

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

October 9, 1979

Bernard Freeman
245 Falmouth Rd.
Scarsdale, NY 10583

Dear Mr. Freeman:

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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Sincerely,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Bernard Freeman :

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 Years 1970, 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 9th day of October, 1979, he served the within notice of Decision by certified mail upon Bernard Freeman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

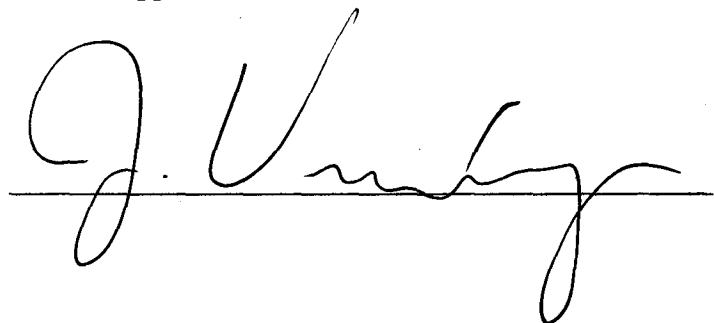
Bernard Freeman
245 Falmouth Rd.
Scarsdale, NY 10583

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
9th day of October, 1979.


Nancy D. D'Amico


Jay Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BERNARD FREEMAN	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1970 and 1971.	:	

Petitioner, Bernard Freeman, 245 Falmouth Road, Scarsdale, New York 10583, 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 1970 and 1971 (File No. 13187).

A small claims hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 10, 1978 at 2:45 P.M. Petitioner appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether income reported by petitioner as salary or wages was subject to unincorporated business tax.

II. If so, whether the penalty for failure to file an unincorporated business tax return for 1971 should be eliminated.

FINDINGS OF FACT

1. Petitioner, Bernard Freeman, together with his wife, Pearl Freeman, filed a joint New York State Income Tax Resident Return for 1970. In said return, he referred to his occupation as management agent and in Schedule A showed business income from real estate management and as an agent of \$6,120.32. He also showed wage or salary income of \$6,250.00. Attached to the return were two withholding tax statements issued to Bernard Freeman: one from Taft Estates, Inc. amounting to \$2,375.00 and one from Taft Construction Corp. amounting to \$2,375.00. Petitioner also filed a Schedule C with his Federal Form 1040 for 1970, in which he broke down his gross profit into the following management fees:

Taft Construction Corp.	\$4,318.59
Taft Estates Inc.	4,889.73
Arcofree Corp.	<u>750.00</u>
Total Gross Profit	\$9,958.32

He deducted business expenses for auto and travel in the amount of \$3,838.00. The net profit shown on the schedule was \$6,120.32. On said schedule he listed his principal business activity as "Management-Real Estate Agent."

2. Petitioner, Bernard Freeman, together with his wife, Pearl Freeman, filed a New York State Combined Income Tax Return for 1971. In said return, he referred to his occupation as management agent and in Schedule A showed \$7,174.89 in business income, but did not state the type of business. He also showed wage or salary income of \$12,250.00. Withholding tax statements filed with petitioner's 1971 return showed the following income:

Elm-Ardsley Corp.	\$ 6,000.00
Arcofree Corporation	1,500.00
Taft Construction Corp.	2,375.00
Taft Estates, Inc.	<u>2,375.00</u>
Total	\$12,250.00

Petitioner also filed a Schedule C with Federal Form 1040 for 1971, in which he indicated that his principal business activity was "Management-Real Estate Agent." The business income was derived from "management fees" and gross receipts were shown as \$10,816.89. After a deduction for auto and travel expenses of \$3,642.00, the net profit for 1971 was reported as \$7,174.89.

Petitioner also filed a New York State unincorporated business tax return for 1971, in which he reported a net profit of \$6,425.00. After an allowance for taxpayer's services of \$1,220.00 and the exemption of \$5,000.00, no unincorporated business tax was shown as payable with said return.

3. Petitioner filed Schedule SE Form 1040 for the years at issue. For 1970 he showed net earnings from business of \$6,120.32 and after allowing for FICA wages (as indicated on withholding tax forms) of \$6,250.00, paid self-employment tax in the amount of \$106.95, based on self-employment income of \$1,550.00. For 1970 he showed net earnings from business of \$7,174.89 and after allowing for FICA wages of \$12,250.00, no self-employment tax was shown to be due.

4. On November 26, 1973, the Income Tax Bureau issued a Notice of Deficiency against petitioner in the amount of \$1,180.99, including

penalties and interest. This was done on the grounds that petitioner's wage and salary income was interrelated to his business activities and, therefore, subject to unincorporated business tax.

5. Taft Construction Corp. and Taft Estates, Inc. were New York corporations, each of which owned an apartment house located in the Borough of the Bronx, New York. Petitioner owned 55% of the shares of each corporation and served as the president and as a director of each corporation. The buildings owned by each corporation were attached and were served by one common office located in one of the buildings. There was an employee who worked in the office and handled most of the clerical work involved with the operation of the two buildings. Petitioner saw to it that the rents were collected and that the bills were paid. He visited the building four or five times a week.

6. Elm-Ardsley Corp. was a New York corporation which owned and operated an indoor tennis facility in Ardsley, New York. Mr. Freeman owned 30% of the stock of the corporation and served as an officer and as a director. He visited this facility several times each week.

7. Arcofree Corporation is a Florida corporation which did not do business in New York. It owned and operated a "taxpayer" type of commercial real estate located in Miami Beach, Florida. Mr. Freeman owned 37 1/2% of the stock of Arcofree Corporation and served as an officer and director of said corporation. Mr. Freeman visited the Arcofree property once or twice a year. In addition, he frequently spoke via long distance telephone with the other individuals operating the building on a day-to-day basis in Florida.

8. Petitioner maintained no separate office other than the offices on the premises of the properties owned by the several corporations.

9. Petitioner was not paid the "management fee" from the corporations on any pre-established basis. He claimed that his accountant advised him as to both how much he should take from each corporation as salary and how much he should take as a management fee. Petitioner did not receive any dividend income from the corporations for the years at issue.

CONCLUSIONS OF LAW

A. That regardless of the fact that certain payments to petitioner were characterized as "management fees," all of petitioner's activities on behalf of the aforementioned corporations constituted the performance of services by an individual as an employee, officer, or director of said corporations, within the meaning and intent of section 703(b) of the Tax Law. Thus, since petitioner did not otherwise regularly carry on any business, none of the payments made to petitioner by said corporations was subject to unincorporated business tax.

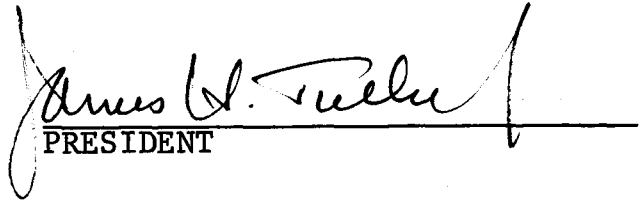
B. That in view of Conclusion of Law "A", it is unnecessary to determine whether or not the penalty for failure to file an unincorporated business tax return for 1971 should be eliminated.

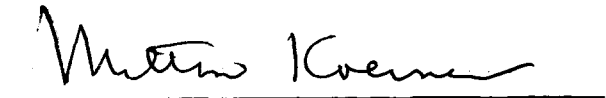
C. That the petition of Paul Freeman is granted and the Notice of Deficiency issued November 26, 1973 is hereby cancelled in full.

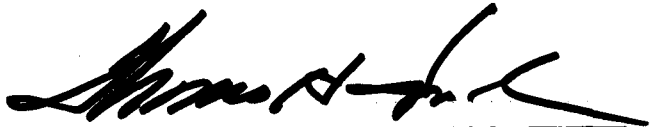
DATED: Albany, New York

STATE TAX COMMISSION

OCT 9 1979


PRESIDENT


COMMISSIONER


COMMISSIONER