

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Morris Schaeffer :

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 Years 1974 & 1975. :

State of New York
County of Albany

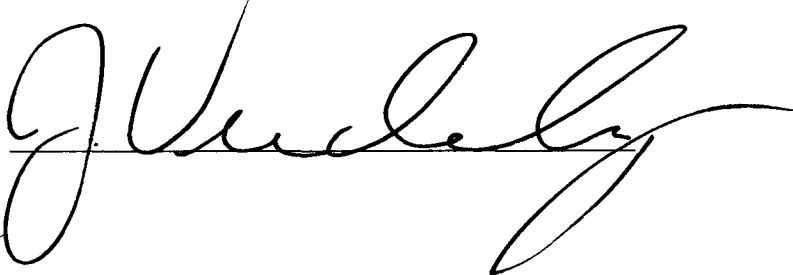
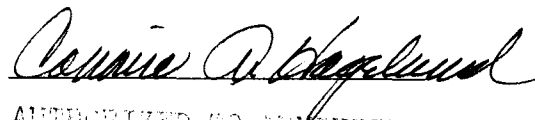
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Morris Schaeffer, the petitioner in the within proceeding,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

Morris Schaeffer
2138 Howard Pl.
Bellmore, NY 11710

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

In the Matter of the Petition
of

Morris Schaeffer

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AFFIDAVIT OF MAILING

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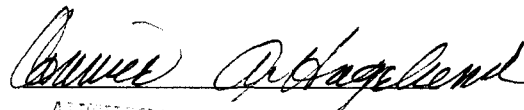
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Bertram S. Primoff the representative of the petitioner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

Bertram S. Primoff
Primoff & Company
41 E. 42nd St.
New York, NY 10017

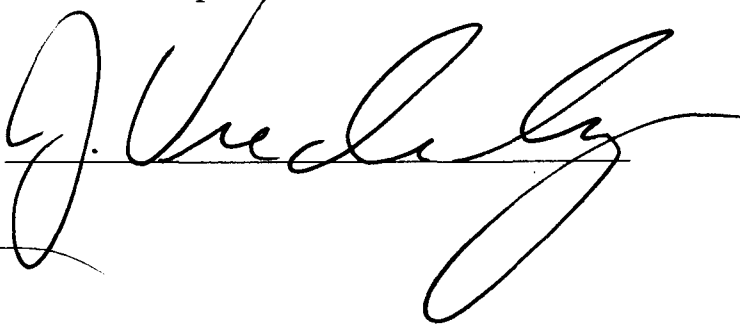
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

October 12, 1982

Morris Schaeffer
2138 Howard Pl.
Bellmore, NY 11710

Dear Mr. Schaeffer:

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
Bertram S. Primoff
Primoff & Company
41 E. 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MORRIS SCHAEFFER	:	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 1974 and 1975.	:	

Petitioner, Morris Schaeffer, 2138 Howard Place, Bellmore, New York 11710, 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 1974 and 1975 (File No. 24075).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 2, 1981 at 2:45 P.M. Petitioner Morris Schaeffer appeared with Bertram S. Primoff, C.P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner's activities as a sales representative constituted the carrying on of an unincorporated business thereby subjecting the income derived from said activities to unincorporated business tax.

II. Whether the Audit Division properly disallowed one-half of the \$1,000.00 long-term capital losses shown on petitioner's 1974 and 1975 New York returns.

FINDINGS OF FACT

1. Petitioner herein, Morris Schaeffer, and his wife, Pearl Schaeffer, timely filed separate 1974 and 1975 New York State personal income tax returns

on combined forms IT-208. On said returns petitioner reported income from his activities as a sales representative of \$27,438.10 for 1974 and \$43,095.99 for 1975. Both the 1974 and 1975 returns claimed a \$1,000.00 long-term capital loss for a non-business bad debt. No unincorporated business tax returns were filed for the years in question.

2. On June 19, 1978, the Audit Division issued to petitioner a Notice of Deficiency for the years 1974 and 1975 asserting additional personal income tax due of \$135.00, additional unincorporated business tax due of \$2,779.38 and penalties and interest due of \$1,702.47, making for a combined balance due of \$4,616.85. The penalties were asserted pursuant to sections 685(a)(1), (a)(2) and (c) of the Tax Law for failure to file unincorporated business tax returns, failure to pay the unincorporated business tax when due and failure to file declarations of estimated tax.

3. The aforementioned Notice of Deficiency was premised on a Statement of Audit Changes dated April 6, 1978 wherein, for personal income tax purposes, one-half of petitioner's claimed \$1,000.00 capital losses for 1974 and 1975 were disallowed since "Married taxpayers filing separate returns are each limited to a \$500.00 deduction for losses from the sale or exchange of capital assets". The unincorporated business tax due was asserted based on the Audit Division's determination that petitioner's income from his activities as a sales representative was subject to unincorporated business tax.

4. During the years at issue petitioner was a sales representative for various companies, all of whom paid him on a straight commission basis. The following chart indicates the source and amount of commissions earned:

	<u>1974</u>	<u>1975</u>
Great American Factory	\$ 3,021.11	\$ 2,152.77
Tropix Togs, Inc,	28,183.21	3,605.89
Nexus Industries, Inc.	-0-	45,650.36
Capital Quilting Co., Inc.	3,257.68	1,929.22
Total	<u>\$34,462.00</u>	<u>\$53,338.24</u>

The Great American Factory, Tropix Togs, Inc. and Nexus Industries, Inc. are all interrelated companies and will hereinafter be collectively referred to as the "Nexus Group".

5. No social security taxes or Federal or State income taxes were withheld from the commissions earned by petitioner. Petitioner did not have any form of employment contract with any of the above mentioned principals and he was free to represent other firms, as long as they were not carrying competing lines.

6. Petitioner did not receive reimbursement for any of his selling expenses and, in 1974, deducted total business expenses of \$7,023.90; while in 1975 business expenses amounted to \$10,242.25. Said expenses consisted of charges for legal fees, telephone, advertising, maintenance, supplies, postage, publications, club dues, Christmas gifts, entertainment, auto expenses, cab fares, contributions and air fare.

7. The majority of petitioner's time was spent selling the items carried by the Nexus Group. He prepared his own itinerary and utilized his own methods and techniques in selling their products. For one week out of every month the president of the Nexus Group would visit the New York City office and meet with major customers. Petitioner was responsible for setting up the appointments for the president and was required to accompany him during this week.

8. In a letter dated August 22, 1977 petitioner, in response to an inquiry received from the Audit Division, stated that "There is no supervision or control by any organization over my activities. I am free to contact any

potential customers, national and international, as well as the entire Eastern border. The time and effort I put forth for these firms is up to myself."

9. The Nexus Group maintained a health insurance program, however, petitioner did not participate in said program since his spouse's employer offered a more comprehensive plan. Petitioner participated in the Nexus Group's stock option plan.

10. Petitioner did not argue nor was any evidence presented with respect to the penalties asserted pursuant to sections 685(a)(1), (a)(2) and (c) of the Tax Law.

CONCLUSIONS OF LAW

A. That petitioner's activities as a sales representative during the years 1974 and 1975 constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law and the income derived from said activities is therefore subject to unincorporated business tax. That petitioner has failed to sustain the burden of proof pursuant to sections 722 and 689(e) of the Tax Law to show that his activities were supervised and controlled to the extent necessary to be considered an employee within the purview of section 703(b) of the Tax Law (Lieberman v. Gallman, 41 N.Y. 2d 774).

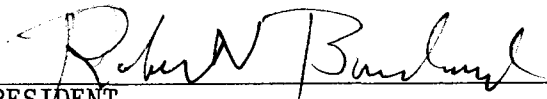
B. That the Audit Division properly limited petitioner's long-term capital loss deduction to \$500.00, the amount which would have been deductible for Federal income tax purposes had separate Federal income tax returns been filed [Internal Revenue Code section 1211(b)(2), Tax Law section 612(f) and 20 NYCRR 116.6(d)].

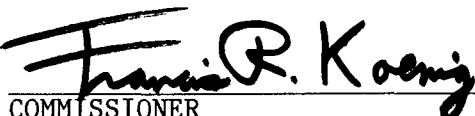
C. That the petition of Morris Schaeffer is denied and the Notice of Deficiency dated June 19, 1978 is sustained, together with such additional penalties and interest as may be lawfully due and owing.

DATED: Albany, New York

OCT 18 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER