

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Michael J. DeZinna :

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 1970 - 1971. :

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Michael J. DeZinna, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael J. DeZinna

11 Woodward St.

Roslyn Heights, NY 11577

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

7th day of July, 1980.

Deborah A Bank

J. Vredenburg

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

July 7, 1980

Michael J. DeZinna
11 Woodward St.
Roslyn Heights, NY 11577

Dear Mr. DeZinna:

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) 722 & 690 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
MICHAEL J. DE ZINNA
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 and 1971.

DECISION

Petitioner, Michael J. De Zinna, 11 Woodward Street, Roslyn Heights, New York 11577, 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 and 1971 (File No. 14209).

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 September 18, 1978 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the income derived from petitioner's activities as a sales engineer was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Michael J. De Zinna, and Frances De Zinna, his wife, timely filed joint New York State income tax resident returns for the years 1970 and 1971, on which petitioner reported business income from his activities as a sales engineer. Unincorporated business tax returns were not filed for said years.

2. On December 23, 1974, the Income Tax Bureau issued a Notice of Deficiency against petitioner, Michael J. De Zinna, asserting unincorporated business tax on the income derived from his activities as a sales engineer. Adjustments pursuant to section 659 of the Tax Law were also made and were conceded to by petitioner and are not at issue here.

3. During the years in issue, petitioner was a sales engineer and was retained, under contract, as a sales representative by the Merrill Manufacturing Corporation ("Merrill"), which had its principal office in the State of Wisconsin. Petitioner represented Merrill for approximately sixteen years.

4. Petitioner's activities consisted of redesigning existing products used by a particular firm into an equally efficient, but less expensive product. The design was then submitted to Merrill for its evaluation and approval. If the design was approved, Merrill manufactured the new product, sold it to the firm at a reduced price, and then paid petitioner a commission consisting of a percentage of the sales actually made.

5. The design developed by petitioner became the sole property of Merrill. Merrill also absorbed any liabilities or damages which may have resulted from the new product.

6. Petitioner was required to submit written reports to Merrill detailing his visits and sales activities. Although he was allowed to visit clients at his own discretion, he was usually given an itinerary to follow and was required to visit each of Merrill's customers at least once every sixty days.

7. Petitioner's territory was limited by Merrill to the States of New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Maryland, Delaware, New Jersey, New York and parts of Pennsylvania.

8. Merrill did not withhold payroll taxes from petitioner's compensation. Expenses reimbursed by Merrill were limited to expenses incurred by petitioner

in attending sales meetings in Wisconsin, or expenses incurred by him in transporting clients to the factory and/or office located in Wisconsin in order to finalize a deal.

9. Petitioner filed Schedule C (Profit or Loss from Business or Profession) with his Federal return wherein he deducted expenses for the maintenance of an office in his home and for depreciation on furniture, fixtures and equipment. Petitioner also paid a self-employment tax on the net profit derived from his business.

10. During 1971 Merrill Manufacturing Corporation paid petitioner \$25,547.18, and Basic Wire Products, Incorporated, a subsidiary of Merrill, paid him \$750.24. The total income received from both firms represented the total gross receipts as shown on his Schedule C.

11. Petitioner participated in a group medical insurance plan and in a profit-sharing plan which were provided by Merrill for all its employees.

12. Petitioner paid, without any reimbursement from Merrill, for an advertisement in the yellow pages which advertisement contained both petitioner's name and the name of the firm he represented.

13. Petitioner contended that he was requested by Merrill to incorporate his activities because of Federal laws which required that federal and social security taxes be withheld and because Merrill did not want to incur employee expenses, such as unemployment insurance, disability insurance, etc.

CONCLUSIONS OF LAW

A. That sufficient direction and control was not exercised over petitioner's activities by Merrill Manufacturing Corporation so as to create an employer-employee relationship in accordance with the meaning and intent of section 703(b) of the Tax Law.

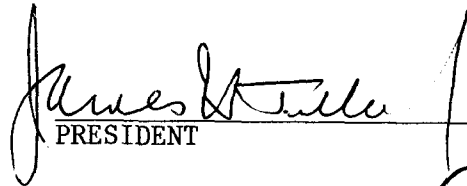
B. That the income derived from petitioner's activities during 1970 and 1971 constituted income derived from the carrying on of an unincorporated business within the meaning and intent of section 703 of the Tax Law; thus the income derived therefrom was subject to unincorporated business tax.

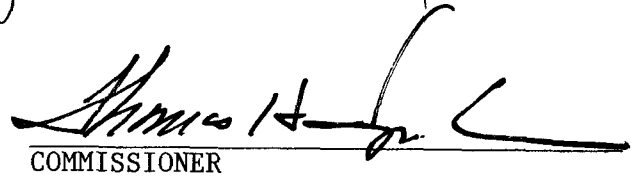
C. That the petition of Michael J. De Zinna is denied and the Notice of Deficiency issued December 23, 1974 is sustained, together with such additional interest as may be lawfully owing.

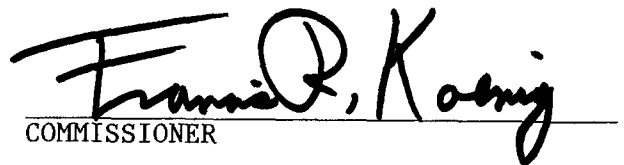
DATED: Albany, New York

JUL 07 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Michael J. DeZinna :

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 1970 - 1971. :

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 6th day of August, 1980, he served the within notice of Decision by certified mail upon Michael J. DeZinna, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael J. DeZinna
RD # 1, Box 188C
Saylonsburg, PA

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
6th day of August, 1980.

Seetha C. Bank

J. Vredenburg