

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
HARRY NICOLL

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Personal Income & Unincorporated Business :
Taxes under Article(s) 22 & 23 of the :
Tax Law for the Year(s) ~~xxx~~ ~~Period(s)~~ :
1970, 1971 and 1972.

State of New York
County of Albany

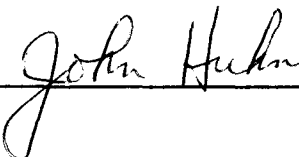
John Huhn , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 13th day of October , 1978 , she served the within
Notice of Decision by (certified) mail upon Harry Nicoll
~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Harry Nicoll
1275 15th Street
Fort Lee, New Jersey 07024

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)~~
~~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
13th day of October , 19 78







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

October 13, 1978

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

**Harry Nicoll
1275 15th Street
Fort Lee, New Jersey 07024**

Dear Mr. Nicoll:

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 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

Joseph Chrywatt
**JOSEPH CHRYWATT
HEARING EXAMINER**

~~XX~~

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
HARRY NICOLL
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, 1971 and 1972.

DECISION

Petitioner, Harry Nicoll, 1275 15th Street, Fort Lee, New Jersey 07024, 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, 1971 and 1972 (File No. 12285).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on February 10, 1978 at 9:00 A.M. Petitioner appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (Francis Cosgrove, Esq., of counsel).

ISSUES

I. Whether petitioner's sales activities during 1970, 1971 and 1972 constituted the carrying on of an unincorporated business.

II. Whether petitioner could properly claim a deduction on his personal income tax returns for 1970, 1971 and 1972 for his contributions to a self-employment retirement ("Keogh") plan.

FINDINGS OF FACT

1. Petitioner, Harry Nicoll, timely filed New York State personal income tax returns for 1970, 1971 and 1972. He did not file unincorporated business tax returns for said years.

2. The Income Tax Bureau contended that petitioner's sales activities constituted the carrying on of an unincorporated business. Accordingly, it issued a Notice of Deficiency on March 31, 1975 for 1970, 1971 and 1972 in the amount of \$4,282.45 in unincorporated business tax, plus \$769.22 in interest, for a total of \$5,051.67. On November 13, 1975, the Income Tax Bureau abated \$350.00 of the tax for 1971, to reflect its allowance of a deduction for contributions by petitioner to his self-employment retirement plan, for personal income tax purposes. Petitioner paid the remaining tax due (\$3,932.45), plus the interest shown due on the Notice of Deficiency of \$769.22, for a sum of \$4,701.67.

3. During the years at issue, petitioner performed services for Truitt Brothers, Inc. (hereinafter "Truitt") as a shoe sales representative. He was compensated on a commission basis for goods shipped, with a weekly draw against commissions. He was

issued a wage and tax statement for each year and social security was deducted from his compensation. Petitioner was covered for workman's compensation and disability insurance by Truitt. A group medical plan was also made available to him. Truitt did not permit petitioner to carry a competing line.

4. Truitt's factory and offices were located in Belfast, Maine. Petitioner's territory was the greater New York City area and west to Utica, New York. Petitioner had a small office in New York City. Rent, telephone and answering service expenses were borne by Truitt. Petitioner's wife worked at the office, without compensation from Truitt. Both Truitt's name and petitioner's name were on the door and both were listed in the phone directory. Petitioner also had an office in his home which he used for bookkeeping and business phone calls.

5. Petitioner was not reimbursed by Truitt for any selling expenses which he incurred. He filed Federal Schedule "C," in order to show the expenses deducted from gross income. Petitioner conceded that there was little if any supervision by Truitt over his day-to-day selling activities. He could visit any customer whenever he wished. Petitioner could take vacations and days off at will. His sales volume was Truitt's primary concern.

6. Petitioner sold shoes in his territory for another principal during 1970, 1971 and 1972. The income derived from petitioner's services on behalf of this other principal constituted approximately 2 1/2% to 7% of his total income for said years. No other information was submitted regarding this other principal.

7. Petitioner financed his own retirement ("Keogh") plan. He claimed a deduction of \$2,500.00 each year on his Federal tax return for his contributions to the plan. He similarly claimed this deduction on his New York State personal income tax returns for 1970 and 1972. Petitioner failed to claim the deduction in his New York State tax return for 1971. The Income Tax Bureau allowed the deduction for 1971 and reduced petitioner's personal income tax by \$350.00. It applied said amount as an abatement against the amount of tax shown due on the Notice of Deficiency issued to petitioner.

CONCLUSIONS OF LAW

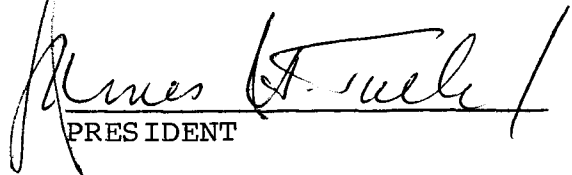
A. That petitioner's sales activities during 1970, 1971 and 1972 constituted the carrying on of an unincorporated business, in accordance with the meaning and intent of section 703 of the Tax Law.

B. That petitioner could properly claim a deduction on his New York State personal income tax returns for his contributions to a self-employment retirement plan and that he properly did so for the years 1970 and 1972. That said deduction was allowed by the Income Tax Bureau for 1971 by a \$350.00 abatement of the tax shown due on the Notice of Deficiency dated March 31, 1975; therefore, no further adjustment, except for interest, is required of the Income Tax Bureau regarding this matter.

C. That the petition of Harry Nicoll is denied and the Notice of Deficiency issued March 31, 1975 is sustained, together with such additional interest as may be lawfully due.

DATED: Albany, New York
October 13, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER