

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Harry Smith (deceased) :  
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 1968 & 1969. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

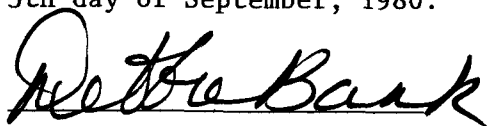
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of September, 1980, he served the within notice of Decision by certified mail upon Harry Smith (deceased), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

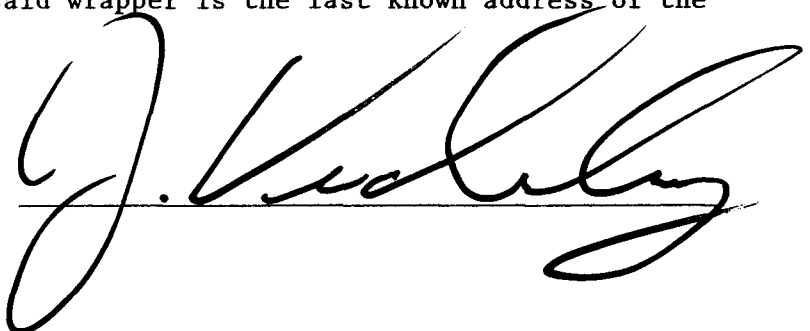
Harry Smith (deceased)  
c/o Berenice Smith, Executrix  
50 E. 79th St. Apt. 8-C  
New York, NY 10021

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.

  
Notary Public



STATE OF NEW YORK  
STATE TAX COMMISSION

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of  
Harry Smith (deceased) :  
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Personal Income & UBT :  
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AFFIDAVIT OF MAILING

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 Stanley Luterman 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. Stanley Luterman  
c/o Greenberg & Greenberg  
110 E. 59th St.  
New York, NY 10022

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  
5th day of September, 1980.

Robert Bank

J. Vredenburg

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

September 5, 1980

Harry Smith (deceased)  
c/o Berenice Smith, Executrix  
50 E. 79th St. Apt. 8-C  
New York, NY 10021

Dear Ms. Smith:

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  
Stanley Luterman  
c/o Greenberg & Greenberg  
110 E. 59th St.  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
HARRY SMITH	:	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 1964 through 1969.	:	

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Petitioner, Harry Smith (now deceased), 50 East 79th Street, New York, New York 10021, 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 1964 through 1969 (File No. 01388).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 28, 1977 at 2:50 P.M. and was continued on May 16, 1978 at 1:15 P.M. Petitioner (now deceased) appeared by Greenberg & Greenberg, PA (Norman Greenberg, of counsel). The Audit Division appeared by Peter Crotty, Esq. (James Morris, Esq, of counsel).

ISSUES

I. Whether petitioner's business activities as a commission salesman or sales consultant for one voting machine company constituted the carrying on of an unincorporated business under section 703 of the Tax Law, for each of the years 1964 through 1969.

II. Whether petitioner's business income should be allocated for New York State income tax purposes according to the place where the income was earned.

III. Whether the Income Tax Bureau properly assessed the personal income and unincorporated business taxes alleged to be due from petitioner (now deceased).

FINDINGS OF FACT

1. Petitioner, Harry Smith, timely filed New York State resident income tax returns for each of the years 1964 through and including 1969. He filed the 1964 tax return separately, but for 1965 through 1969, Harry Smith filed a combined return with his wife Berenice Smith, separately stating New York income for husband and wife who filed Federal income tax returns jointly. No unincorporated business tax returns were filed for any year.

2. On December 29, 1969, the Income Tax Bureau issued a Notice of Deficiency assessing petitioner, Harry Smith, personal income and unincorporated business taxes as follows:

<u>Year</u>	<u>Deficiency</u>	<u>Interest</u>	<u>Total</u>
1964	\$ 5,117.59	\$1,444.68	\$ 6,562.23
1965	2,851.39	633.86	3,485.25
1966	6,939.07	1,126.21	8,065.28
1967	7,011.58	717.28	7,728.86
	<u>\$21,919.59</u>	<u>\$3,922.03</u>	<u>\$25,841.62</u>

On November 12, 1973, a Notice and Demand for Payment of Tax Due Under Jeopardy Assessment was sent to petitioner, Harry Smith (now deceased), for the tax asserted in the Notice of Deficiency dated December 29, 1969. The interest was computed to date resulting in a total due of \$30,894.10.

3. On December 6, 1973, the Income Tax Bureau issued a jeopardy assessment against petitioner, Harry Smith, in the amount of \$9,530.00. Based on the prior years audit, petitioner's business activities had been held to be carrying on of an unincorporated business; thus, the income therefrom was held to be subject to unincorporated business tax for 1968 and 1969. The assessment was detailed as follows:

<u>Year</u>	<u>Tax</u>	<u>Interest @ 6%</u>	<u>Total</u>
1968	\$5,594.58	\$1,557.81	\$7,152.39
1969	1,951.34	426.27	2,377.61
	<u>\$7,545.92</u>	<u>\$1,984.08</u>	<u>\$9,530.00</u>

In accordance with provisions of section 694 of the Tax Law, a Notice of Deficiency was issued to petitioner for 1968 and 1969 on January 7, 1974.

4. On March 3, 1970, petitioner, Harry Smith, filed a petition for redetermination of the deficiency assessed against him for the years 1964 through 1967.

On March 20, 1974, petitioner, Harry Smith, filed a petition for redetermination of the Notice of Deficiency issued January 7, 1974.

Petitioner, Harry Smith, claimed to be an employee not subject to the imposition of unincorporated business tax. If found subject to the unincorporated business tax, petitioner Harry Smith, requested allocation for out-of-state earnings.

5. Petitioner, Harry Smith, was a salesman of voting machines for one company, Shoup Voting Machine Corporation, Bala Cynwyd, Pennsylvania. He traveled all over the United States selling voting machines, acting as consultant to municipalities who were potential or actual customers of his principal. Petitioner, Harry Smith, maintained an office at 1271 Sixth Avenue, New York, New York 10020, through the years 1964 to 1969. While he stated in a letter to the Income Tax Bureau that he had no employees, petitioner, Harry Smith, reported on the Schedule "C" attached to his Federal income tax Form 1040, that he had an employer's identification number for social security withholding purposes.

6. On his Schedule "C" attached to the Federal Income Tax Form 1040, petitioner, Harry Smith, deducted New York State unemployment insurance taxes, social security taxes and payroll. On his Schedule C-3 attached to his own Form 1040, petitioner paid social security tax on his "Self-Employment Income" in each of the years 1964 through 1969.

7. The Shoup Voting Machine Corporation withheld no income or social security taxes from the monies it paid petitioner, Harry Smith. The company did not reimburse petitioner, Harry Smith, for his travel and entertainment. Petitioner, Harry Smith, deducted these as business expenses on his Federal income tax returns.

8. Petitioner, Harry Smith's, death occurred between the dates of the two hearings. His widow, Berenice Smith, was appointed executrix of the Estate of Harry Smith under the terms of his will. She did not appear at the formal hearing, but did submit an affidavit alleging that petitioner, Harry Smith (now deceased), had maintained offices for conducting out-of-state business. These offices were allegedly located at 5905 Princeton Avenue, Chicago, Illinois 60621, 4507 Turquoise Street, Los Angeles, California 98761, and 55 East City Line Avenue, Bala Cynwyd, Pennsylvania 19004. She stated that sales in Illinois and Wisconsin were dealt with at the Chicago premises; California transactions were dealt with at the Los Angeles premises, and New Jersey transactions at the Pennsylvania premises. No verification of these allegations was submitted.

9. Petitioner, Harry Smith, was a resident of New York State during the entire period under review.

10. Petitioner, Harry Smith, paid a total of \$21,819.62 as unincorporated business tax in installments, ended December 28, 1973. No proof was adduced that the income tax deficiency for 1964 had been paid.

11. No testimony or proof was presented at the hearing as to the nature and extent of the supervisory control exercised by the principal for which petitioner, Harry Smith (now deceased), sold exclusively.

#### CONCLUSIONS OF LAW

A. That the activities of petitioner, Harry Smith, during the years 1964

through 1969 constituted the carrying on of an unincorporated business; thus, his income derived therefrom was subject to the unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law.

B. That the income received by petitioner as commissions from the firm that he represented from 1964 through 1969 constituted income from his regular business of sales consultant and salesman of voting machines, and that said income was not compensation as an employee exempt from the imposition of unincorporated business tax, in accordance with the meaning and intent of section 703(b) of the Tax Law.

C. That the income of petitioner, Harry Smith, was not subject to allocation under the Tax Law. Petitioner, Harry Smith, was at all pertinent times a resident of New York State. He did not sustain the burden of proof required to show that he maintained out-of-state offices from which he conducted out-of-state income-producing business.

D. That the notices of deficiency dated December 29, 1969 and December 6, 1973 for both income and unincorporated business taxes are sustained. The Audit Division shall give credit for the taxes paid and shall compute legal interest until the total balance due shall have been paid.

E. That the petition of Harry Smith is in all respects denied.

DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER