

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Theodore R. Guenther

:

:

: 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 1976.

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 June, 1981, he served the within notice of Decision by certified mail upon Theodore R. Guenther, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Theodore R. Guenther  
444 East 86th St.  
New York, NY 10028

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 June, 1981.

*Anne A. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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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 June, 1981, he served the within notice of Decision by certified mail upon Maurice S. Kalker 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. Maurice S. Kalker  
London and Kalker  
401 Seventh Ave.  
New York, NY 10001

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 June, 1981.

*Cornie A. Hagelund*

*J. Vredenburg*

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

June 19, 1981

Theodore R. Guenther  
444 East 86th St.  
New York, NY 10028

Dear Mr. Guenther:

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  
Maurice S. Kalker  
London and Kalker  
401 Seventh Ave.  
New York, NY 10001  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
THEODORE R. GUENTHER  
for Redetermination of a Deficiency or  
for Refund of Unincorporated Business  
Tax under Article 23 of the Tax Law for  
the Year 1976.

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DECISION

Petitioner, Theodore R. Guenther, 444 East 86th Street, New York, New York 10028, 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 1976 (File No. 25029).

A formal hearing was held before Gasper S. Fasullo, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 5, 1980 at 9:15 A.M. Petitioner appeared by Maurice S. Kalker, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioner's business activities as a sales engineer constituted the carrying on of an unincorporated business during the year 1976.

FINDINGS OF FACT

1. Petitioner, Theodore R. Guenther, and his wife, Greta T. Guenther, filed a joint New York State income tax resident return for the year 1976. Petitioner did not file an unincorporated business tax return for that year.

2. On August 31, 1978, the Audit Division issued a Statement of Audit Changes against petitioner proposing unincorporated business tax on petitioner's

1976 income in the sum of \$6,231.67 plus an addition to tax pursuant to sections 685(a)(1) and (a)(2) of the Tax Law in the sum of \$1,931.83, for a total due in the sum of \$8,893.48, on the ground that petitioner's sales activities for that year constituted the carrying on of an unincorporated business.

3. On December 15, 1978 the Audit Division issued a Notice of Deficiency against petitioner for the year 1976 imposing unincorporated business tax against petitioner in the amount of \$6,231.67, plus penalty and/or interest in the sum of \$2,940.28, for a total due in the sum of \$9,171.95.

4. During the year 1976 petitioner was sales engineer for Atlantic Steel Corp., selling technical steel products for all kinds of mining in the United States, Africa and other parts of the world. Petitioner was paid on a commission basis.

5. Schedule C of petitioner's United States Income Tax Return for the year 1976 discloses that petitioner's gross commissions from sales for that year amounted to \$192,701 from which he deducted \$68,208 in business expenses. Included are expenses for air and railroad fare, auto rental, hotels, food, entertainment, telephone, cables, secretarial, agency representation, advertising, etc.

6. Petitioner paid fees to persons who suggested possible sources of sales. For the year 1976 petitioner paid fees in the sum of \$5,000 for such information.

7. The petitioner was not reimbursed by Atlantic Steel Corp. for any of the aforesaid business expenses set forth in paragraphs "5" and "6" above.

8. Instead of a W-2 form furnished to employees, Internal Revenue Service form 1099-MISC is attached to petitioner's 1976 income tax return. Said form

sets forth the amount of \$192,701.53 received by petitioner from Atlantic Steel Corp. as "commissions and fees (paid) to non-employees" (emphasis added).

9. Atlantic Steel Corp. did not pay or deduct for unemployment insurance, disability benefits, withholding taxes or social security.

10. Petitioner had no written contract with Atlantic Steel Corp.

11. Petitioner had a "Keogh" self-employment retirement plan during the year 1976.

CONCLUSIONS OF LAW

A. That the income received by petitioner, Theodore R. Guenther, from Atlantic Steel Corp. during 1976 constituted income from his regular business of selling. It did not constitute compensation as an employee within the meaning of section 703(b) of the Tax Law.

B. That the aforesaid activities of petitioner during 1976 constituted the carrying on of an unincorporated business, within the meaning of section 703 of the Tax Law; thus, the income derived therefrom is subject to unincorporated business tax.

C. That the petition of Theodore R. Guenther is denied and the Notice of Deficiency issued on December 15, 1978 is sustained, together with such additional interest as may be lawfully due.

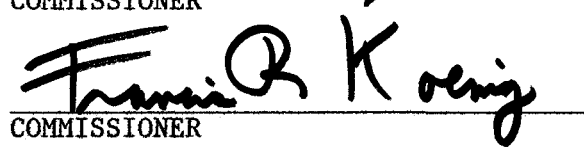
DATED: Albany, New York

JUN 19 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227



☐ Moved, tell us address

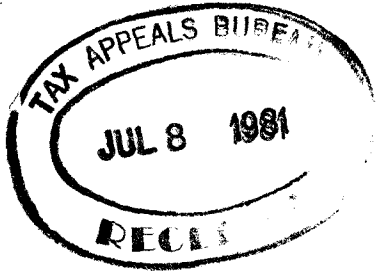
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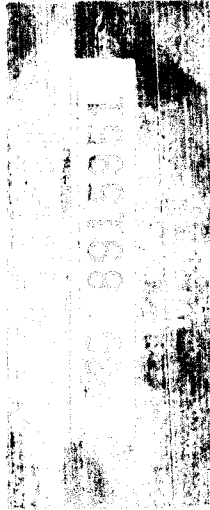
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NEW YORK, N. Y. 10028

Theodore R. Guenther  
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New York, NY 10028



*Remailed  
NOV 06 1981*



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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  
6th day of November, 1981.

*Connie R. Haglund*

*J. Vredenburg*



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