

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Seymour Scherzer :

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 1968 - 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 23rd day of January, 1981, he served the within notice of Decision by certified mail upon Seymour Scherzer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Seymour Scherzer  
91 Beacon Hill Dr.  
Dobbs Ferry, NY 10522

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  
23rd day of January, 1981.

*Connie Q. Hageland*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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Unincorporated Business Tax :

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for the Years 1968 - 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 23rd day of January, 1981, he served the within notice of Decision by certified mail upon Mark L. Friedman 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. Mark L. Friedman  
Goidel, Goidel & Helfenstein  
96 Fulton St.  
New York, NY 10038

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

23rd day of January, 1981.

*Connie P. Hegeland*

*J. Vredenburg*

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

January 23, 1981

Seymour Scherzer  
91 Beacon Hill Dr.  
Dobbs Ferry, NY 10522

Dear Mr. Scherzer:

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  
Mark L. Friedman  
Goidel, Goidel & Helfenstein  
96 Fulton St.  
New York, NY 10038  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
Of	:	
SEYMOUR SCHERZER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1968,	:	
1969, 1970, 1971, 1972 and 1973.	:	

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Petitioner, Seymour Scherzer, 91 Beacon Hill Drive, Dobbs Ferry, New York 10522, 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 1968, 1969, 1970, 1971, 1972 and 1973 (File Nos. 18297 and 19178).

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 June 23, 1980 at 9:15 A.M. Petitioner appeared with Mark Friedman, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the income derived from petitioner's activities as a manufacturer's representative is subject to the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Seymour Scherzer, timely filed a joint New York State Income Tax Resident Return with his wife, Florence Scherzer, for the year 1968. For each of the years 1969 through 1973 he timely filed a New York State Combined Income Tax Return. On all said returns petitioner listed his occupation as "self" (which he stated signified self-employed) and reported business income from his activities as a "manufacturer's representative". Petitioner did not file an unincorporated business tax return for any of said years at issue.

2. On October 25, 1973, the Audit Division issued a Statement of Audit Changes to petitioner for the years 1968, 1969 and 1970, wherein it held that, "...income earned as manufacturer's representative is subject to unincorporated business tax". Accordingly, a Notice of Deficiency was issued against petitioner on May 23, 1977 asserting unincorporated business tax of \$1,539.81, penalties, for 1968 pursuant to section 685(a) then in effect and for 1969 and 1970 pursuant to sections 685(a) (1) and 685(a) (2) of \$627.55, for failure to file unincorporated business tax returns and failure to pay the tax determined to be due respectively, plus interest of \$649.07, for a total due of \$2,816.43.

3. On December 3, 1976 the Audit Division issued a Statement of Audit Changes to petitioner wherein it held that the income derived from his activities was subject to unincorporated business tax for the years 1971, 1972 and 1973. Accordingly, a Notice of Deficiency was issued against petitioner for said years on March 28, 1977 asserting unincorporated business tax of \$2,541.10, plus interest of \$679.69, for a total due of \$3,220.79.

4. During the years at issue, petitioner was a manufacturer's representative and national sales manager for Jaclo, Inc., a New York manufacturer of plumbing supplies. Petitioner's sales territory consisted of metropolitan New York, Nassau, Suffolk and Westchester counties. He was restricted to selling solely to wholesale plumbing and heating supply companies.

5. Petitioner was compensated solely on a commission basis which he testified was paid at a rate which was sufficiently high to cover the bulk of business expenses he incurred.

6. In his capacity as manufacturer's representative, petitioner planned his own itinerary and worked from an office which he maintained in his personal residence.

7. In order to expedite service, petitioner leased a warehouse which he stocked with Jaclo, Inc.'s products. Petitioner testified that Jacklo, Inc. paid for the rental of said warehouse.

8. Jaclo, Inc. did not withhold income or social security taxes from petitioner's compensation. Further, Jaclo, Inc. did not cover petitioner for pension, disability or workmen's compensation benefits.

9. As national sales manager for Jaclo, Inc., petitioner was responsible for the hiring and firing of other manufacturer's representatives. He was required to attend trade shows (For which his expenses were reimbursed) and hold meetings with his subordinates.

10. Petitioner used two business cards in connection with his activities for Jaclo, Inc. The card used for soliciting sales in his capacity as a manufacturer's representative, listed petitioner's name, home address and home telephone number. No reference was made to Jaclo, Inc. The card petitioner used in his capacity as sales manager listed the company's name and address and petitioner as sales manager.

11. During the years at issue, petitioner also sold non-competitive plumbing supplies for several other companies. He contended that he represented three or four other principals during each year at issue and solicited such business through his regular Jaclo, Inc. customers. He contended that seventy to eighty percent of his income was derived from selling Jaclo, Inc. products.

12. Petitioner contended that his activities for all principals during each year at issue constituted services rendered under bona fide employer-employee relationships, and as such, his income derived therefrom is exempt from the imposition of unincorporated business tax.

13. Each year petitioner reported his income derived from his sales activities on a Federal "Schedule C". Furthermore, he paid social security self-employment tax.

14. Although petitioner was allowed sufficient time to submit a breakdown of income derived from all principals during each year at issue, he failed to do so.

CONCLUSIONS OF LAW

A. That an insufficient degree of direction and control was exercised by Jaclo, Inc. and petitioner's other principals, over his activities, to constitute a bona fide relationship of employer-employee. This, coupled with the fact that there was no clear division of time and effort expended by petitioner in his activities engaged in for his principals, leads to the conclusion that petitioner's activities were those of an independent contractor rather than an employee. Accordingly, such activities constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law, and the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701 of the Tax Law.

B. That the petition of Seymour Scherzer is denied and the notices of deficiency dated May 23, 1977 and March 28, 1977 are sustained together with such additional penalties and interest as may be lawfully owing.

DATED: Albany, New York

JAN 23 1981

STATE TAX COMMISSION

*Kenneth A. Tuohy*  
PRESIDENT

*Thomas H. J. C.*  
COMMISSIONER

*Francis Q. Koenig*  
COMMISSIONER