

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

John F. Freer :

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 1965-1968. :

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 5th day of September, 1980, he served the within notice of Decision by certified mail upon John F. Freer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John F. Freer  
183 Bathhurst Dr.  
Tonawanda, NY 14150

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  
5th day of September, 1980.

*Robert Bank*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

John F. Freer

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 1965-1968. :

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 5th day of September, 1980, he served the within notice of Decision by certified mail upon James F. Kogler 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. James F. Kogler  
Matter, Matter, D'Agostino & Kogler  
17 Court St.  
Buffalo, NY 14202

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  
5th day of September, 1980.

*Debbie Bank*

*J. Vredenburg*

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

September 5, 1980

John F. Freer  
183 Bathhurst Dr.  
Tonawanda, NY 14150

Dear Mr. Freer:

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  
James F. Kogler  
Matter, Matter, D'Agostino & Kogler  
17 Court St.  
Buffalo, NY 14202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
JOHN F. FREER	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1965, 1966, 1967 and 1968.	:	

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Petitioner, John F. Freer, 183 Bathhurst Drive, Tonawanda, New York 14150, 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 1965 through 1968 (File No. 11345).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, One West Genesee Street, Buffalo, New York, on November 1, 1979 at 9:15 A.M. Petitioner John F. Freer appeared with James F. Kogler, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the income received by petitioner from his activities as a mutual funds and life insurance sales manager was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, John F. Freer, filed joint New York State income tax resident returns with his spouse for 1965 through 1968. He did not file unincorporated business tax returns.

2. The Income Tax Bureau held petitioner's income from his activities as sales manager subject to unincorporated business tax for 1965 through 1968.

On May 24, 1971 the Income Tax Bureau issued a Notice of Deficiency against the petitioner for 1965 through 1968 imposing unincorporated business tax of \$930.34, plus penalty of \$232.58 (pursuant to section 685(a) of the Tax Law) and interest of \$180.24. On the notice, the Income Tax Bureau allowed a credit of \$21.00 for estimated tax not claimed on the petitioner's 1966 personal income tax return.

3. During the years at issue the petitioner was a salesman and district manager for the Investors Diversified Service, Inc. (hereinafter "IDS"). Petitioner worked under restrictive contracts for IDS. The contracts reported the petitioner to be an independent contractor. Several years prior to the years at issue, IDS and the American Life Insurance Company entered into an agreement wherein IDS representatives were allowed to sell life insurance for American Life Insurance Company. The purpose of this was to fully satisfy the customers of IDS since IDS only sold mutual funds. Petitioner was required to solicit new customers and service old customers. All applications for mutual funds and/or life insurance and checks received from customers had to be approved and processed through IDS. The petitioner was not allowed to place business with any other investment or insurance companies. During these years, at least seventy-five percent of petitioner's income came from IDS.

4. The petitioner was entitled to free office space at the Buffalo office of IDS. However, if the salesman had an office in his home, IDS would not compensate for that expense. The petitioner was required to attend regular sales meetings at the local office and was required to report weekly to the divisional office in person to file his reports. IDS had the right to transfer petitioner to any place where the company functioned.

5. Petitioner did not have any power on his own to hire or fire sales or other personnel working for IDS.

6. Petitioner, John F. Freer, was subject to IDS's established standards and was covered by IDS's profit sharing and medical plan.

7. IDS provided petitioner with office space, office supplies, equipment, telephone service and secretarial help at its place of business. Petitioner incurred home office expense, supplies and travel and entertainment expenses which the company would not reimburse him for.

9. During the years at issue petitioner was paid strictly on a commission basis with no withholding of payroll taxes.

10. All records and monies generated or received from petitioner's customers was the property of IDS.

CONCLUSIONS OF LAW

A. That although the agreement between petitioner and Investors Diversified Services, Inc. designated him as an independent contractor and he was treated as such for payroll purposes, petitioner was in fact an employee of said principal in accordance with the meaning and intent of section 703(b) of the Tax Law and his income derived therefrom was not subject to unincorporated business tax.

B. That the petition of John F. Freer is granted and the Notice of Deficiency issued May 24, 1971 is cancelled. The Audit Division is hereby directed to authorize a refund to petitioner and his spouse for \$21.00, together with such interest that may be lawfully owing.

DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER