

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Theodore Fischer :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Unincorporated Business Tax :

under Article 23 of the Tax Law

for the Year 1971. :

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 31st day of August, 1979, he served the within notice of Decision by certified mail upon Theodore Fischer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Theodore Fischer

8 Oxford Ct.

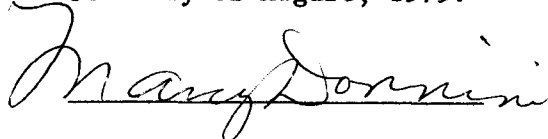
New City, NY 10956

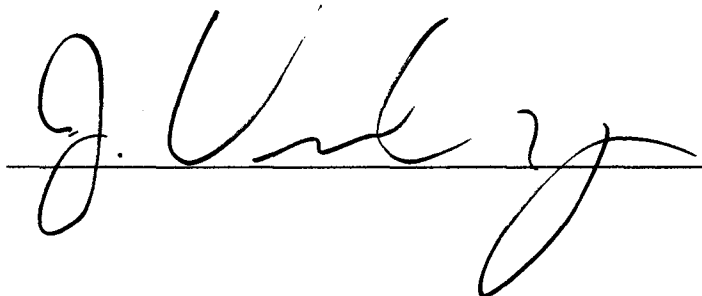
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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

31st day of August, 1979.


Mary Dorrini


J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
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Theodore Fischer :

AFFIDAVIT OF MAILING

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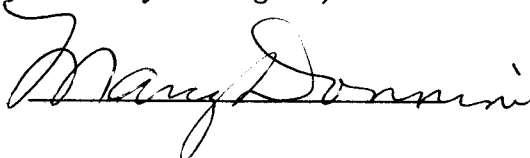
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Decision by certified mail upon Melvin I. Primoff the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

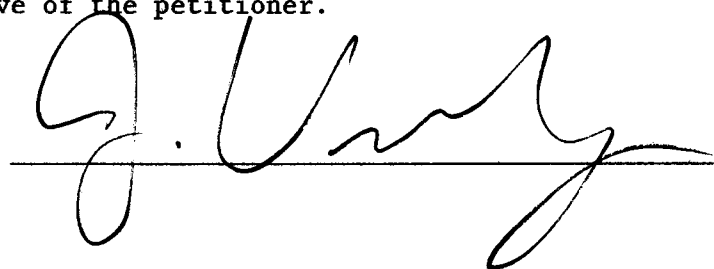
Mr. Melvin I. Primoff
41 E. 42nd St.
New York, NY 10017

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
31st day of August, 1979.







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

STATE TAX COMMISSION
JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

August 31, 1979

Theodore Fischer
8 Oxford Ct.
New City, NY 10956

Dear Mr. Fischer:

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) 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,

A handwritten signature in cursive script, likely belonging to John J. Sollecito, the Director of the State Tax Commission.

cc: Petitioner's Representative
Melvin I. Primoff
41 E. 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 23, 1978 at 10:45 A.M. Petitioner appeared by Melvin Primoff, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Robert Felix, Esq., of counsel).

ISSUES

I. Whether petitioner's activities selling printed material constituted the carrying on of an unincorporated business, or whether he was performing services in the capacity of an employee and as such, exempt from the imposition of unincorporated business tax.

II. Whether penalties pursuant to sections 685(a)(1) and 685(a)(2) were properly imposed on petitioner by the Income Tax Bureau for 1971, for his failure to file an unincorporated business tax return.

FINDINGS OF FACT

1. Petitioner, Theodore Fischer, timely filed a New York State Income Tax Resident Return (Form IT-201) for 1971. He did not file an unincorporated business tax return for said year, relying on the advice of his accountant and the determination by the Income Tax Bureau that he was not engaged in an unincorporated business for the two previous years. The Income Tax Bureau conceded that petitioner's failure to file an unincorporated business tax return was not due to willful neglect.

2. The Income Tax Bureau issued a Statement of Audit Changes against petitioner for 1971, on which it contended that his activities as a salesman constituted the carrying on of an unincorporated business. Accordingly, it issued a Notice of Deficiency to him on January 26, 1976 for \$662.39 in unincorporated business tax, plus \$301.39 in penalty (pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law) and \$150.23 in interest, for a total due of \$1,114.01.

3. During 1971 petitioner performed services for Promotion Graphics Associates of New York City, Inc. (hereinafter "Promotion"). He solicited printed material jobs such as books, catalogs, stationery, advertising specialties and direct-mailing material. He estimated the charges to the customer for the job and then followed-up by arranging for the purchase through Promotion of the materials needed for the job. He made all other arrangements, including outside printing and delivery of the finished merchandise to the customer. A sale could be rejected by Promotion if the customer's credit was unacceptable or if petitioner's estimate was too low.

4. Petitioner determined the hours which he worked. His principal was mainly interested in the results of his efforts and there was no general supervision of his day-to-day activities. Petitioner was paid on a commission basis, determined by the profits of the jobs sold. Social Security and taxes were not withheld from the compensation which he reported on Federal Form 1099. Petitioner financed his own retirement plan and also contributed the entire cost of a company medical plan. Petitioner was not reimbursed for any expense. He could take vacations at will after making arrangements for someone else to take care of his work already in progress.

5. Promotion prohibited petitioner from performing services as a printing salesman for any other principal. It provided petitioner with office space, stationery, business cards, telephone service and clerical assistance at its place of business. Petitioner also maintained an office in his home, from which he transacted business. He filed a Federal Schedule "C" to deduct a home office expense and other business-connected expenses such as rent, postage, stationery, telephone and entertainment.

CONCLUSIONS OF LAW

A. That petitioner, Theodore Fischer's sales activities during 1971 constituted the carrying on of an unincorporated business, in accordance with the meaning and intent of section 703(a) of the Tax Law, and that they did not constitute the performance of services as an employee, in accordance with section 703(b) of the Tax Law.

B. That petitioner's failure to file an unincorporated business tax return for 1971 was due to reasonable cause and not due to willful neglect, in accordance with the meaning and intent of sections 685(a)(1) and 685(a)(2) of the Tax Law.

C. That the petition of Theodore Fischer is granted to the extent that all penalties are cancelled. The Income Tax Bureau is hereby directed to so modify the Notice of Deficiency issued January 26, 1976 and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 31 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER