

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Arthur E. Delorenzo, Sr. :

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 5th day of September, 1980, he served the within notice of Decision by certified mail upon Arthur E. Delorenzo, Sr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur E. Delorenzo, Sr.
41 Tompkins St.
Cortland, NY 13045

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
5th day of September, 1980.

Arthur E. Delorenzo, Sr.

[Signature]

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

September 5, 1980

Arthur E. Delorenzo, Sr.
41 Tompkins St.
Cortland, NY 13045

Dear Mr. Delorenzo:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ARTHUR E. DeLORENZO, SR. : 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 1971 through 1974. :
:

Petitioner, Arthur E. DeLorenzo, Sr., 41 Tompkins Street, Cortland, New York 13045, 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 1971 through 1974 (File No. 13741).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 333 E. Washington Street, Syracuse, New York, on March 18, 1980 at 2:45 P.M. Petitioner Arthur E. De Lorenzo, Sr. appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether the overhaul of an engine and drive-train of a business automobile is to be treated as a business repair expense or depreciable capital expenditure.

II. If the aforementioned overhaul constituted a depreciable capital expenditure, whether the petitioner is entitled to a depreciation adjustment for subsequent years.

III. Whether the income received by petitioner from his activities as a mutual funds and life insurance sales manager was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Arthur E. DeLorenzo, Sr., filed New York State income tax resident returns for 1972 through 1974. The Income Tax Bureau had no record of petitioner filing a New York State income tax resident return for 1971. This return was filed at the time a field audit was performed and was based on petitioner's Federal return.

2. On December 22, 1975, in accordance with a field audit conducted by the Income Tax Bureau, a Statement of Audit Changes was issued for additional personal income tax due for 1971 through 1973. On that same date, a second Statement of Audit Changes was issued on the grounds that petitioner's income from his activities as sales manager was subject to unincorporated business tax for 1971 through 1974. In accordance with both statements of audit changes, the Income Tax Bureau issued on December 22, 1975 a Notice of Deficiency against petitioner for 1971 through 1974 imposing personal income and unincorporated business taxes of \$3,379.90, plus penalty of \$50.34 (pursuant to section 685(c) of the Tax Law), and interest of \$546.76, for a total due of \$3,977.00.

3. In 1972, petitioner incurred the expense for a major overhaul of the engine and drive-train of his business car. The Income Tax Bureau determined the allowable expense to be \$1,565.00 which it contended should be treated as a capital expenditure and depreciated. After adjusting petitioner's 1972 return, the Bureau made no adjustment to reflect this determination in subsequent years. A review of petitioner's tax returns for the years in question indicates that as of January 1, 1973, a new business auto was placed into service. No other personal income tax adjustments are at issue other than petitioner's contention that this expenditure should be treated as an expense in 1972.

4. During the years at issue, petitioner was a salesman and District Sales Manager for Investors Diversified Service, Inc. (hereinafter "IDS"). He operated under a Full Time Sales Representative's Agreement. Petitioner was required to solicit new customers and service old customers. All applications for mutual funds and/or life insurance and checks received from customers had to be approved and processed through IDS. Petitioner was not allowed to place business with or represent other companies.

5. Petitioner, as District Sales Manager for IDS, was reimbursed by IDS for the rental of office space, office supply expenses, telephone service and secretarial help. His travel and entertainment expenses were not directly reimbursed, but rather petitioner paid these expenses from his commissions.

6. Petitioner was required to attend regular sales meetings at the local office and was required to report weekly to the divisional office in person to file his reports. As District Sales Manager for IDS, it was petitioner's responsibility to train personnel sent to him by IDS. Petitioner did not have any power on his own to hire or fire any personnel working for IDS.

7. Petitioner, Arthur E. DeLorenzo, Sr., was subject to IDS's established standards and was covered by IDS's profit sharing and medical plan.

8. During the years at issue, petitioner was paid strictly on a commission basis with no withholding of payroll taxes.

9. All records and money generated or received from customers seen by petitioner were the property of IDS.

CONCLUSIONS OF LAW

A. That a major overhaul of an engine and drive-train is a depreciable capital expenditure in accordance with Internal Revenue Regulation 1.167. Further, since the record indicates that petitioner had abandoned or replaced the overhauled vehicle on or before January 1, 1973, depreciation on the

capital improvement would no longer be allowable within the meaning and intent of section 167 of the Internal Revenue Code and Article 22 of the Tax Law.

B. That although the agreement between petitioner and Investors Diversified Service, Inc. designated him as an independent contractor and was treated as such for payroll purposes, petitioner was, in fact, an employee of said principal in accordance with the meaning and intent of section 703(b) of the Tax Law and his income derived therefrom was not subject to unincorporated business tax.

C. That the petition of Arthur E. DeLorenzo, Sr. is granted to the extent that the unincorporated business tax and penalty and interest are cancelled; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER