsi was required and petitioner had to pay the vacation man. The vacation man was an employee of Pepsi who would make the deliveries in the absence of petitioner and other delivery route persons.

9. Income taxes were not withheld from petitioner's compensation, but social security taxes were withheld by Pepsi.

10. Petitioner does not have his own business location or office.

11. Petitioner's personal income tax returns for the years at issue were prepared by an accountant who advised the petitioner that he was not subject to unincorporated business tax.

CONCLUSIONS OF LAW

A. That petitioner's principal exercised sufficient direction and control over his daily activities so as to constitute a bona fide employer-employee relationship. Accordingly, petitioner's activities as a delivery salesman constituted services as an employee pursuant to section 703(b) of the Tax Law. As such, the income derived therefrom is exempt from the imposition of unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

B. That the penalty pursuant to section 685(c) of the Tax Law was properly imposed for personal income tax purposes.

C. That the petition of Benedict C. Cirino is granted to the extent that the unincorporated business tax imposed is cancelled, along with the related penalties imposed under sections 685(a)(1), 685(a)(2) and 685(c) of the Tax Law.

D. That the Audit Division is hereby directed to accordingly modify the notices of deficiency issued March 13, 1980; and that, except as so granted, the petition is in all other respects denied.

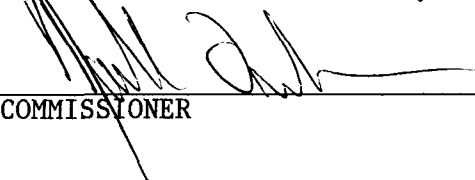
DATED: Albany, New York

OCT 12 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER