

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

DONALD and SARAH O'CONNELL

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of ~~Personal Income and~~ :
Unincorporated Business :
Taxes under Article(s) 22 & 23 of the :
Tax Law for the Year(s) ~~1968, 1969 and 1970~~ :
1968, 1969 and 1970.

State of New York
County of Albany

John Huhn , 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 25th day of August , 1978, ~~he~~ served the within
Notice of Decision by (certified) mail upon Donald & Sarah O'Connell

(~~representative of~~) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Mr. & Mrs. Donald O'Connell
121 Millbrook Circle
Norwood, New Jersey

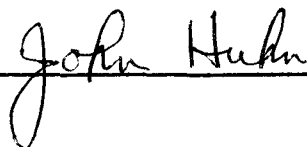
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

25th day of August , 1978.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

DONALD and SARAH O'CONNELL

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Personal Income and :
Unincorporated Business :
Taxes under Article(s) 22 & 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1968, 1969 and 1970.

State of New York
County of Albany

John Huhn , 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 25th day of August , 1978, he served the within
Notice of Decision by (certified) mail upon George A. Hamilton

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows:

George A. Hamilton
Certified Public Accountant
2083 Jericho Turnpike
East Northport, New York 11731

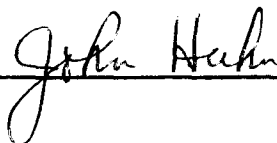
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

25th day of August , 1978.







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

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

August 25, 1978

**Mr. & Mrs. Donald O'Connell
121 Millbrook Circle
Norwood, New Jersey**

Dear Mr. & Mrs. O'Connell:

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 Chyrywat
Hearing Examiner**

cc: Petitioner's Representative
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DONALD and SARAH O'CONNELL	:	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 1968, 1969 and 1970.	:	

Petitioners, Donald and Sarah O'Connell, 121 Millbrook Circle, Norwood, New Jersey, 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 1968, 1969 and 1970 (File No. 00357).

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 August 30, 1977 at 2:45 P.M. Petitioner Donald O'Connell appeared with George A. Hamilton. The Income Tax Bureau appeared by Peter Crotty, Esq. (Louis Senft, Esq., of counsel).

ISSUES

I. Whether the income derived from petitioner Donald O'Connell's activities as a salesman was subject to unincorporated business tax and, if so, whether said income can be allocated to sources within and without New York State.

II. Whether the income derived from Donald O'Connell's activities as a salesman was properly allocated to sources within and without New York State on the joint New York State income tax nonresident returns filed by him and his wife for the years at issue.

FINDINGS OF FACT

1. Petitioners, Donald and Sarah O'Connell, filed New York State income tax nonresident returns for 1968, 1969 and 1970 and reported sixty-five percent of Donald O'Connell's net business income as being derived from sources within New York State. Mr. O'Connell did not file unincorporated business tax returns for these years.

2. The Income Tax Bureau contended that Donald O'Connell's activities as a commission agent during 1968, 1969 and 1970 constituted the carrying on of an unincorporated business, and that he had not submitted information to support an allocation of income to sources within and without New York State. Accordingly, the Income Tax Bureau issued two notices of deficiency on March 20, 1972. One Notice of Deficiency was issued against Donald O'Connell asserting unincorporated business tax of \$3,147.89, plus penalty of \$933.98 (pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law) and interest of \$335.63. The second Notice of Deficiency was issued against Donald and Sarah O'Connell asserting personal income tax of \$3,116.66, plus interest of \$326.36.

3. During the period at issue, Donald O'Connell was a salesman for Magnet Litho Supply Corp. (hereinafter "Magnet"), a firm located in the City and State of New York. He was paid on a commission

basis and no income or social security taxes were withheld from his commission, nor was he reimbursed for business expenses. Magnet did provide petitioner with desk space and telephone services at their New York office.

4. Petitioner did not maintain an office or a regular place of doing business outside the State of New York.

5. On the New York State income tax returns filed by the petitioners for the years at issue, Donald O'Connell described his occupation as "self-employed" and reported his income as business income. On the Federal returns filed for said years, income was reported on Schedule "C" and self-employment taxes were paid.

6. Magnet did not impose limitations on the territory covered by petitioner, nor did they control the amount of time he devoted to his selling activities.

7. Evidence submitted did not clearly establish the degree of direction and control exercised over Donald O'Connell by Magnet, nor did it clearly establish the percentage of sales consummated or transacted within and without New York State.

8. Petitioner Donald O'Connell did not file unincorporated business tax returns for 1968, 1969 and 1970 upon the advice of his accountant.

CONCLUSIONS OF LAW

A. That sufficient direction and control was not shown to have been exercised by Magnet so as to result in an employer-employee relationship in accordance with the meaning and intent of section 703(b) of the Tax Law.

B. That the activities of Donald O'Connell during the years at issue constituted the carrying on of an unincorporated business and that the income derived therefrom is subject to unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

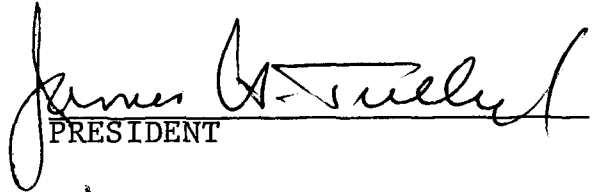
C. That Donald O'Connell did not have a regular place of business outside New York State; accordingly, all of the net income from his unincorporated business must be allocated to New York State for unincorporated business tax purposes in accordance with section 707(a) of the Tax Law. All of said net income must also be allocated to New York State for personal income tax purposes pursuant to section 632(c) of the Tax Law and 20 NYCRR 131.1.

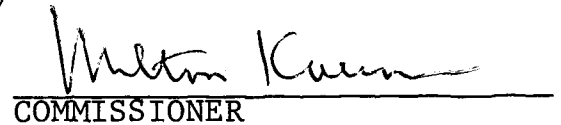
D. That Donald O'Connell's failure to file unincorporated business tax returns for the years at issue was due to reasonable cause and not due to willful neglect. Therefore, penalties asserted pursuant to section 685(a) of the Tax Law for 1968 and sections 685(a)(1) and 685(a)(2) of the Tax Law for 1969 and 1970 are cancelled. The Income Tax Bureau is hereby directed to modify the Notice of Deficiency issued to him on March 20, 1972 and that, except as so modified, the Notice is otherwise sustained.


E. That except as granted above, the petition of Donald and Sarah O'Connell is denied and the Notice of Deficiency issued to them on March 20, 1972 for personal income tax is sustained, together with such interest as may be lawfully owing.

DATED: Albany, New York
August 25, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER