

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Robert & Betty Jane Burger :

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 1973. :

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 17th day of October, 1980, he served the within notice of Decision by certified mail upon Robert & Betty Jane Burger, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert & Betty Jane Burger

223 Parkside Dr.

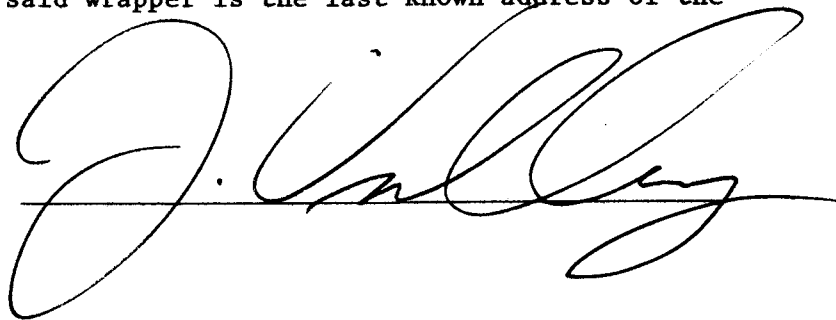
Roslyn Heights, NY 11577

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  
17th day of October, 1980.

Dorothy A Bank



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

October 17, 1980

Robert & Betty Jane Burger  
223 Parkside Dr.  
Roslyn Heights, NY 11577

Dear Mr. & Mrs. Burger:

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

Very truly yours,

STATE TAX COMMISSION

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	:	
ROBERT BURGER and BETTY JANE BURGER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1973.	:	

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Petitioners, Robert Burger and Betty Jane Burger, 223 Parkside Drive, Roslyn Heights, New York 11577, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1973 (File No. 16265).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 13, 1980 at 10:45 A.M. Petitioners appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the income derived from petitioner Robert Burger's activities as a salesman is subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Robert Burger and Betty Jane Burger, filed a New York State Income Tax Resident Return for 1973. Petitioner Robert Burger did not file an unincorporated business tax return for subject year.

2. Under date of May 24, 1976, the Audit Division issued a Notice of Deficiency against petitioners asserting personal income tax of \$98.77, unincorporated business tax of \$517.57 and interest of \$97.39, for a total of \$713.73. Petitioners did not contest the deficiency in personal income tax and remitted

payment for same under date of August 18, 1976. Accordingly, the personal income tax portion of the deficiency is not herein at issue.

3. For 1973, petitioner Robert Burger was employed as a salaried salesman for F.C. Industries, Inc., with offices in New York City, and as a salaried and commission salesman for Norfield Corporation, with offices in Danbury, Connecticut. Both entities were managed and controlled by Mr. Frank Curatola, who was the principal officer/stockholder of F.C. Industries, Inc. and Chairman of the Board of Directors and principal stockholder of Norfield Corporation.

Petitioner was a nominal officer and nonstockholder of F.C. Industries, Inc. He acquired the title of executive vice-president of F.C. Industries, Inc., at the behest of Mr. Frank Curatola, when an additional name and title was required in filing the articles of incorporation for said entity.

4. Petitioner, for subject year, was concurrently employed as a salesman for both corporations. His primary function was to solicit orders for cellular cones manufactured by his employer which were used for partitions and skylights by builders engaged in the heavy construction industry. The time allocated to each principal was determined by the corporate officers on the basis of income generated by petitioner from each entity. Petitioner was prohibited by his principals from selling any other item(s), whether or not in competition with his principals product.

Petitioner was required to maintain regular working hours and could not take time off from work without company authority. His itinerary was arranged by both Mr. Frank Curatola and Mr. D.R. Beasley, president of Norfield Corporation.

The corporate officers selected the territory which they wanted petitioner to develop and the specific accounts which he was to concentrate upon. In

addition, petitioner was required to frequently report to officers of both entities for instruction. Petitioner was also required to attend regularly scheduled sales meetings, and on occasion, to attend conventions.

Both entities withheld income and social security taxes, maintained health insurance plans and paid unemployment insurance for petitioner.

Petitioner had the use of office space at both business locations. He also used a portion of the den in his home where he did miscellaneous clerical work for his employers.

Petitioner undertook to achieve an agreed result and to accept the directions of his employers as to the manner in which the result shall be attained.

5. Petitioner Betty Jane Burger, for subject year, was a housewife and had no separate income. She was not engaged in any business activity.

#### CONCLUSIONS OF LAW

A. That petitioner Robert Burger, although employed by two separate entities, the entities had common management and control, which jointly exercised direction and control over his selling activities. The petitioner Robert Burger was not free to allocate his time and effort among his principals as he saw fit. Further, he was prohibited by his employer(s) from taking on any other lines. Therefore, the earnings received by petitioner were for services rendered as an employee and are exempt from unincorporated business tax, in accordance with the meaning and intent of section 703(b) of the Tax Law.

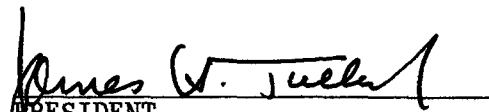
B. That the petition of Robert Burger and Betty Jane Burger is granted,

and the Notice of Deficiency issued on May 24, 1976 for unincorporated business tax is cancelled.

DATED: Albany, New York

OCT 17 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER