

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Robert Freeman

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 1975 - 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 4th day of June, 1982, he served the within notice of Decision by certified mail upon Robert Freeman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Freeman
34 Bonnie Dr.
Westbury, NY 11590

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
4th day of June, 1982.

Conrad G. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

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Robert Freeman :

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for Redetermination of a Deficiency or a Revision :
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Business Tax under Article 23 of the Tax Law for :
the Years 1975 - 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 4th day of June, 1982, he served the within notice of Decision by certified mail upon Lawrence S. Zeff the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence S. Zeff
21 Holly Lane
Jericho, NY 11753

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
4th day of June, 1982.

Bernie A. Hagelund

J. Vredenburg

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

June 4, 1982

Robert Freeman
34 Bonnie Dr.
Westbury, NY 11590

Dear Mr. Freeman:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Lawrence S. Zeff
21 Holly Lane
Jericho, NY 11753
Taxing Bureau's Representative

STATE TAX COMMISSION

1. Petitioner, Robert Freeman filed unincorporated business tax returns for Robert Freeman-Special, a sole proprietorship, for subject years.

2. On February 7, 1979, the Audit Division issued a Notice of Deficiency, against petitioner asserting unincorporated business tax of \$4,821.14 plus interest of \$978.62 for a total of \$5,799.71. The Notice of Deficiency was based on a Statement of Audit Changes dated September 14, 1978 wherein as a result of a field audit it was determined that petitioner's activities for MBR Produce Corporation, RMD Produce Corporation and Robert Freeman Produce Corporation were performed in furtherance of his unincorporated business and, therefore, petitioner's salaries from these corporations was subject to unincorporated business tax.

3. Petitioner's unincorporated business known as Robert Freeman-Special (hereinafter "Special") was engaged principally in selling fruit and produce consigned to it by farmers and cooperatives for which it received commissions. Rarely did it make purchases for its own account.

Petitioner had no specific duties nor performed any sales or purchasing function for Special. Petitioner's sole contribution to Special consisted in financing its operations.

Special's day to day operations were conducted by its sole employee, who received a fixed salary plus an equal share of the net profits. Losses of Special, were borne solely by petitioner.

4. MBR Produce Corporation's (hereinafter "Corporation #1") principal business activity is to purchase fruit and produce directly for retailers for a fee. In some instances, Corporation #1, purchased merchandise for its own account and sold such merchandise to the retailers.

Corporation #1 was founded by petitioner and two unrelated parties who each own a one third interest in its outstanding capital stock.

Petitioner's duties for Corporation #1 consisted primarily of contacting retailers on a daily basis for the purpose of taking orders for fruit and produce.

5. RMD Produce Corporation's (hereinafter "Corporation #2"), principal business activity consisted of purchasing fruit and produce from wholesalers which it then sold to retailers. Corporation #2 was founded by petitioner and two unrelated parties who each own a one third interest in its outstanding capital stock.

Petitioner's principal duty for Corporation #2 was the day to day purchasing of fruits and produce.

6. Robert Freeman Produce Corporation's (hereinafter "Corporation #3") principal business activity consisted of purchasing fruits and produce for its own account which it then sold to retailers. Petitioner is the sole shareholder of Corporation #3.

7. Each of the foregoing entities employs its own bookkeeper to maintain its separate books and records as well as separate bank accounts.

8. Corporations 1, 2, and 3 withheld Federal, New York State and social security taxes from the compensation paid to petitioner.

CONCLUSIONS OF LAW

A. That the services rendered by petitioner Robert Freeman for Corporations 1, 2 and 3 were independent of, and not in furtherance of his unincorporated consignment business so as to constitute part of a business regularly carried on by him. Therefore, the salaries received by petitioner for services rendered as an employee of said corporations are exempt from unincorporated business tax in accordance with the meaning and intent of section 703 subdivision (b) of the Tax Law which provides, in relevant part, that:

"The performance of services by an individual as an employee or... officer... of a corporation... shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual."

In Matter of Naroff v. Tully, 55 A.D.2d 775, the court held:

"The clear purpose of the proviso in subdivision (b) is to prevent an individual entrepreneur from sheltering the unincorporated business tax income which derives from the conduct of his unincorporated business in the form of salaries for services as an employee or officer of the corporate entities, in a situation where the corporate entities exist primarily to advance the business purposes of the unincorporated entity and do not have an independent and unrelated business purpose."

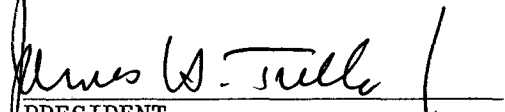
B. That the services rendered by petitioner for subject years as an employee of Corporations 1, 2 and 3, were not so interrelated and integrated with his unincorporated business activities as to constitute part of a business regularly carried on by him and, therefore, the salary received from said corporations is not subject to unincorporated business tax.

C. That the petition of Robert Freeman is granted and the Notice of Deficiency issued February 7, 1979 is hereby cancelled.


DATED: Albany, New York

JUN 04 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER