

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Howard Grevelding :

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 1971 - 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 19th day of September, 1980, he served the within notice of Decision by certified mail upon Howard Grevelding, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


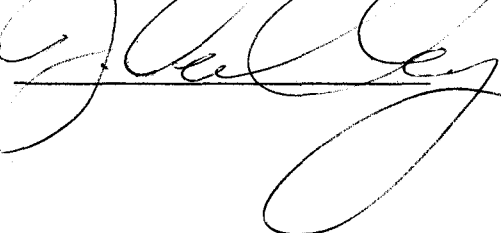
Howard Grevelding
117 W. Heman St.
E. Syracuse, NY 13057

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

19th day of September, 1980.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Howard Grevelding :
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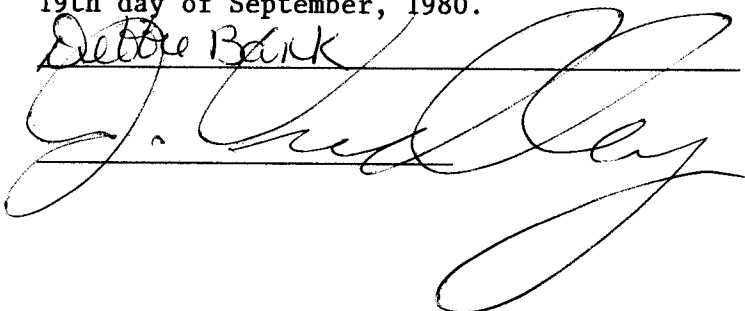
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of September, 1980, he served the within notice of Decision by certified mail upon Kenneth F. Kadish the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Kenneth F. Kadish
1650 One Lincoln Center
Syracuse, NY 13202

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
19th day of September, 1980.

Debbie Bank


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

September 19, 1980

Howard Grevelding
117 W. Heman St.
E. Syracuse, NY 13057

Dear Mr. Grevelding:

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
Kenneth F. Kadish
1650 One Lincoln Center
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HOWARD GREVELDING	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business Tax :	:	
under Article 23 of the Tax Law for the	:	
Years 1971, 1972 and 1973.	:	

Petitioner, Howard Grevelding, 117 West Heman Street, East Syracuse, New York 13057, 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 1971, 1972 and 1973 (File No. 15847).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on March 19, 1980 at 1:15 P.M. Petitioner, Howard Grevelding, appeared with Kenneth F. Kadish. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner performed services for Fruehauf Corporation during 1971 through 1973 as an employee or as an independent contractor.

FINDINGS OF FACT

1. Petitioner, Howard Grevelding, and Marion Grevelding, his wife, filed joint New York State income tax resident returns for 1971, 1972 and 1973. Petitioner, Howard Grevelding, reported his occupation as being "self-employed"; however, he did not file unincorporated business tax returns for said years.

2. The Audit Division contended that petitioner's activities as a spray painter constituted the carrying on of an unincorporated business, and that the income derived therefrom was subject to unincorporated business tax.

Accordingly, on May 24, 1976, the Audit Division issued a Notice of Deficiency for 1971, 1972 and 1973 in the amount of \$1,677.56 in unincorporated business tax, plus penalties of \$688.83 pursuant to sections 685(a)(1) and (2) of the Tax Law, and \$349.06 in interest, for a total due of \$2,715.45.

3. During the tax years in question, the petitioner worked for Fruehauf Corporation (hereinafter "Fruehauf") as a contract painter. Petitioner painted trucks and truck trailers at the Fruehauf Corporation in Syracuse, New York. Fruehauf supplied the petitioner with a place to work, all supplies needed to perform his task, paint equipment, and environmental safety equipment. Petitioner provided some of his own work clothing and small tools which is common within the trade.

4. Petitioner was required to report to work at Fruehauf from 8:00 A.M. to 4:30 P.M. daily and be available on Saturdays when necessary. Petitioner worked under the direct supervision and control of Fruehauf's service manager and shop superintendent. Petitioner was told which trucks were to be painted, the order in which they were to be done and the quality of work to be performed.

5. Petitioner does no advertising, has no business card or letterhead and does not engage in the solicitation of customers. Petitioner did not operate an independent painting business after working hours nor did petitioner own any painting equipment.

6. All trucks painted by petitioner belong to customers of Fruehauf and Fruehauf set the prices charged to its customers. Petitioner would only set the cost of his labor based on his expertise on how long the task would take him, times a predetermined hourly amount (this amount had been previously determined by petitioner and Fruehauf). This information (cost of petitioner's labor) was given to service manager to enable the service manager to give the customer a price. Fruehauf did not withhold Federal, State or local taxes from petitioner's pay.

CONCLUSIONS OF LAW

A. That although the mode of payment between the petitioner and Fruehauf Corporation would designate 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. That the control exercised by employer is of paramount importance in determining whether a taxpayer is employee or independent contractor (Matter of Greene v. Gallman, 39 A.D.2d, 270, 272, affd. 33 N.Y.2d 778), all facts and circumstances must, nevertheless, be evaluated in reaching a determination (Matter of Kent v. State Tax Commission, 55 A.D.2d 727). On the instant record there is substantial evidence that the employer controlled all facets and manner in which the petitioner performs his required tasks; therefore, Howard Grevelding is an employee for unincorporated business tax purposes and not subject to the unincorporated business tax.

B. That the petition of Howard Grevelding is granted and the Notice of Deficiency issued May 24, 1976 is cancelled.

DATED: Albany, New York

SEP 19 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER