

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
John Hoegerl (Deceased) :

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 & 1972. :

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon John Hoegerl (Deceased), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

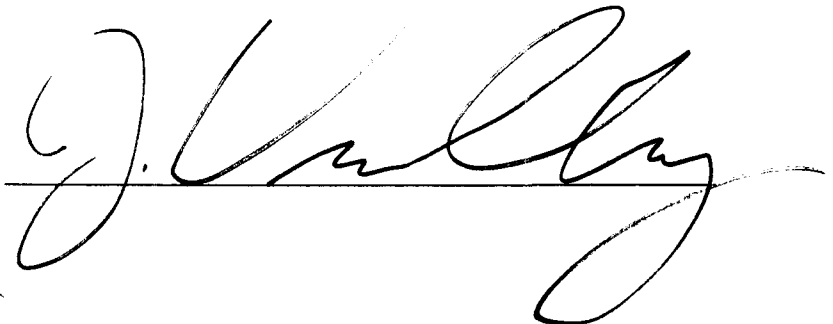
John Hoegerl (Deceased)  
87 Lamarck Dr.  
Snyder, NY 14226

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  
7th day of July, 1980.

Deborah A Bank



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
John Hoegerl (Deceased) :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Unincorporated Business Tax :  
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for the Years 1971 & 1972. :

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon John Marshall Gorman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

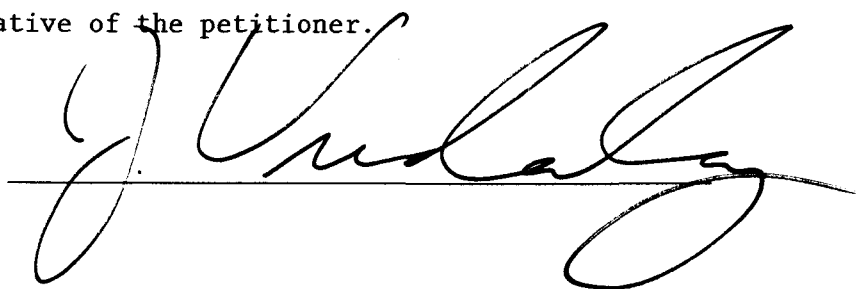
Mr. John Marshall Gorman  
Gorman & Marx  
One M and T Plaza, Rm. 1330  
Buffalo, NY 14203

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  
7th day of July, 1980.

Deborah A. Bank



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

July 7, 1980

John Hoegerl (Deceased)  
87 Lamarck Dr.  
Snyder, NY 14226

To the Executors:

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  
John Marshall Gorman  
Gorman & Marx  
One M and T Plaza, Rm. 1330  
Buffalo, NY 14203  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
JOHN HOEGERL (DECEASED)	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business Tax :	:	
under Article 23 of the Tax Law for the	:	
Years 1971 and 1972.	:	

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Petitioner, John Hoegerl (Deceased), 87 Lamarck Drive, Snyder, New York 14226, 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 and 1972 (File No. 13657).

On November 1, 1979, petitioner's representative, John Marshall Gorman, Esq., advised the State Tax Commission, in writing, that he desired to waive a small claims hearing and to submit the case to the State Tax Commission based on the entire record contained in the file.

ISSUE

Whether the petitioner's activities as a consultant were that of an employee or that of an independent contractor subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, John Hoegerl, and his wife, Marie C. Hoegerl, filed New York State income tax resident returns for 1971 and 1972. Petitioner did not file unincorporated business tax returns for said years.

2. On January 26, 1976, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, on which it contended that his consultant activities during the years at issue constituted the carrying on of an

unincorporated business. Accordingly, it issued a Notice of Deficiency against petitioner for 1971 and 1972 on January 26, 1976 in the amount of \$1,591.35 in unincorporated business tax, plus \$339.90 in interest, for a total of \$1,931.25.

3. Petitioner was employed by Haughton Elevator Company, a Division of Reliance Electric Company, without interruption, since 1921. During fifty years petitioner worked his way up from office boy to salesman, to service manager in Buffalo, to service manager in New York City, to District Manager in Buffalo, New York. By the first year herein at issue, petitioner had held the post of Buffalo District Manager since 1938. Petitioner was then seventy years old. There was a custom, or unwritten law, in the company that employees should retire at the age of 65. Since petitioner had passed that age but was still a vigorous and respected manager, petitioner's superiors suggested a nominal change in petitioner's status. Accordingly, a form of agreement was signed by petitioner and the company whereby petitioner would act as "consultant" for the company, would perform advisory services and would accept as full compensation for such services the sum of \$2,395.20 per month while the agreement was in effect. Petitioner agreed "not to directly or indirectly handle, deal, or become interested in the manufacture, marketing, selling or servicing of products which are similar in kind or character to those dealt in by Haughton."

The contract was dated February 15, 1971. Thereafter, petitioner continued to work for Haughton Elevator Company continuously and exclusively. The only change in practice was that petitioner would sign an "invoice" each month and receive a paycheck without withholding for taxes.

Petitioner's duties and responsibilities were the same as they were before 1971. Petitioner was still the Buffalo District Manager. Petitioner's territory still included all of Western and Central New York, from Buffalo as far east as Herkimer, and also Erie and other parts of Pennsylvania. Petitioner

was still in charge of the Haughton employees in Buffalo, two salesmen, two office girls, a construction superintendent and a service superintendent. Also under petitioner's orders were the employees in Rochester consisting of a branch manager, a service superintendent, a construction superintendent and one office girl, and the same kind of a staff in Syracuse.

Petitioner's duties were more than advisory. Petitioner was in charge of the negotiation, execution and performance of contracts for elevators, equipment and maintenance in the whole territory. At the same time, petitioner was under the direction and control of the officers of the Reliance Electric Company and the Haughton Division, whose offices were in Toledo, Ohio.

Petitioner's office was provided and paid for by Haughton, as was all secretarial service and other office expense. The Company furnished a car for petitioner's exclusive use and paid for all maintenance, except that petitioner paid for gasoline used on any pleasure trip. Other travel allowances were paid by the Company for which petitioner submitted monthly vouchers.

The Company paid for a share of petitioner's Group Health and Life Insurance premiums in the same manner as was done before 1971. The Company paid the petitioner's dues as its representative in the Buffalo Executives Association and in the Construction Specification Institute.

After February 15, 1971, petitioner worked full time for Haughton Elevator Company. Petitioner performed services for no other company or person. Petitioner continued as Buffalo District Manager until December 1, 1975, when petitioner was moved to the position of New York District Manager of Haughton Elevator Company where petitioner was then employed and performed the same kind of job.

4. The agreement between petitioner and company reads in part:

"1. RETAINER. HAUGHTON does hereby retain CONSULTANT as an independent sales and technical advisor and consultant in connection with any matters relating to the manufacture, construction, sale, distribution, or servicing of elevators within the market area described in Exhibit A hereto; and CONSULTANT does hereby accept such engagement."

5. Petitioner described his occupation on his 1972 New York State Income Tax Resident Return as a "consultant". Petitioner also reported the disputed income as "business income" on schedule A of the New York State income tax resident returns for 1971 and 1972.

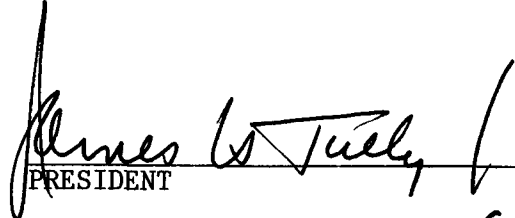
CONCLUSIONS OF LAW

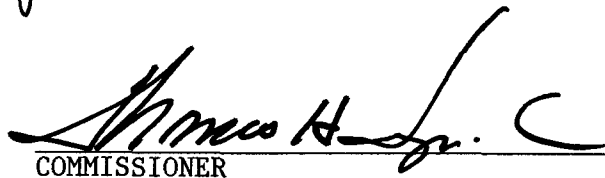
A. That although the agreement between petitioner and Reliance Electric Company, Haughton Elevator Division designated him as an "independent consultant" and he was treated as such for payroll purposes, petitioner was in fact an employee of said principal in accordance with the meaning and intent of section 703(b) of the Tax Law and his income derived therefrom was not subject to unincorporated business tax.

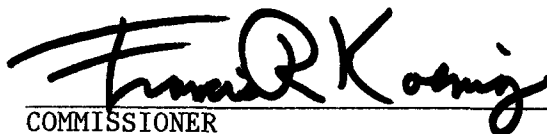
B. That the petition of John Hoegerl (Deceased) is granted and the Notice of Deficiency issued on January 26, 1976 is cancelled.

DATED: Albany, New York  
JUL 07 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER