

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PHILIP BIRNBACH AND ROSANNE BIRNBACH	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of	:	
the Tax Law for the Years 1979 and 1980.	:	

Petitioners, Philip Birnbach and Rosanne Birnbach, 483 Todt Hill Road, Staten Island, New York 10304, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1979 and 1980 (File No. 45379).

A 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 March 20, 1985 at 1:15 P.M. with all briefs to be submitted by April 20, 1985. Petitioner Philip Birnbach appeared pro se and for his wife, Rosanne Birnbach. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether petitioner Philip Birnbach properly reported 100% of his business net profit as personal service income in computing the maximum tax on personal service income for each of the years 1979 and 1980.

II. Whether petitioner Philip Birnbach is properly entitled to allocate a portion of his unincorporated business income to sources without New York State.

FINDINGS OF FACT

1. Philip Birnbach (hereinafter "petitioner") timely filed a New York State Income Tax Resident Return with his wife, Rosanne Birnbach, for each of the years 1979 and 1980 under filing status "Married filing separately on one return". On such returns, petitioner reported business income (net profit) of \$80,196.00 (1979) and \$95,222.00 (1980) derived from the operation of his unincorporated business; Birnbach Gear Co., 47 Columbia Place, Brooklyn, New York. In computing the maximum tax on personal service income for each of said years petitioner reported 100% of the aforestated business net profit as personal service income.

2. Petitioner also timely filed a New York State Unincorporated Business Tax Return for each of said years whereon he allocated a portion of his reported business net profit to sources without New York State. For 1979 \$19,427.00 was allocated to sources without New York State and for 1980 \$42,987.00 was allocated to sources without New York State. On each return petitioner noted that the "New York Income (was) determined from books". His business address reported on each return was 47 Columbia Place, Brooklyn, New York.

3. On December 10, 1982, the Audit Division issued a Statement of Personal Income Tax Audit Changes to petitioner whereon his computed maximum tax on personal service income was adjusted for each year at issue based on the following explanation:

"Since capital is a material income producing factor, your personal service income is deemed to be 30% of the net profit from business."

4. On December 10, 1982, the Audit Division also issued a Statement of Unincorporated Business Tax Audit Changes to petitioner whereon his claimed allocation for each year at issue was disallowed based on the following explanation:

"Since you have failed to substantiate that you have a place of business outside New York, it is determined that there is no allocation allowable. Therefore, all income is deemed to be from New York sources."

5. On April 14, 1983, the Audit Division issued two (2) notices of deficiency to petitioner and his wife based on the aforestated statements of audit changes. One such notice asserted additional personal income tax of \$2,796.00, penalty of \$55.92 and interest of \$778.20, for a total due of \$3,630.12. The other notice asserted additional unincorporated business tax of \$2,594.00, penalty of \$51.88, plus interest of \$720.32, for a total due of \$3,366.20.

6. Although petitioner contested the adjustment made for personal income tax purposes, he offered no explanation as to why he believes he is properly entitled to claim the maximum tax rate on his entire business net profit. His only argument was that his accountant advised him that the tax was correctly computed for each year at issue.

7. During the years at issue petitioner owned and operated Birnbach Gear Co. at the aforestated business address. On occasion, when certain orders were received for special gears or sprockets which he was unable to produce with his equipment, he used a friend's machine shop in Elizabeth, New Jersey, which was outfitted with the necessary machinery. He reciprocated by allowing his friend to use his machinery when the need arose. Petitioner's claimed allocation of business income to sources without New York State relates solely to the use of his friend's New Jersey machine shop.

8. Petitioner had no ownership interest in the New Jersey machine shop. He did not pay a rental charge or fee for its use.

9. Rosanne Birnbach was not involved in petitioner's unincorporated business.

CONCLUSIONS OF LAW

A. That section 603-A of the Tax Law provides a maximum tax rate on New York personal service income. Subsection (b)(1) of section 603-A provides that for purposes of said section the term "New York personal service income" means:

"(A) wages salaries, or professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income-producing factors, under regulations prescribed by the tax commission, a reasonable allowance as compensation for the personal services rendered by the taxpayer shall be considered as earned income".

B. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that the percentage of his net profit from business for 1979 and 1980 determined by the Audit Division to be attributable to personal services rendered was erroneous or improper. Accordingly, the adjustment made with respect to personal income taxes is sustained.

C. That section 707(a) of the Tax Law provides that:

"...if an unincorporated business is carried on both within and without this state, as determined under regulations of the tax commission, there shall be allocated to this state a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions. If the unincorporated business has no regular place of business outside this state, all of such excess shall be allocated to this state."

D. That, in general, an unincorporated business is carried on at any place either within or without New York State where the unincorporated business entity has a regular place of business. A regular place of business is any bona fide office, factory, warehouse or other place which is systematically and regularly used by the unincorporated business entity in carrying on its business.

(20 NYCRR 207.2(a))

E. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of Article 22 of the Tax Law, as incorporated into Article 23 by section 722(a), to show that he had a regular place of business without New York State during the years 1979 and 1980. Accordingly, petitioner's entire net business income is allocated to New York State.

F. That the two (2) notices of deficiency issued April 14, 1983 with respect to both personal income tax and unincorporated business tax are cancelled insofar as they apply to Rosanne Birnbach, since she was not involved in the business.

G. That the petition of Philip Birnbach and Rosanne Birnbach is granted to the extent provided in Conclusion of Law "F", supra, and except as so granted, said petition is, in all other respects, denied.

H. That except as provided in Conclusion of Law "F", supra, the two (2) notices of deficiency issued April 14, 1983 are sustained together with such additional interest as may be lawfully owing.

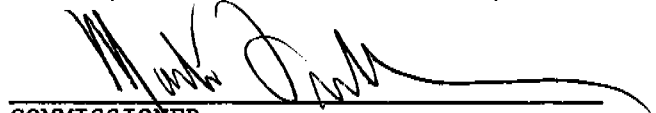
DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985


PRESIDENT


COMMISSIONER


COMMISSIONER