

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

EDWIN & ADA MAILLARD

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business & Personal :
Income Taxes under Article(s) 22 and 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ 1970 :
and 1971.

State of New York
County of Albany

Carmen Mottolese, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of September, 1976, she served the within Notice of Decision by (certified) mail upon Edwin & Ada Maillard ~~XXXXXXXXXXXX~~ the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Mr. & Mrs. Edwin Maillard
37 High Street
Staten Island, New York 10305
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)~~ ~~XXXXXX~~ petitioner herein and that the address set forth on said wrapper is the last known address of the ~~(representative of the)~~ ~~XXXXXXXXXXXX~~ petitioner.

Sworn to before me this

27th day of September, 1976.

Carmen Mottolese

Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

ADDRESS YOUR REPLY TO

September 27, 1976

TELEPHONE: (518) **457-3850**

Mr. & Mrs. Edwin Maillard
37 High Street
Staten Island, New York 10305

Dear Mr. & Mrs. Maillard:

Please take notice of the **DECISION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section(s) **690 and 722** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned. They
will be referred to the proper party for reply.

Very truly yours,

Frank J. Puccia
Supervisor of Small
Claims Hearings

Enc.

cc: ~~XXXXXXXXXXXXXXXXXXXX~~

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|--|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| EDWIN & ADA MAILLARD | : | |
| for a Redetermination of a Deficiency or | : | DECISION |
| for Refund of Personal Income and Unin- | : | |
| corporated Business Taxes under Articles | : | |
| 22 and 23 of the Tax Law for the Years | : | |
| 1970 and 1971. | : | |

Petitioners, Edwin and Ada Maillard, 37 High Street, Staten Island, New York 10305, 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 1970 and 1971 (File # 1-74392406). A small claims hearing was held before Joseph Marcus, Small Claims Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 13, 1976 at 10:45 A.M. Edwin Maillard appeared pro se and for his wife, Ada Maillard. The Income Tax Bureau appeared by Peter Crotty, Esq., (Irwin A. Levy, Esq. of counsel).

ISSUES

I. Was the income derived by the petitioner from his activities as an owner-operator of a truck tractor subject to the unincorporated business tax?

(2)

II. Did petitioner have reasonable cause for failing to file New York State unincorporated business tax returns for 1970 and 1971?

FINDINGS OF FACT

1. Petitioners, Edwin and Ada Maillard, timely filed New York State income tax returns for the years 1970 and 1971 on Forms IT-201.

2a. On November 24, 1975, the Income Tax Bureau issued a statement of audit changes against the petitioners showing additional personal income tax due for the year 1970 and unincorporated business tax due for the tax years 1970 and 1971. The personal income tax audit change for the year 1970 was a result of an adjustment based on a Federal audit and was not contested at the hearing.

2b. The only issue being disputed by the petitioner, Edwin Maillard, is the imposition of unincorporated business tax on the income from his activities as a truck tractor operator. In accordance with the aforementioned statement of audit changes, the Income Tax Bureau issued a Notice of Deficiency in the sum of \$1,001.31 including interest and penalties.

3. During the years in question petitioner, Edwin Maillard, was under contract to Richmond Storage Warehouse and Van Company. Section 1 of the contract states that "the CONTRACTOR represents and warrants that he is in fact an Independent Contractor, and

(3)

the existence and continuance of this Agreement are specifically conditioned upon the validity and continued vitality of the representation and warranty made in this paragraph."

4. Petitioner stated that for the purposes of loading and unloading his van, he was obliged to use men supplied by the "COMPANY". Section 6 of the contract entitled "Direction and Control by Contractor" relegated to the petitioner the right to select such helpers and have full direction and control over them, their hiring, firing, training and supervision and their wages, hours and working conditions.

5. The maintenance and expenses were the responsibility of the petitioner and such expenses were, in fact, deducted on schedule "C" of petitioner's Federal tax returns.

6. Section 6 of the contract further states that the petitioner "shall personally determine and select the routes of travel, points of stopping for rest or for servicing his said vehicle."

7. Petitioner's remuneration by the company was based on rates as quoted in schedule "B" of the contract entitled "Contractor's Rate Schedule", and was essentially determined by the distance traveled.

8. Petitioner was given withholding tax statements for the years 1970 and 1971 indicating total payments made by the company to the petitioner. No indication was evident on these statements as to amounts attributable to the use of petitioner's

(4)

tractor, although the amounts paid were clearly in excess of the wages paid to a driver who did not use his own equipment.

9. Petitioner's tax returns were prepared by a public accountant upon whose advice petitioner relied in filing his returns.

CONCLUSIONS OF LAW

A. That the income received by the petitioner, Edwin Maillard, as an owner-operator of a truck tractor under contract with the aforementioned company, constituted income from his regular business of trucking and not compensation as an employee exempt from the imposition of unincorporated business tax in accordance with the meaning and intent of section 703(b) of the Tax Law.

B. That the aforesaid activities of the petitioner, Edwin Maillard, during the years 1970 and 1971 constituted the carrying on of an unincorporated business and his income derived therefrom was subject to unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law.

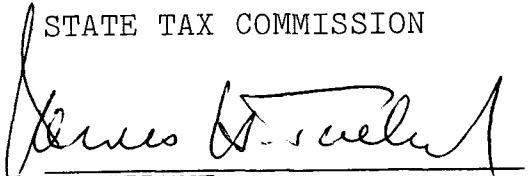
C. That the petitioner, Edwin Maillard, has reasonable cause for not filing New York State unincorporated business tax returns for the years 1970 and 1971 and, therefore, the penalties imposed pursuant to section 685(a)(1) and (a)(2) of the Tax Law are waived.

(5)

D. That the petition of Edwin Maillard is granted to the extent of cancelling penalties imposed pursuant to section 685(a) of the Tax Law in the sum of \$219.42 for the years 1970 and 1971 and the Income Tax Bureau is hereby directed to accordingly modify the Notice of Deficiency dated November 24, 1975 and except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
September 27, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER