

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Jerome Kramer :  
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 1966-1973. :

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AFFIDAVIT OF MAILING

State of New York  
County of Albany

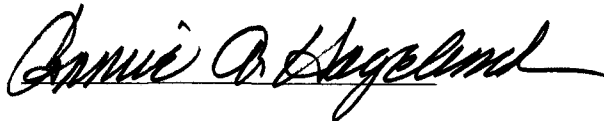
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Jerome Kramer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

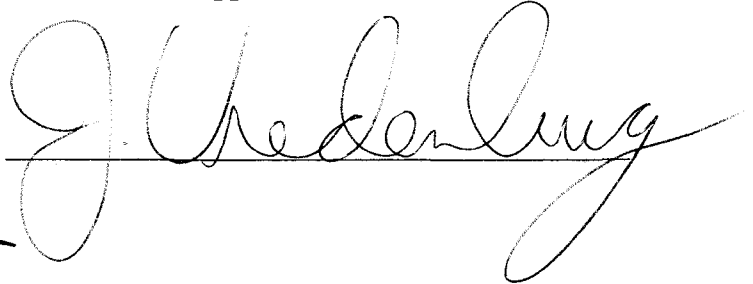
Jerome Kramer  
515 Bernita Dr.  
Rivervale, NJ 07675

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  
27th day of November, 1981.





STATE OF NEW YORK  
STATE TAX COMMISSION

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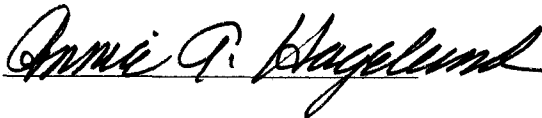
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Eugene V. Weissman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

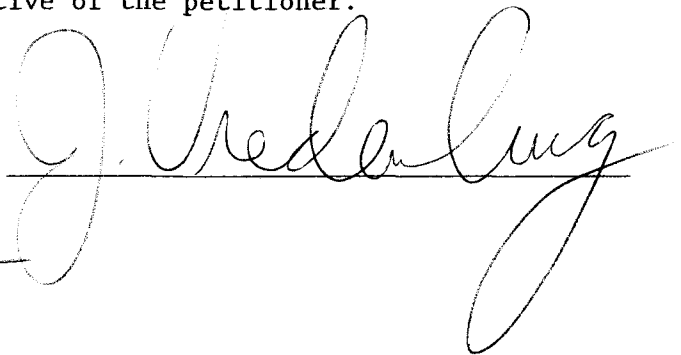
Eugene V. Weissman  
Krakower & Weissman  
477 Madison Ave.  
New York, NY 10022

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  
27th day of November, 1981.

  
Annie P. Haglund

  
Jay Vredenburg

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

November 27, 1981

Jerome Kramer  
515 Bernita Dr.  
Rivervale, NJ 07675

Dear Mr. Kramer:

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  
Eugene V. Weissman  
Krakower & Weissman  
477 Madison Ave.  
New York, NY 10022  
Taxing Bureau's Representative

## STATE TAX COMMISSION

1. Petitioner, Jerome Kramer, timely filed joint New York State income tax resident returns with his wife for the years 1966, 1967 and 1968. For the years 1969 through 1973, he timely filed New York State combined income tax returns. On each of said returns, with the exception of that filed for 1973, petitioner reported wage income. Additionally, on each of said returns,

petitioner reported business income from activities variously described as "outside salesman" (1967 and 1968), and "mfgs. representative" (1970, 1971, 1972 and 1973). Petitioner did not file an unincorporated business tax return for any of said years at issue.

2. On January 24, 1977, the Audit Division issued two statements of audit changes to petitioner. One held that the income (total of wages and business income reported) derived from petitioner's activities during the years 1966, 1967, 1968 and 1969 was subject to the unincorporated business tax, while the other held similarly for the years 1970, 1971, 1972 and 1973. Such statements were issued "based on the decision of the State Tax Commission dated January 31, 1974 for the tax years 1962, 1963, 1964 and 1965." Accordingly, two notices of deficiency were issued under the same date. One asserted unincorporated business tax of \$2,419.73 for the years 1966, 1967, 1968 and 1969, plus interest of \$1,184.62, for a total due for such period of \$3,604.35; while the other asserted unincorporated business tax of \$5,123.30 for the years 1970, 1971, 1972 and 1973, plus interest of \$1,408.12, for a total due of \$6,531.42.

3. During the years at issue, petitioner was a giftware salesman, representing Haeger Potteries, Inc., its affiliate, Royal Haeger Lamp Co. and Harris and Mallow Products, Inc. He contended that he was a bona fide employee of said principals since he was under their complete supervision with respect to his activities.

4. In the late 1950's, petitioner began working for Harris and Mallow Products, Inc. (Harris and Mallow), a manufacturer of decorative wall clocks, whose main office was located in New Jersey. His assigned territory consisted of metropolitan New York, New Jersey and parts of eastern Pennsylvania. He sold to retail stores and was compensated on a commission basis. He was not

reimbursed for his selling expenses incurred since his rate of commission was considered adequate for him to personally incur such expenses.

5. Petitioner worked from his home, where he had space set aside for record keeping and the storing of samples. He personally prepared his itinerary, which had to be planned around certain "target accounts" specified by Harris and Mallow.

6. Harris and Mallow required petitioner to:

- (a) Report on his activities several times per week.
- (b) Meet an established sales quota.
- (c) Attend conventions.
- (d) Attend all sales meetings, which were generally held at the rate of two or three per month.
- (e) Attend many new product seminars where instruction was regularly given on technical information of new products, and
- (f) Produce new customers in addition to those given by the company.

7. Harris and Mallow provided petitioner with medical coverage and a hospitalization plan. Around 1973, when Harris and Mallow became a division of Thomas Industries, Inc., petitioner was covered under a plan entitled "Weekly Salaried Employees' Benefits".

8. Harris and Mallow did not withhold income taxes from petitioner's compensation.

9. During the years at issue, petitioner also represented the Haeger Potteries, Inc., a manufacturer of ceramic giftware, located in Dundee, Illinois. A nominal amount of income was also derived from their affiliate, Royal Haeger Lamp Co.

10. The Haeger Potteries, Inc. (Haeger) assigned petitioner a territory consisting solely of eastern Pennsylvania.

11. Haeger compensated petitioner on a commission basis which was sufficiently high enough for him to personally pay for his own selling expenses.

12. Haeger covered petitioner under a medical plan and workmen's compensation. Additionally, it provided life insurance coverage for petitioner.

13. Haeger required petitioner to attend sales meetings.

14. A letter from Haeger dated October 29, 1968, which was received in evidence, states that:

- (a) Haeger considers "Mr. Kramer an employee" since January, 1959.
- (b) Haeger sets up selling schedules and quotas for petitioner.
- (c) Petitioner is required to report on and meet all selling plans, and
- (d) Haeger allows petitioner to represent only one other company.

15. Haeger withheld Federal income taxes and social security taxes from petitioner's compensation, but did not withhold New York State income taxes.

16. Petitioner contended that his method of operation for Haeger was essentially the same as that for Harris and Mallow.

17. Both Haeger and Harris and Mallow maintained showrooms in New York City.

18. Petitioner had no employees during the years at issue.

19. Both Haeger and Harris and Mallow were aware of, and gave approval for petitioner to represent the other company.

20. Petitioner filed an unincorporated business tax return for 1962. He contended that during such year he was employed by his brother and that since his brother's income was subject to unincorporated business tax, his brother's accountant (who also prepared petitioner's return) assumed that his income was similarly subject. Petitioner contended that since no tax was due he did not question it.

21. Petitioner contended that an adverse State Tax Commission decision on this issue for the years 1962, 1963, 1964 and 1965 was erroneous and lacking in

factual information since he did not testify during the hearing conducted for said years.

22. The record does not indicate that the Audit Division conducted an audit, examination, inquiry or interview for the purpose of ascertaining facts relating to petitioner's business activities during the years 1966 through 1973.

CONCLUSIONS OF LAW

A. That the issuance of two notices of deficiency for the years 1966 through 1969 and 1970 through 1973, based solely on a decision containing facts and conclusions pertaining to the years 1962 through 1965, is arbitrary, capricious, and contrary to the meaning and intent of sections 681(a) and 697(b) of the Tax Law (Petition of Ralph Dolgoff, N.Y.S.T.C., October 3, 1980).

B. That petitioner's sales activities during the years at issue constituted services rendered as an employee within the meaning and intent of section 703(b) of the Tax Law and 20 NYCRR 203.10. Accordingly, the income derived therefrom is not subject to the imposition of unincorporated business tax.

C. That the petition of Jerome Kramer is granted and the two notices of deficiency, each dated January 24, 1977, are hereby cancelled.

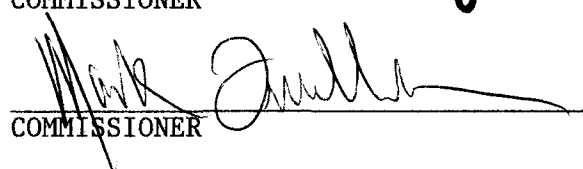
DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER