

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Frederick Stoffo : 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 1971 - 1975.

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Frederick Stoffo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frederick Stoffo  
1300 Naragansett Blvd.  
Cranston, RI 02905

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  
28th day of September, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Frederick Stoffo :

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 1971 - 1975.

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Murray Appleman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray Appleman  
225 Broadway  
New York, NY 10007

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  
28th day of September, 1983.

Lucan Powell

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

Connie Hagelund

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

September 28, 1983

Frederick Stoffo  
1300 Naragansett Blvd.  
Cranston, RI 02905

Dear Mr. Stoffo:

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) 690 & 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 Law 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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Murray Appleman  
225 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
FREDERICK STOFFO	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1971	:	
through 1975.	:	

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Petitioner, Frederick Stoffo, 1300 Naragansett Boulevard, Cranston, Rhode Island, 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 1971 through 1975 (File Nos. 32025 and 32026).

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 September 25, 1981 at 9:00 A.M. Petitioner appeared by Murray Appleman, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq. of counsel).

#### ISSUES

I. Whether the period of limitation on assessment of unincorporated business tax begins to run where an individual reflects potential unincorporated business income on his personal income tax return.

II. Whether the State Tax Commission is bound by the decision of a New York City agency determining petitioner not to be subject to its unincorporated business tax on the basis that he was not an independent contractor.

III. Whether petitioner was an employee of rather than an independent contractor for Celebrity Fashion Jewels, Inc. and therefore, his salary and his override commission are exempt from unincorporated business tax.

FINDINGS OF FACTS

1. Petitioner timely filed New York State resident income tax returns for the years 1971 through 1975. Petitioner did not file New York State unincorporated business tax returns for those same years.

2. On January 25, 1980, the Audit Division issued notices of deficiency for payment of unincorporated business tax (1) for the years 1971 through 1974 in the amount of \$5,933.64 (which included \$1,818.37 in penalties and interest) and (2) for the year 1975 in the amount of \$2,380.00 (which included \$578.53 in penalties and interest).

3. For the years in issue, petitioner was an executive vice president of Celebrity Fashion Jewels, Inc. ("Celebrity"). Celebrity was in the business of selling costume jewelry primarily through home parties. Petitioner's duties for Celebrity included functioning as a sales executive, supervising the design department, preparing written material for the sales catalogue and supervising photographic sessions for such catalogue.

4. Petitioner's duties, when functioning as a sales executive, included recruiting and training Celebrity's sales representatives, motivating and directing sales managers within his group and, when directed by Celebrity, travel to and conduct sales seminars. Celebrity had an operational plan which petitioner was required to follow when recruiting sales personnel. Celebrity also provided petitioner with Fashion Show Director and Manager Application forms which set forth certain requirements and standards the applicants must meet and agree to before becoming a Celebrity sales representative. Petitioner was not allowed to deviate from these requirements when recruiting applicants. The president of Celebrity had the right to reject applicants recruited by petitioner.

5. Celebrity paid petitioner a salary plus override commissions. The commissions were based on the amount of sales from the managers and sales people within his group. Commissions paid were substantially more, for each of the years in issue, than the salary petitioner received from Celebrity.

6. Celebrity provided petitioner with an office and secretary at its main office located at 93 34th Street, Brooklyn, New York. Celebrity also provided petitioner with health insurance and he was included in the company's pension, profit sharing and worker's compensation plans.

7. Petitioner was forbidden from representing other firms or promoting other lines of merchandise. He stated that to represent other companies would cause his dismissal from Celebrity.

8. In general, Celebrity allowed petitioner to set his daily work schedule. When not travelling for Celebrity, he was usually in the office from 10:00 A.M. to 4:00 P.M. Petitioner was responsible to the president of Celebrity and usually spoke to him on a daily basis.

9. Celebrity reported petitioner's salary for each of the years in issue on a Wage and Tax Statement wherein federal and state income tax and FICA tax were withheld. Celebrity reported petitioner's commission on Federal Form 1099. Taxes were not withheld from said commissions.

10. Petitioner incurred business expenses for such items as promotion, advertising, travel, etc., which were not reimbursed by Celebrity.

11. On September 4, 1975, the New York City Finance Administration issued petitioner a letter which stated, based on the facts submitted by petitioner, that he was not engaged in the conduct of a business for New York City unincorporated business tax purposes.

12. Petitioner contributed to a retirement plan (Keogh Plan) for each of the years 1972 through 1975.

CONCLUSIONS OF LAW

A. That sections 722 and 683(c)(1)(a) of the Tax Law provide that unincorporated business tax may be assessed at any time if an unincorporated business tax return is not filed. There is no provision in the Tax Law which provides for the period of limitation on assessment of unincorporated business tax to begin to run where income potentially subject to such tax is reflected on a New York State personal income tax return. Accordingly, since petitioner did not file unincorporated business tax returns for the years in issue, the notices of deficiency are timely.

B. That the opinion of the New York City Finance Administration that petitioner's activities for Celebrity did not constitute the conduct of a business for New York City unincorporated business tax purposes is not binding upon New York State. The State Tax Commission may arrive at its own conclusions based on the facts as determined by an independent audit or investigation.

C. That the determination of whether services are performed by an individual as an employee or as an independent agent turns upon the degree of direction and control exercised by the employer over the individual. Matter of Greene v. Gallman, 39 A.D.2d 270, aff'd 33 N.Y.2d 778.

D. That Celebrity Fashion Jewels, Inc. exercised sufficient direction and control over petitioner's activities to constitute an employee-employer relationship within the meaning and intent of section 703(b) of the Tax Law. Petitioner was obligated, among other things, to follow Celebrity's operational plan for recruiting sales representatives for the company, to travel at the direction of Celebrity, to train new sales representatives, to motivate and direct sales managers


and to supervise the design department of Celebrity. Furthermore, Celebrity provided petitioner with an office, secretary, company forms and company health insurance, pension and profit sharing plans. Accordingly, the income earned by petitioner from his activities for Celebrity during the years in issue is not subject to the unincorporated business tax.


E. That the petition is granted and the notices of deficiency dated February 22, 1980 are cancelled.

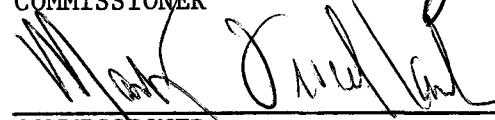
DATED: Albany, New York

SEP 28 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



TA 26 (9-79)

STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227

**CERTIFIED**  
P 481 208 2  
**MAIL**

CLAIM CHECK  
NO.

522804

☐ HOLD

DATE

*9/30*  
SIGNATURE

2ND NOTICE

RETURN

Detached from  
PS Form 3849-A  
Oct. 1980



*CMV*

Frederick Stoffo  
1300 Naragansett Blvd.  
Cranston, RI 02905

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

September 28, 1983

Frederick Stoffo  
1300 Naragansett Blvd.  
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NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Murray Appleman  
225 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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Refund of Unincorporated Business Tax under	:	
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E. That the petition is granted and the notices of deficiency dated February 22, 1980 are cancelled.

DATED: Albany, New York

SEP 28 1983

STATE TAX COMMISSION

Rodriguez  
PRESIDENT

Francis R. Koemp  
COMMISSIONER

[Signature]  
COMMISSIONER