

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Louis & Nettie Stone :
c/o Jonathan Stone : 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 1972,1973. :

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 13th day of February, 1980, he served the within notice of Decision by certified mail upon Louis & Nettie Stone, c/o Jonathan Stone, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis & Nettie Stone
c/o Jonathan Stone
293 Artist Lake Dr.
Middle Island, NY 11953

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
13th day of February, 1980.

Joanne Knapp

A large, stylized handwritten signature, likely of Jay Vredenburg, written in dark ink over a horizontal line.

STATE OF NEW YORK
STATE TAX COMMISSION

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Louis & Nettie Stone :
c/o Jonathan Stone : 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 1972,1973. :

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 13th day of February, 1980, he served the within notice of Decision by certified mail upon Saul Siegel 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. Saul Siegel
Personal Tax Services Inc.
391 A Fulton Avenue
Hempstead, NY 11550

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
13th day of February, 1980.

Joanne Knapp

[Signature]

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

February 13, 1980

Louis & Nettie Stone
c/o Jonathan Stone
293 Artist Lake Dr.
Middle Island, NY 11953

Dear Mr. & Mrs. Stone:

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
Saul Siegel
Personal Tax Services Inc.
391 A Fulton Avenue
Hempstead, NY 11550
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
LOUIS STONE and NETTIE STONE : DECISION
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business and Per- :
sonal Income Taxes under Articles 22 and 23 :
of the Tax Law for the Years 1972 and 1973.

Petitioners, Louis Stone and Nettie Stone c/o Jonathan Stone, 293 Artist Lake Drive, Middle Island, New York 11953, filed a petition for redetermination of a deficiency or for refund of unincorporated business and personal income taxes under Articles 22 and 23 of the Tax Law for the years 1972 and 1973 (File No. 17850).

A small claims hearing was held before William Valcarcel, Hearing Officer, on October 18, 1978 at 10:30 A.M. at the offices of the State Tax Commission, Suffolk District Office, Veterans Highway, Hauppauge, New York. Petitioner appeared by Saul Siegel. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether petitioner Louis Stone's income from his activities as an insurance salesman during the years 1972 and 1973 is subject to the unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Louis Stone and Nettie Stone, timely filed joint New York State income tax resident returns for the years 1972 and 1973 on which business income was reported from petitioners activities as an insurance salesman. Unincorporated business tax returns were not filed for these years.

2. On September 28, 1976, in compliance with Section 659 of the Tax Law, petitioners, Louis and Nettie Stone, notified the Audit Division of Federal audit changes instituted by the Internal Revenue Service for the year 1973, and an additional personal income tax was paid with interest.

3. On audit, the Audit Division issued a Notice of Deficiency dated January 24, 1977 along with an explanatory Statement of Audit Changes, whereby unincorporated business tax was imposed on petitioner Louis Stone's income from his activities as an insurance salesman during the years 1972 and 1973. Additional personal income tax was also imposed for the year 1973, which reflected a correction of an error made in reporting the Federal audit changes instituted by the Internal Revenue Service. This correction was conceded by petitioners and is not at issue.

4. Petitioner Louis Stone was an insurance agent for the Equitable Life Assurance Society of the United States ("Equitable") and specialized in group insurance plans and tax shelter annuities. Usually he sold to organizations or municipalities who offered these types of plans and/or annuities to its employees.

5. Prior to March, 1967, petitioner Louis Stone's activities were conducted from the agency offices of Equitable in Huntington, New York. In addition, he was:

- (a) Provided with desk space and secretarial services at the agency office;
- (b) required to regularly report the details and results of his activities to the agency manager;
- (c) forbidden to place insurance with any other firm without the express permission from Equitable;
- (d) subject to rules of procedure, conduct and dress mandated by Equitable;
- (e) compensated on a commission basis, which was solely subjected to the withholding by Equitable of deductions under the Federal Insurance Contributions Act. Income taxes were not withheld;

- (f) provided by Equitable with a retirement plan, a disability plan, an investment plan, a medical insurance plan and group life insurance;
- (g) required by Equitable to attend training classes and seminars;
- (h) required to maintain a specific level of production in order to continue representing Equitable;
- (i) considered by Equitable, in accordance with their written agreement, to be an "independent contractor";
- (j) not limited to a specific territory in which he could sell.

6. Subsequent to March, 1967, petitioner Louis Stone's health failed to an extent that he was no longer able to travel, or actively render services as an insurance agent. Accordingly, he was deemed disabled and was granted monthly disability benefits by Equitable.

7. Although petitioner Louis Stone was disabled and receiving disability benefits, Equitable allowed him to render a limited amount of services from his home. His activities during the years 1972 and 1973 primarily consisted of maintaining his existing "group clientele" accounts.

8. Petitioner Louis Stone established a small office at his home, where he performed his services by correspondence and by telephone. All clerical and secretarial services were performed by his wife petitioner Nettie Stone without pay. Occasionally, when his wife was not available, petitioner would hire a temporary typist.

9. Although Equitable did not exercise a significant degree of direction and control over petitioner Louis Stone's daily activities as conducted from his home, they retained the right to do so. In addition, they monitored his activities

very closely to assure themselves that his limited duties were being performed and to determine improvements, if any, in his disabled condition. If petitioner Louis Stone was able to go out and acquire a substantial amount of new business, his disability status would have been questioned and perhaps he would have been declared ineligible for the monthly disability payments made by Equitable.

10. Petitioner Louis Stone was kept well informed by the agency office as to any changes in procedures, company policy and premium costs. Any training classes offered by Equitable were administered to him by correspondence. Desk space and secretarial services at the agency office were still available to him, but he was too disabled to utilize them.

11. During 1972 and 1973, petitioner Louis Stone was forbidden to place insurance with other firms, was required to follow their rules and procedures, was provided with a retirement plan, an investment plan, a medical insurance plan and group life insurance. In addition, deductions under the Federal Insurance Contributions Act were deducted from his commissions by Equitable; however, income taxes were not withheld.

CONCLUSIONS OF LAW

A. That the Equitable Assurance Society of the United States retained the right to impose sufficient direction and control over petitioner's activities so as to cause him to become its employee, but chose not to totally exercise it during the years 1972 and 1973. "In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed, it is sufficient if it has the right to do so." [20 NYCRR 203.10(b)].

B. That accordingly, petitioner Louis Stone was an employee during the years 1972 and 1973 and the income derived therefrom was not subject to the unincorporated business tax in accordance with the meaning and intent of Section 703(b) of the Tax Law.

C. That the petition of Louis Stone and Nettie Stone is granted to the extent that the tax liability pursuant to Article 23 of the Tax Law is cancelled in full. The Audit Division is hereby directed to modify accordingly the Notice of Deficiency issued January 1, 1973. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 13 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER