

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Bernard P. Brennan :
and Alice Brennan : 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 1971 - 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 28th day of November, 1980, he served the within notice of Decision by certified mail upon Bernard P. Brennan, and Alice Brennan, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

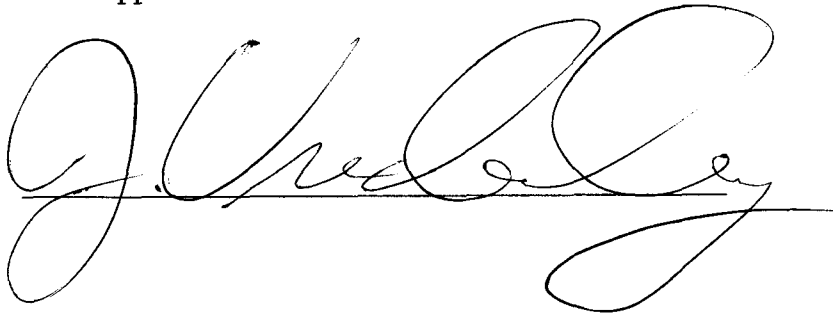
Bernard P. Brennan
and Alice Brennan
39 Haviland Ave.
Glens Falls, NY 12801

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
28th day of November, 1980.

Deborah A Bank



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Bernard P. Brennan :
and Alice Brennan : 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 1971 - 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 28th day of November, 1980, he served the within notice of Decision by certified mail upon Robert J. McGavisk 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. Robert J. McGavisk
121 Maple St.
Glens Falls, NY 12801

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
28th day of November, 1980.

Detorah A. Bank

J. Vredenburg

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

November 28, 1980

Bernard P. Brennan
and Alice Brennan
39 Haviland Ave.
Glens Falls, NY 12801

Dear Mr. & Mrs. Brennan:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Robert J. McGavisk
121 Maple St.
Glens Falls, NY 12801
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
BERNARD P. BRENNAN	:	
and	:	DECISION
ALICE BRENNAN	:	
for Redetermination of Deficiencies or	:	
for Refund of Personal Income and	:	
Unincorporated Business Taxes under	:	
Articles 22 and 23 of the Tax Law for	:	
the Years 1969, 1971 through 1974.	:	

Petitioners, Bernard P. Brennan and Alice Brennan, 39 Haviland Avenue, Glens Falls, New York 12801, filed petitions 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 1969, 1971 through 1974 (File Nos. 17684 and 22991).

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 March 25, 1980 at 1:15 P.M. Petitioner Bernard P. Brennan appeared with Robert J. McGavish. The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether petitioners properly deducted travel expense and itemized deductions on their 1969 New York State income tax return.

II. Whether the income derived from petitioner Bernard P. Brennan's activities as a hearing aid salesman during 1969 and 1971 through 1974 is subject to unincorporated business tax.

FINDINGS OF FACTS

1. Petitioner Bernard P. Brennan and his wife, Alice Brennan, filed joint New York State income tax returns for 1969 and 1971 through 1974 and reported business income from his activities as a hearing aid salesman. Unincorporated business tax returns were not filed for said years.

2. On July 30, 1973, the Income Tax Bureau issued two notices of deficiency for 1969 on which no petitions were filed. One Notice of Deficiency was issued on grounds the petitioners did not substantiate their travel expenses and itemized deductions on their 1969 personal income tax return. Accordingly, it asserted additional personal income tax of \$666.97, plus interest of \$131.70, for a total of \$798.67. The second Notice of Deficiency was issued on the grounds that petitioner Bernard P. Brennan's activities as a hearing aid salesman was subject to unincorporated business tax. The Bureau imposed unincorporated business tax of \$610.85, plus interest of \$120.62, for a total due of \$731.47.

3. Petitioners paid and filed a claim for refund of personal income and unincorporated business taxes in the amount of \$1,612.16 for 1969. On August 30, 1976, the Audit Division issued a Notice of Disallowance.

4. On December 20, 1976, the Audit Division issued a Notice of Deficiency against petitioner Bernard P. Brennan for the years 1972 through 1974 asserting unincorporated business tax of \$364.03, plus interest on income derived from his activities as a hearing aid salesman. A Notice of Deficiency was also issued for 1971 in the amount \$254.01, plus interest.

5. Petitioner Bernard P. Brennan was a salesman for Acousticon Hearing Aids (hereinafter "Acousticon"), which had its main office in Glens Falls, New York and branch offices in Plattsburgh, New York and Rutland, Vermont. Petitioner worked for Acousticon during 1969, 1972 and through June, 1973. He

was compensated on a commission basis and no taxes were withheld on said commissions.

6. Each business morning, petitioner Bernard P. Brennan would report at the main office in Glens Falls and would be assigned a sales territory for that day. He would be given a schedule of appointments, which were either sale or service appointments, which were subject to change by Acousticon. Petitioner was also responsible for the transportation of telephone solicitation operators (employees of Acousticon) to the territory assigned to him that day.

7. Petitioner was provided with samples and all sales forms. All orders were subject to the terms, conditions, and approval of Acousticon. All monies received by petitioner from the customers were the property of Acousticon.

8. Petitioner had a contract with Acousticon that he would not represent or sell for any other firm. Acousticon provided the petitioner with medical insurance. Petitioner was not reimbursed for business expenses.

9. For the last half of 1973 and for 1974, the petitioner was employed by Accredited Hearing Aids (hereinafter "Accredited"). The petitioner was paid a salary and all taxes were withheld. Petitioner was assigned a sales territory for each day. He would be given a schedule of appointments and was responsible to transport telephone solicitation operators (employees of Accredited) to the territory assigned him that day. Petitioner was provided with samples and all sales forms. All orders were subject to the terms, conditions and approval of Accredited. All monies received were the property of Accredited.

10. Petitioners were granted an extension of time in which to submit documentary evidence with respect to travel expense and itemized deductions claimed for 1969; however, no documentary evidence was submitted.

CONCLUSIONS OF LAW

A. Petitioners, Bernard P. Brennan and Alice Brennan, have failed to sustain the burden of proof imposed by section 689(e) of the Tax Law to show that they are entitled to a deduction for travel expense and itemized deductions. Accordingly, that portion of the Notice of Disallowance issued August 30, 1976 is sustained.

B. That Acousticon Hearing Aids (for the years 1969, 1971 and through June, 1973) and Accredited Hearing Aids (for the years July through December 1973 and 1974) exercised sufficient direction and control over the petitioner's Bernard P. Brennan activities so as to cause him to be their employee within the meaning and intent of section 703(b) of the Tax Law.

Accordingly the income received by petitioner Bernard P. Brennan is not subject to the imposition of unincorporated business tax within the meaning and intent of section 701 of the Tax Law. That the Audit Division is hereby directed to modify the Notice of Disallowance issued August 30, 1976 and allow the claim for refund of unincorporated business tax, together with such additional interest as may be lawfully owing. That the other notices of deficiency issued for unincorporated business tax are cancelled.

C. That the petitions of Bernard P. Brennan and Alice Brennan are granted to the extent indicated in Conclusion of Law "B", above; that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

NOV 28 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER