

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Rita M. Ostrer :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Unincorporated :  
Business Tax under Article 23 of the Tax Law for :  
the Years 1976 & 1977. :  
:

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State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 16th day of July, 1985, he served the within notice of Decision by certified mail upon Rita M. Ostrer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rita M. Ostrer  
181 Kings Pt. Rd.  
Great Neck, NY 11024

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
16th day of July, 1985.

David Parchuck

Ann M. O'Hagan  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :  
Rita M. Ostrer :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Unincorporated :  
Business Tax under Article 23 of the Tax Law for :  
the Years 1976 & 1977. :  
:

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AFFIDAVIT OF MAILING

State of New York :  
ss.:  
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 16th day of July, 1985, he served the within notice of Decision by certified mail upon Steven M. Ostrer, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven M. Ostrer  
251 Hempstead Tpke.  
Elmont, NY 11003

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
16th day of July, 1985.

David Parchuck

Annunzio A. DiGirolamo

Authorized to administer oaths  
pursuant to Tax Law section 174

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

July 16, 1985

Rita M. Ostrer  
181 Kings Pt. Rd.  
Great Neck, NY 11024

Dear Ms. Ostrer:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Steven M. Ostrer  
251 Hempstead Tpke.  
Elmont, NY 11003  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
RITA M. OSTRER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1976	:	
and 1977.	:	

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Petitioner Rita M. Oster, 181 Kings Point Road, Great Neck, New York 11024 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 1976 and 1977 (File Nos. 35179 and 37369).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 22, 1984 at 1:15 P.M., with all briefs to be submitted by December 17, 1984. Petitioner appeared by Steven M. Ostrer, CPA. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

- I. Whether the notices of deficiency were barred by the statute of limitations.
- II. Whether the income from petitioner's activities as a general agent for an insurance company were subject to unincorporated business tax.
- III. Whether penalties were properly asserted for failure to file a tax return, failure to pay tax shown as due on a return required to be filed and failure to file a declaration or underpayment of estimated tax.

FINDINGS OF FACT

1. The Audit Division issued notices of deficiency to petitioner, Rita Ostrer, as follows:

<u>Years</u>	<u>Date Issued</u>	<u>Additional Tax Asserted to be Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
1976	July 23, 1981	\$5,738.43	\$2,842.43	\$2,071.88	\$10,652.74
1977	September 10, 1981	5,457.10	-0-	1,586.41	7,043.51

2. The Statement of Audit Adjustment for each of the respective years explained that the Audit Division considered the income from petitioner's activities involving insurance to be subject to unincorporated business tax. In addition, the penalties asserted for the year 1976 were pursuant to sections 685(a)(1) and (a)(2) of the Tax Law for, respectively, failure to file a tax return and failure to pay tax shown as due on a return required to be filed and pursuant to section 685(c) of the Tax Law for failure to file a declaration or underpayment of estimated tax.

3. Petitioner filed a New York State Income Tax Resident Return for the year 1976. On the return, petitioner listed her occupation as "insurance". Petitioner attached to the return a Schedule C encaptioned Profit (or Loss) From Business or Profession. The schedule disclosed that petitioner reported gross receipts or sales of \$304,206.06 and deductions for legal and professional fees of \$9,274.96 and commissions of \$172,751.00. Petitioner also reported the following business expenses:

Telephone	\$1,815.00
Subscriptions	927.79
Auto Expenses	793.61
Travel & Entertainment	3,492.56
Office Expenses	562.60
Bank Charges and Miscellaneous	235.50

4. Petitioner filed a New York State Income Tax Resident Return for the year 1977 and again listed her occupation as "insurance". She did not file a Schedule C Profit (of Loss) From Business or Profession with this return.

5. Unincorporated business tax returns were not filed during the years in issue.

6. During the years in issue, petitioner was a general agent for the Charter Life Insurance Company ("Charter Life"). Three or four sub-agents placed policies with Charter Life through petitioner's general agency. Petitioner and the sub-agents shared the commissions earned on such policies. Most of the commissions earned by petitioner were the results of the efforts of the sub-agents. Nevertheless, petitioner did write some policies for friends of her family.

7. Petitioner conducted her insurance affairs from her home. She did not maintain a separate office, business phone or employ personnel or assistants. However, she did have a typewriter and photocopy machine in her home which items she used for business purposes.

#### CONCLUSIONS OF LAW

A. That section 683(c)(1)(A) of the Tax Law provides that tax may be assessed at any time if no return is filed. Section 683(c)(1)(A) of the Tax Law is applicable to Article 23 pursuant to section 722 of the Tax Law. Since unincorporated business tax returns were not filed for 1976 or 1977, the notices of deficiency were not barred by the statute of limitations.

B. That 20 NYCRR 203.1(a) provides, in part, that in determining whether an activity constitutes an unincorporated business "... the continuity, frequency and regularity of activities, as distinguished from casual or isolated transactions, and the amount of time, thought and energy devoted to

the activities or transactions are the factors which are to be taken into consideration."

C. That petitioner was engaged in continuous, frequent and regular business activity involving insurance. Accordingly, the Audit Division properly concluded that the income from petitioner's activities as a general agent for an insurance company was subject to unincorporated business tax.


D. That petitioner has not presented any evidence warranting a cancellation of the penalties asserted.

E. That the petition of Rita M. Ostrer is denied and the notices of deficiency are sustained.

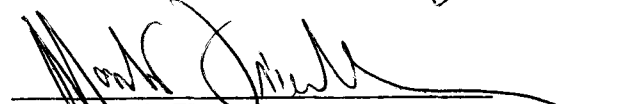
DATED: Albany, New York

JUL 16 1985

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER