

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

JAMES P. KENNEDY

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Unincorporated Business :  
Taxes under Article (x) 23 of the :  
Tax Law for the Year(s) on Period(s) :  
1967, 1968 and 1969.

State of New York  
County of Albany

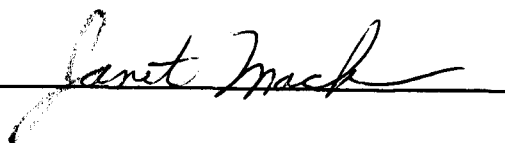
John Huhn , being duly sworn, deposes and says that  
he is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 14th day of February , 1978, he served the within  
Notice of Decision by (certified) mail upon Henry H. Bolz  
(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Henry H. Bolz, CPA  
30 East 42nd Street  
New York, New York 10017

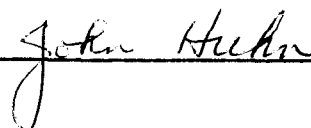
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

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

14th day of February , 1978.

  
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STATE TAX COMMISSION

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~~(representative of)~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

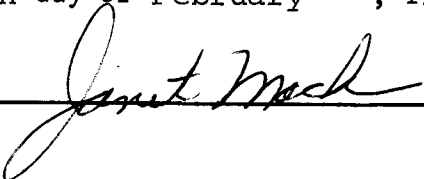
as follows: Mr. James P. Kennedy  
16 Malverne Avenue  
Malverne, New York 11565

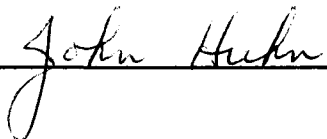
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Sworn to before me this

14th day of February, 1978.

  
\_\_\_\_\_

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

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

**February 14, 1978**

**Mr. James P. Kennedy**  
**16 Malverne Avenue**  
**Malverne, New York 11565**

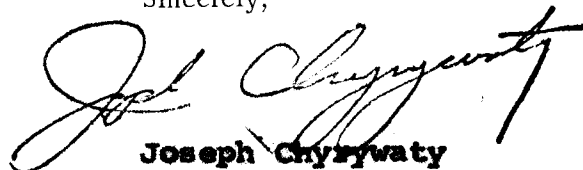
**Dear Mr. Kennedy:**

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 **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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

  
**Joseph Chyrywaty**  
**Hearing Examiner**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JAMES P. KENNEDY	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1967, 1968 and 1969.	:	

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Petitioner, James P. Kennedy, 16 Malverne Avenue, Malverne, New York 11565, 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 1967, 1968 and 1969 (File No. 15565).

A small claims hearing was held before Joseph A. Milack, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 17, 1977 at 1:15 P.M. The petitioner appeared by Henry H. Bolz, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Louis Senft, Esq., of counsel).

ISSUE

Whether the income derived from petitioner's activities as a manufacturer's representative during the years 1967, 1968 and 1969 was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner filed New York State income tax resident returns with his wife for the years 1967, 1968 and 1969. He did not file New York State unincorporated business tax returns for said years.

2. On June 24, 1974, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, imposing unincorporated business tax in the amount of \$3,282.20. It was issued on the grounds that the income he received from his activities as a manufacturer's representative during the years 1967, 1968 and 1969 was subject to unincorporated business tax. Accordingly, the Income Tax Bureau issued a Notice of Deficiency therefor.

3. During the years 1967, 1968 and 1969, petitioner was an industrial diamond salesman. He represented at least three principals, but not more than four during each of said years. He was paid by his principals on a commission basis. During the years 1967, 1968 and 1969, he received respectively, 83 percent, 75 percent and 62 percent of his total income from Metal Removal Co., Inc.

4. During the years 1967, 1968 and 1969, no division of time and effort existed in connection with petitioner's selling activities for the various principals that he represented.

5. There is no evidence to indicate that petitioner's principals exercised any supervision or control over his activities, other than to limit his sales territory and to require his daily telephone contact with them. He was permitted to sell the noncompetitive lines of other principals.

6. In 1968 and 1969, petitioner took a self-employed retirement deduction as a sole proprietor on the Federal income tax returns he filed for said years.

7. The principals for whom petitioner sold did not deduct Federal or New York State withholding tax or social security tax from the commissions paid to him.

8. Except for the expenses petitioner incurred in attending dinners and one or two sales meetings a year, he was not otherwise reimbursed for the expenses he incurred in connection with his sales activities during the years 1967, 1968 and 1969. He deducted such expenses on Federal Schedule "C".

CONCLUSIONS OF LAW

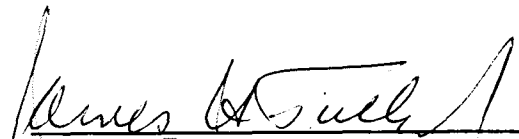
A. That the income received by petitioner from principals he represented during the years 1967, 1968 and 1969, constituted income from his regular business of selling merchandise as an independent contractor and not as an employee exempt from the imposition of unincorporated business tax, in accordance with the meaning and intent of section 703(b) of the Tax Law.

B. That the activities of petitioner during the years 1967, 1968 and 1969 constituted the carrying on of an unincorporated business and that his income derived therefrom was subject to unincorporated business tax, in accordance with the meaning and intent of section 703 of the Tax Law.

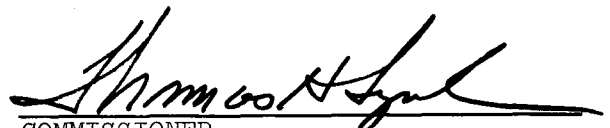
C. That the petition of James P. Kennedy is denied and the Notice of Deficiency issued June 24, 1974 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York  
February 14, 1978

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER