

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Peter Scher

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 1969 - 1974. :

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 August, 1982, he served the within notice of Decision by certified mail upon Peter Scher, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter Scher
90-17 68th Ave.
Forest Hills, NY 11950

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 August, 1982.

Bernice A. Dependent

J. Vredenburg

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Herbert Grodin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

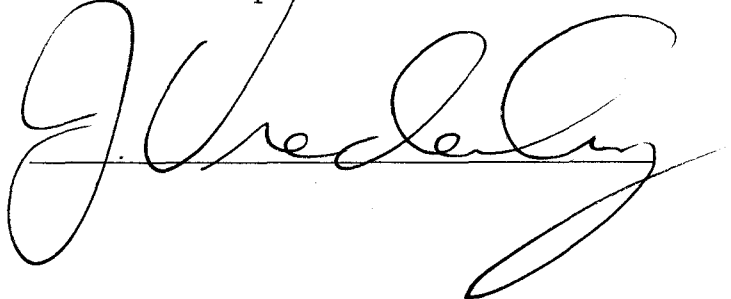
Herbert Grodin
32 Delaware Ave.
Jericho, NY 11753

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 August, 1982.





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

August 4, 1982

Peter Scher
90-17 68th Ave.
Forest Hills, NY 11950

Dear Mr. Scher:

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
Herbert Grodin
32 Delaware Ave.
Jericho, NY 11753
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
PETER SCHER
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1969
through 1974.

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DECISION

Petitioner, Peter Scher, 90-17 Sixty Eighth Avenue, Forest Hills, New York 11375, 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 1969 through 1974 (File Nos. 25802, 25369 and 25155).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 28, 1981 at 2:45 P.M. Petitioner appeared by Herbert Grodin, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether assessment of unincorporated business tax liability against petitioner for the years 1969 through 1974 is barred by the statute of limitations.

II. Whether, in the event assessment is not barred by the statute of limitations, petitioner is subject to the imposition of unincorporated business tax as an independent contractor.

FINDINGS OF FACT

1. Petitioner, Peter Scher, together with his wife who is not a party to this proceeding, timely filed New York State income tax returns for the years

1969 through 1974. Petitioner listed his occupation thereon for each of those years as "Salesman".

2. On January 8, 1979 the Audit Division issued a Notice of Deficiency to petitioner asserting unincorporated business tax due in the amounts of \$106.80 for 1969 and \$351.78 for 1970, plus penalty and interest for each year. An accompanying Statement of Audit Changes dated August 8, 1972 stated in explanation that "[t]he income from your activities as insurance broker is subject to the unincorporated business tax."

3. On November 13, 1978 the Audit Division issued a Notice of Deficiency to petitioner asserting unincorporated business tax due in the amounts of \$431.96 for 1971, \$445.02 for 1972 and \$489.46 for 1973, plus interest for each year. A similar explanation as the above was contained in the accompanying Statement of Audit Changes dated January 4, 1977.

4. On February 23, 1979 the Audit Division issued a Notice of Deficiency to petitioner asserting unincorporated business tax due in the amount of \$360.13 for 1974 plus penalty and interest. Again, the accompanying Statement of Audit Changes, dated September 5, 1978, offered a similar explanation for the asserted tax liability.

5. During the years at issue herein, petitioner worked as a full-time insurance soliciting agent pursuant to a "Career Agency Agreement" between petitioner and the Aetna Life Insurance Company ("Aetna").

6. According to the terms of petitioner's work agreement with Aetna, he was bound to offer to place with Aetna all insurance business he solicited. If for some reason Aetna decided any business solicited by Mr. Scher was unacceptable to it, Mr. Scher could then attempt to secure insurance for the particular client with insurance companies other than Aetna.

7. Mr. Scher solicited business both in the fields of life insurance and casualty insurance. For the years at issue, Mr. Scher received income not only from Aetna but also from other insurance companies.

8. Aetna furnished Mr. Scher with an office and furniture, stenographic and typing services, a telephone and certain advertising at no cost to him. He did, however, pay without reimbursement by Aetna his own travel and entertainment expenses incurred in connection with his work. Mr. Scher did not have his name on his office door nor did he engage any full or part-time employees or assistants to work for him.

9. Mr. Scher generally worked mornings in his office making phone calls, and spent afternoons and evenings meeting with potential clients he had contacted. His sales territory was limited only by boundaries set in his licenses to sell insurance.

10. Mr. Scher was required to report to his office at 9:00 A.M. or to call if he would not be in. In addition, he had to attend informal sales meetings daily and formal meetings weekly to discuss his activities with his supervisors. Mr. Scher needed prior approval from his supervisors before taking vacations.

11. Mr. Scher was required to maintain weekly, monthly and annual records detailing his clients, telephone calls, appointments, face-to-face interviews, selling interviews, closings and amounts of premiums and commissions. These records were closely reviewed by his supervisors.

12. Mr. Scher was required to meet minimum production standards in terms of sales quotas for Aetna. He consistently exceeded these minimum quotas and in fact received several awards in recognition of this achievement. Mr. Scher also regularly attended insurance training courses and seminars offered by Aetna.

13. Aetna provided petitioner with group life and health insurance coverage, a survivor's benefits plan, disability insurance and a retirement plan.

14. Mr. Scher was paid on a commissions earned basis by Aetna and by the other companies with whom he placed insurance. Aetna withheld from such commissions social security taxes, but did not withhold Federal or New York State income taxes. On commissions earned from other companies, no taxes were withheld.

15. According to figures supplied at the hearing commissions earned by petitioner were divided as to their source as follows:

<u>YEAR</u>	<u>"TOTAL"</u>	<u>TOTAL "AETNA"</u>	<u>TOTAL "OTHER"</u>
1969	\$14,156.40	\$ 9,770.40	\$ 4,386.00
1970	22,178.00	14,337.00	7,841.00
1971	23,580.00	12,081.68	11,498.32
1972	25,362.00	11,813.24	13,548.76
1973	26,928.00	11,825.22	15,102.78
1974	24,382.00	11,828.00	12,554.00

Mr. Scher testified the above dollar amounts should not be viewed as any indication of the comparative amounts of time devoted to each of the sources of income, inasmuch as the "other" income reflects primarily commissions on the sale of casualty insurance. Mr. Scher stated casualty insurance can show a high commission return without a commensurate time expenditure based on the size of the policy and on the fact that casualty commissions remain constant over the life of the policy while life insurance commissions decrease after the initial year the policy was sold. Finally, Mr. Scher states these figures do not accurately take into account the comparative expenses incurred in earning these commissions.¹

¹ No figures were supplied to show the proportionate share of petitioner's total expenses attributable to each of his sources of income.

16. Petitioner testified that approximately eighty-five percent (85%) of his work time was involved in soliciting insurance for Aetna, and that his remaining work time involved placing insurance with other companies for clients whom Aetna had refused as unacceptable.

17. Petitioner's representative, one Herbert Grodin, who also prepared petitioner's tax returns for the years at issue, stated that (as was his practice) unincorporated business tax returns (Forms IT-202) were included as part of the filing for each year, even though he felt petitioner was not subject to this tax.

18. Three (3) unincorporated business tax forms were introduced into evidence at the hearing. These forms (covering the years 1971, 1972 and 1973) contained neither figures nor tax computations, nor were they signed by petitioner. They did contain petitioner's name, social security number and the words "not subject" in lieu of any figures or computations. No unincorporated business tax returns covering the years 1969, 1970 or 1974 were introduced in any form at the hearing.

CONCLUSIONS OF LAW

A. That an assessment of tax may be made at any time if no return is filed [Tax Law section 683(c)(1)(A)]. That the inclusion of an unsigned tax form with neither figures nor tax computations on it does not constitute the filing of a return. See Arbesfeld v. State Tax Commission, 62 A.D.2d 627, lv. to app. den. 46 N.Y.2d 705. (See also Chasanoff Operating Co. v. State Tax Commission, 79 A.D.2d 780, lv. to app. den. 53 N.Y.2d 601). Accordingly, since returns were not filed, the statute of limitations does not bar assessment of the tax.

B. That there was sufficient direction and control exercised over petitioner's activities on behalf of Aetna as to result in the relationship of employer and employee within the meaning and intent of section 703(b) of the Tax Law and regulations thereunder. Accordingly, income in the form of commissions paid to petitioner by Aetna is not subject to the imposition of the unincorporated business tax.

C. That there is no evidence of an employer/employee relationship existing between petitioner and any company other than Aetna, and thus income in the form of commissions paid to petitioner by companies other than Aetna is subject to the imposition of the unincorporated business tax.

D. That in recomputing petitioner's tax liability, so much of petitioner's total yearly expense as is equal to the ratio arrived at by comparing the yearly amount of petitioner's total "other" income to his "total" income, shall be allocated as expenses attributable to the production of "other" income (see Finding of Fact "15").

E. That the petition of Peter Scher is granted to the extent indicated in Conclusion of Law "B", and is in all other respects denied. The Audit Division is directed to recompute petitioner's unincorporated business tax liability in accordance herewith together with such penalty and interest as may be lawfully due and owing and to modify the Notices of Deficiency issued November 13, 1978, January 8, 1979 and February 23, 1979 to reflect such recomputation.

DATED: Albany, New York

AUG 04 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER