

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Michael P. Spiegler :

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 14th day of November, 1980, he served the within notice of Decision by certified mail upon Michael P. Spiegler, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael P. Spiegler  
1 Hilltop Ln.  
Oyster Bay, NY 11771

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  
14th day of November, 1980.

*Deborah A. Bank*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Michael P. Spiegler :

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

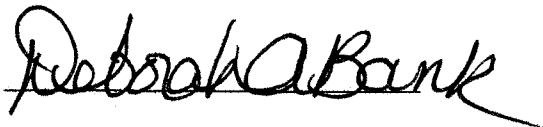
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of November, 1980, he served the within notice of Decision by certified mail upon Theodore Mate the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

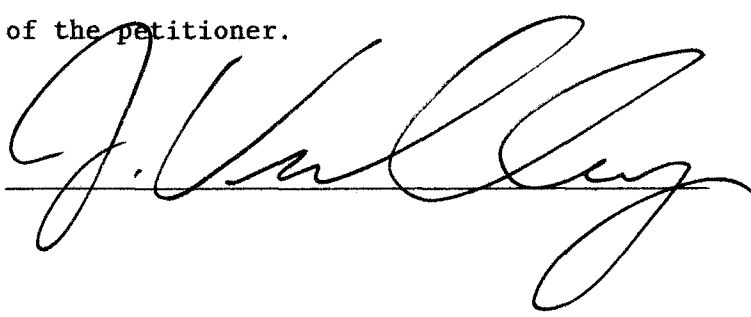
Mr. Theodore Mate  
570 7th Ave.  
New York, NY 10018

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  
14th day of November, 1980.





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

November 14, 1980

Michael P. Spiegler  
1 Hilltop Ln.  
Oyster Bay, NY 11771

Dear Mr. Spiegler:

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  
Theodore Mate  
570 7th Ave.  
New York, NY 10018  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition  
of  
MICHAEL P. SPIEGLER  
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. :

---

DECISION

Petitioner, Michael P. Spiegler, 1 Hilltop Lane, Oyster Bay, New York 11771, 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. 20626).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 13, 1980 at 1:15 P.M. Petitioner appeared with Theodore Mate, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the activities engaged in by petitioner as a salesman constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Petitioner, Michael P. Spiegler, timely filed joint New York State income tax resident returns with his wife for the years 1971 and 1972, whereon he reported commission income derived from his activities as a salesman. He did not file an unincorporated business tax return for either year at issue.

2. On September 26, 1977, the Audit Division issued a Statement of Audit Changes to petitioner wherein it held that the income from his "activities as

a salesman is subject to the unincorporated business tax". Additionally, adjustments were made to business expenses claimed for each year at issue as the result of a Federal audit, but since said adjustments were not contested, they are not at issue herein. Accordingly, a Notice of Deficiency was issued against petitioner on September 26, 1977 asserting unincorporated business tax of \$2,735.96, plus interest of \$902.10, for a total due of \$3,638.06.

3. Petitioner contended that he was a bona fide employee, and as such, the income derived from his sales activities is exempt from the imposition of unincorporated business tax.

4. During the years at issue, petitioner was a jeans salesman for the Hillbilly Jr. Division of Omnico (previously known as Gay Togs). When not on the road, he was required to report to the company's showroom by 9:30 A.M., where he remained until approximately 5:30 P.M. He was required to report to his supervisor on a daily basis. His territory consisted of New York City, Long Island and New Jersey. While on the road (approximately two days per week and usually not overnight) he visited stores which were specified by his supervisor. He was required to prepare activity sheets and had a production quota which he was required to fulfill. Additionally, he was required to attend periodic trade shows.

5. Petitioner, who was compensated on a 6 percent commission basis, was prohibited from selling for any other principals. He was not reimbursed for ordinary and necessary business expenses incurred since the company felt that the commission rate paid was sufficiently high enough for petitioner to personally pay for such expenses.

6. Petitioner's compensation was reported on a U.S. information return, form 1099, rather than a Wage and Tax Statement, form W-2. Income and social security taxes were not withheld from his compensation. He did not receive a

regular paid vacation and was not covered under a company established pension plan.

CONCLUSIONS OF LAW

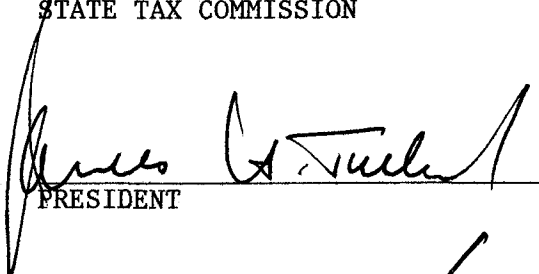
A. That petitioner's principal exercised sufficient direction and control over his daily activities so as to constitute a bona fide employer-employee relationship. Accordingly, petitioner's activities as a salesman constituted services as an employee pursuant to section 703(b) of the Tax Law. As such, the income derived therefrom is exempt from the imposition of unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

B. That the petition of Michael P. Spiegler is granted and the Notice of Deficiency dated September 26, 1977 is hereby cancelled.

DATED: Albany, New York

NOV 14 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER