

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

October 9, 1979

Dominick Dragonetti  
118 The Crossway  
Yonkers, NY 10701

Dear Mr. Dragonetti:

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:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Sincerely,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Harvey M. Lifset  
112 State St.  
Albany, NY 12207  
Taxing Bureau's Representative

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Dominick Dragonetti :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Personal Income & UBT :

under Article 22 & 23 of the Tax Law

for the Years 1973 & 1974. :

State of New York

County of Albany

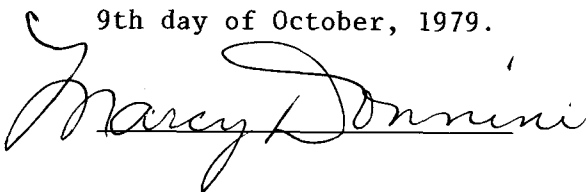
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1979, he served the within notice of Decision by certified mail upon Dominick Dragonetti, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

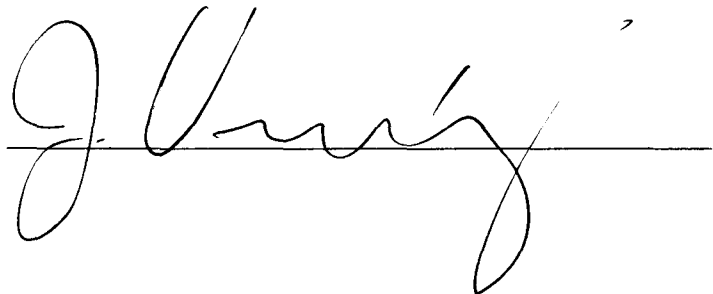
Dominick Dragonetti  
118 The Crossway  
Yonkers, NY 10701

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  
9th day of October, 1979.

  
Nancy Donnini

  
Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
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Dominick Dragonetti :

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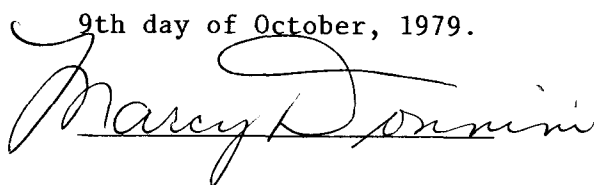
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1979, he served the within notice of Decision by certified mail upon Harvey M. Lifset the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

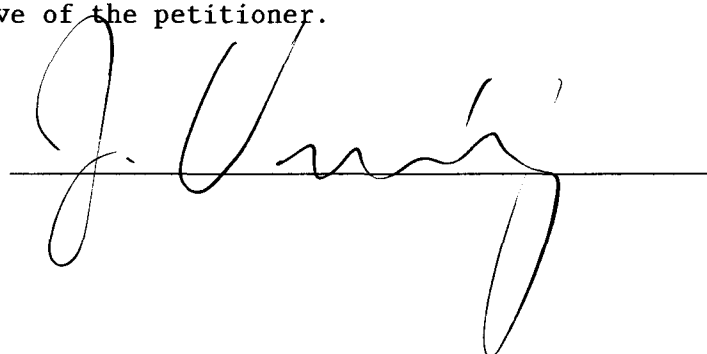
Mr. Harvey M. Lifset  
112 State St.  
Albany, NY 12207

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  
9th day of October, 1979.

  
Nancy Dominici

  
Jay Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
DOMINICK DRAGONETTI	:	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 1973 and 1974.	:	

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Petitioner, Dominick Dragonetti, 118 The Crossway, Yonkers, New York 10701, 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 1973 and 1974 (File No. 19299).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on December 13, 1978 at 1:15 P.M. Petitioner appeared by Harvey M. Lifset, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Barry M. Bresler, Esq. and Kathy L. Sanderson, Esq., of counsel).

ISSUE

Whether the income received by petitioner from his activities as an insurance salesman was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Dominick Dragonetti, timely filed New York State personal income tax returns for 1973 and 1974. He did not file unincorporated business tax returns for said years.

2. The Income Tax Bureau disallowed a portion of the capital loss claimed on petitioner's 1974 personal income tax return, on the grounds that petitioner and his wife had filed separately on Form IT-208 and, therefore, petitioner was entitled to a maximum capital loss of \$500.00. The Bureau also contended that petitioner's activities as an insurance salesman were subject to unincorporated business tax for 1973 and 1974. Accordingly, it issued a Notice of Deficiency to him on June 23, 1977 for said years in the amount of \$75.00 in personal income tax and \$3,426.58 in unincorporated business tax, plus \$1,322.66 in penalty and \$739.95 in interest, for a total of \$5,553.69.

3. Petitioner agreed to the adjustment made by the Income Tax Bureau as to the capital loss claimed, and paid the personal income tax due, plus interest, on June 24, 1977.

4. The Arthur Milton Agency is the general agent for Bankers Security Life Insurance Society. Milton Brokerage Associates, Inc. ("Milton Brokerage") sells general, fire, and casualty insurance. Petitioner is a licensed insurance agent and broker soliciting both life insurance and general insurance pursuant to contracts with the Arthur Milton Agency, Bankers Security Life Insurance Society, and with Milton Brokerage.

5. Petitioner's contract with Milton Brokerage required him to place all orders for general insurance through Milton Brokerage. Milton Brokerage had the right of refusal or acceptance of any general insurance business which he submitted to it. Milton Brokerage rendered all of the clerical and other office work necessary in servicing the insured, including billing the insured in its name for premiums which were due.

6. Milton Brokerage received all commissions due from insurers for the general insurance business placed with it by petitioner. It retained sixty percent of the commissions which it received and paid the other forty percent to petitioner.

7. Milton Brokerage did not withhold income taxes from petitioner's compensation. It did withhold social security tax and petitioner was covered under its medical and life insurance programs.

8. Petitioner did not pay any expenses which were incurred within Milton Brokerage's office; however, other business expenses such as auto expense, entertainment and gifts to customers were paid for by petitioner and were not reimbursed by the agency.

9. Petitioner maintained a self-employed retirement plan, since Milton Brokerage had no pension plan.

10. At the hearing, it was stipulated by the parties that the income received by petitioner from his prime insurance company, Bankers Security Life Insurance Society, was not subject to unincorporated business tax. It was further stipulated that petitioner failed to file unincorporated business tax returns for 1973 and 1974 due to reasonable cause, and that the penalties imposed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law should be cancelled.

11. Petitioner conceded that activities as an insurance salesman for companies other than Bankers Security Life Insurance Society and Milton Brokerage constituted the carrying on of unincorporated business.

#### CONCLUSIONS OF LAW

A. That the personal income tax portion of the Notice of Deficiency issued on June 23, 1977 was properly asserted against petitioner and paid by him on June 24, 1977, with interest.

B. That petitioner's activities as an insurance salesman for Bankers Security Life Insurance Society and Milton Brokerage Associates, Inc. were services performed as an employee within the meaning of section 703(b) of the Tax Law, and are not to be deemed an unincorporated business. Kent v. State Tax Commission, 55 AD2d 727. (It is noted that this conclusion is inconsistent with the Bureau's acceptance of petitioner's deductions for contributions to a self-employed retirement plan. However, since claim for an increased deficiency in personal income tax was not made at or before the hearing, as required by section 689(d) of the Tax Law, the deficiency may not be asserted at this time. The conclusion is, however, consistent with the Internal Revenue Code. See 20 USC 7701(a)(20)).

C. That the penalties are cancelled pursuant to the stipulation made by the parties.

D. That petitioner's activities as an insurance salesman for companies other than Bankers Security Life Insurance Society and Milton Brokerage Associates, Inc. constituted the carrying on of an unincorporated business in 1973 and 1974, within the meaning and intent of section 703 of the Tax Law. However, the income he derived from said activities was too small to result in unincorporated business tax for said year.

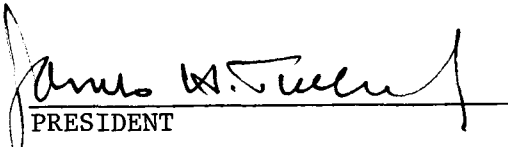
E. That with respect to the imposition of unincorporated business tax under Article 22 of the Tax Law and penalties under sections 685(a)(1) and (a)(2) of said law, the petition of Dominick Dragonetti is granted and the Notice of Deficiency dated June 23, 1977 for \$4,748.74 is cancelled.

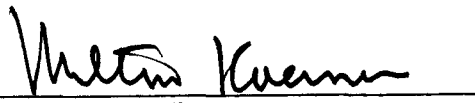
F. That with respect to the imposition of additional personal income tax under Article 22 of the Tax Law, the petition of Dominick Dragonetti is denied and the Notice of Deficiency issued on June 23, 1977 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 9 1979

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER