

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Edward Goldfeder

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 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 6th day of October, 1982, he served the within notice of Decision by certified mail upon Edward Goldfeder, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward Goldfeder
67-04 185th St.
Flushing, NY 11365

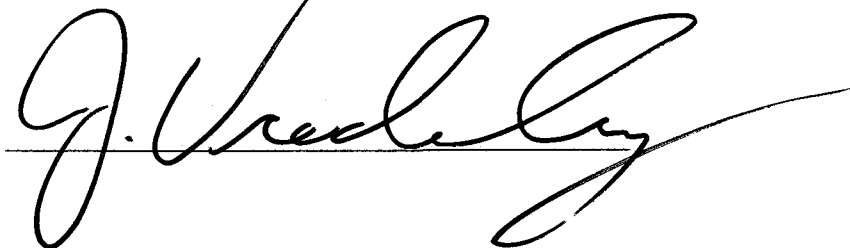
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
6th day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

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In the Matter of the Petition
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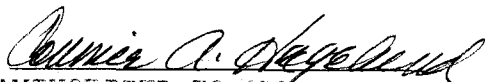
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Charles Wasserman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

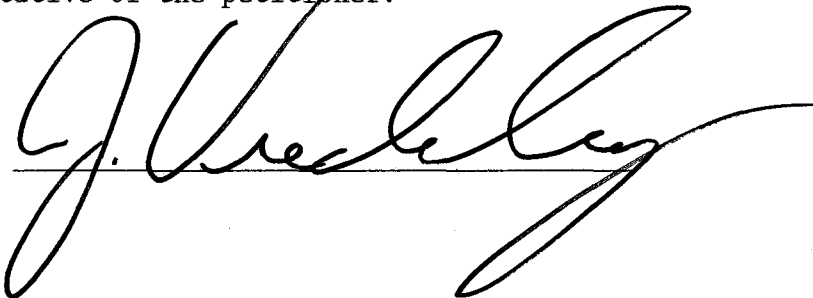
Charles Wasserman
320 Northern Blvd., Rm. 12
Great Neck, NY 11020

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
6th day of October, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

October 6, 1982

Edward Goldfeder
67-04 185th St.
Flushing, NY 11365

Dear Mr. Goldfeder:

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
Charles Wasserman
320 Northern Blvd., Rm. 12
Great Neck, NY 11020
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
EDWARD GOLDFEDER
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1973.

DECISION

Petitioner, Edward Goldfeder, 67-04 185th Street, Flushing, New York 11365, 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 1973 (File No. 29389).

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 September 25, 1981 at 2:45 P.M. Petitioner appeared with Charles Wasserman. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether petitioner's sales activities during the year 1973 constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Edward Goldfeder (hereinafter petitioner) filed a joint New York State Income Tax Resident Return with his wife for the year 1973, whereon he reported "business income" of \$29,366.49 derived from his activities as a sales representative. He did not file an unincorporated business tax return for said year.

2. On March 11, 1977 the Audit Division issued a Statement of Audit Changes to petitioner wherein it held that the income derived from his "activities

as a sales representative is subject to the unincorporated business tax". Accordingly, a Notice of Deficiency was issued against petitioner on January 30, 1980 asserting unincorporated business tax of \$1,065.16, plus penalties and interest of \$877.95, for a total due of \$1,943.11. Said penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to file an unincorporated business tax return and failure to pay the tax determined to be due, respectively.

3. During 1973 petitioner was engaged in selling photographic equipment and supplies for four unaffiliated principals. His major principals were Coast Photo Mfg. Co., Inc. (Coast), a manufacturer of photographic equipment bags and Unicolor, a manufacturer of photographic chemistry, film and paper. Gross income of \$41,880.54 was derived by petitioner from his sales activities during 1973. Of said amount, \$24,083.25 was derived from Coast and \$10,402.28 was derived from Unicolor. Ninety percent of petitioner's time was spent with respect to activities engaged in on behalf of Coast.

4. Petitioner was compensated on a commission basis. The territory he covered for each of his principals was comprised of Manhattan, Westchester, Bronx and Staten Island. Petitioner sold merchandise of more than one principal to several of his accounts.

5. Petitioner began his affiliation with Coast in 1972 and was given training courses. Although he attended trade shows, he was not required to attend sales meetings.

6. Coast instructed petitioner when and how often to visit his accounts and required petitioner to prepare an itinerary.

7. Coast covered petitioner for workmen's compensation.

8. None of petitioner's principals withheld New York State income tax from his compensation, reimbursed him for business expenses incurred, paid him for sick leave time or provided him with pension or health insurance benefits.

9. Petitioner reported the income derived from his sales activities on a Federal Schedule C, "Profit (or Loss) From Business or Profession".

10. Petitioner's "working hours were his own".

11. While rendering testimony, petitioner described himself as an "independent representative" for Coast.

12. Petitioner filed a New York State Unincorporated Business Tax Return for 1972 and paid the tax stated thereon, however, he claimed such filing was erroneous.

13. Although petitioner contended that he was an employee of all his principals, no evidence, documentary or otherwise, was introduced with respect to the nature and degree of direction and control exercised over his activities by principals other than Coast.

14. Petitioner established that the return at issue was not filed based on the advice of his accountant.

CONCLUSIONS OF LAW

A. That petitioner, Edward Goldfeder, has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that any of his principals exercised direction and control over his activities to a degree sufficient for the existence of a bona fide relationship of employer-employee. Accordingly, petitioner was not an employee of any of his principals during the year 1973 within the meaning and intent of section 703(b) of the Tax Law.

B. That petitioner's sales activities engaged in during the year 1973 constituted the carrying on of an unincorporated business pursuant to section

703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701 of the Tax Law.

C. That petitioner's failure to file an unincorporated business tax return for the year 1973 was due to reasonable cause rather than willful neglect. Accordingly, the penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are hereby cancelled pursuant to the provisions of said sections.

D. That the petition of Edward Goldfeder is granted to the extent provided in Conclusion of Law "C" supra, and except as so granted, said petition is, in all other respects denied.

E. That the Audit Division is hereby directed to modify the Notice of Deficiency dated January 30, 1980 to be consistent with the decision rendered herein.

DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER