

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
James F. & Helen B. Murphy : 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 1970 - 1972. :

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon James F. & Helen B. Murphy, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James F. & Helen B. Murphy
770-B Heritage Village
Southbury, CT 06488

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
29th day of January, 1982.

Ann O'Keefe

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
James F. & Helen B. Murphy :

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 1970 - 1972.

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon S. S. Mandel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

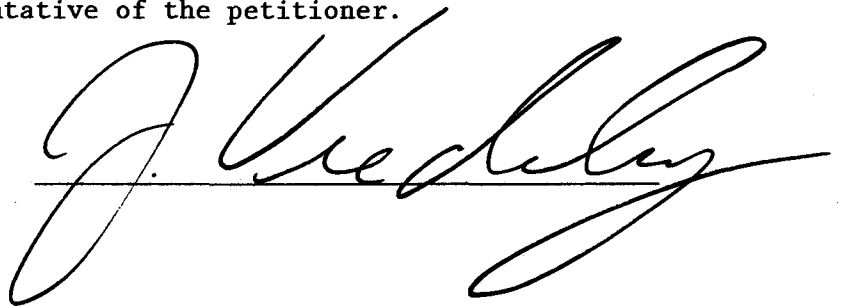
S. S. Mandel
Tenzer, Greenblatt, Fallon & Kaplan
The Chrysler Bldg., 405 Lexington Ave.
New York, NY 10017

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
29th day of January, 1982.





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

January 29, 1982

James F. & Helen B. Murphy
770-B Heritage Village
Southbury, CT 06488

Dear Mr. & Mrs. Murphy:

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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
S. S. Mandel
Tenzer, Greenblatt, Fallon & Kaplan
The Chrysler Bldg., 405 Lexington Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JAMES F. MURPHY and HELEN B. MURPHY : DECISION
for Redetermination of a Deficiency or :
for Refund of Unincorporated Business :
Tax under Article 23 of the Tax Law for :
the Years 1970, 1971 and 1972. :

Petitioners, James F. Murphy and Helen B. Murphy, 770-B Heritage Village, Southbury, Connecticut 06488, 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 1970, 1971 and 1972 (File No. 16735).

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 July 23, 1980 at 2:45 P.M. Petitioner James F. Murphy appeared with S. Sidney Mandel, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (A. Scopellito, Esq., of counsel).

ISSUE

Whether fees derived from petitioner's activities during the years 1970, 1971 and 1972 are subject to the unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, James F. Murphy and Helen B. Murphy, timely filed joint New York State income tax resident returns for the years 1970, 1971 and 1972, on which fees of \$36,941.00, \$52,296.00 and \$19,600.00, respectively, were reported. Petitioner James F. Murphy did not file unincorporated business tax returns for the years 1970, 1971 and 1972.

2. On June 28, 1976, the Audit Division issued a Notice of Deficiency for \$4,395.44, plus penalties and interest, for the years 1970, 1971 and 1972, along with an explanatory Statement of Audit Changes, which indicated;

- (a) that the fees (supra) derived from petitioner's activities as a consultant are subject to the unincorporated business tax.
- (b) that penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law were imposed. (These penalties were conceded by the Audit Division and are not at issue.)

3. Petitioner James F. Murphy was employed by the George A. Fuller Company (hereinafter Fuller Company) from 1926 until July 31, 1969, when he retired. Prior to his retirement, petitioner James F. Murphy was a senior vice-president in charge of construction. Petitioner directed, complied and controlled construction projects from initiation to completion. He coordinated all activities with architects, contractors and engineers, and participated in the writing-up of contracts, cost surveys, construction schedules and verified all purchases. In addition, he was a liaison with all representative unions, utility companies and insurance companies.

4. In 1968, the Fuller Company was engaged to construct the Esso Building (hereinafter Esso Project) in Rockefeller Center in the City and State of New York. Subsequent to petitioner's retirement, the Esso Project began experiencing construction difficulties. In 1970, the Rockefeller Center, Inc., executives in charge of the Esso Project, advised the Fuller Company that unless petitioner James F. Murphy was brought back and placed in direct charge of the Esso Project, they would not permit the Fuller Company to continue constructing the building.

5. In order to avoid losing the one hundred million dollar Esso Project, the Fuller Company asked petitioner James F. Murphy to return and complete the

project. On August 1, 1970, petitioner entered into an agreement with the Fuller Company to return as a consultant in order to protect petitioner's retirement benefits and to satisfy petitioner's desire to return on a part-time basis.

6. Although petitioner was not considered an employee of the Fuller Company, he was elected to its executive committee as vice chairman and required to attend its meetings. In addition, he was awarded the sole responsibility of completing the Esso Project. Petitioner James F. Murphy was given his old office at the Fuller Company and was provided with office facilities at the Esso construction site. In addition, his old duties, authority and responsibility were restored as they were prior to his retirement.

7. Petitioner's experience and expertise liberated him from day-to-day direction and control usually imposed by the Fuller Company. The Executive Committee and the Board of Directors retained the right to exercise its authority in the event petitioner's performance was unsatisfactory. In this regard, petitioner was required to advise and report the status and progress of the Esso Project to both the Executive Committee and the Board of Directors. However, in a letter dated November 13, 1974 to the Audit Division Mr. Murphy stated that there was no control of me exercised in the sense of an employer, employee relationship.

8. Petitioner James F. Murphy was compensated at the rate of \$5,000.00 per month and was reimbursed for expenses incurred in connection with his work. Petitioner's compensation was not subject to the withholding of payroll taxes.

9. Petitioner remained with the Fuller Company until the Esso Project was completed in 1972, when he immediately resumed his retirement status on a full time basis. During and after his reinvolvement with the Fuller Company,

petitioner was not involved with any other construction project, or rendered any services as a consultant. Petitioner never held himself out to the public, or actively sought to obtain other positions within or without his field of expertise.

10. Petitioner, Helen B. Murphy was not involved with her husband's consulting activities.

CONCLUSIONS OF LAW

A. That petitioner James F. Murphy has not sustained the burden of proof imposed by section 722 and 689(e) of the Tax Law to show that sufficient direction and control was exercised over his activities by Fuller Company so as to create an employer-employee relationship, within the meaning and intent of section 703(b) of the Tax Law.

B. That petitioner's activities as a consultant during the years 1970, 1971 and 1972 constituted the carrying on of an unincorporated business, within the meaning and intent of section 703(a) of the Tax Law; and the income derived therefrom is subject to the unincorporated business tax imposed by section 701(a) of the Tax Law.

C. That petitioner Helen B. Murphy's name should be removed from the Notice of Deficiency dated June 28, 1976 since she was not engaged in any unincorporated business activities.

D. That the petition of James F. Murphy and Helen B. Murphy is granted to the extent shown in Conclusion of Law "C", above and is in all other respects denied. The Notice of Deficiency dated June 28, 1976 is sustained.

DATED: Albany, New York

JAN 29 1982

STATE TAX COMMISSION



PRESIDENT



COMMISSIONER



COMMISSIONER