

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Milton Beck

:

:

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 1969 - 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 November, 1981, he served the within notice of Decision by certified mail upon Milton Beck, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Milton Beck  
2330 Ocean Ave.  
Brooklyn, NY 11229

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 November, 1981.

*Carmie A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Milton Beck :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
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& UBT under Article 22 & 23 of the Tax Law for the:  
Years 1969 - 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 November, 1981, he served the within notice of Decision by certified mail upon Albert F. Ciancimino the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert F. Ciancimino  
223 Avenue J  
Brooklyn, NY 11230

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  
6th day of November, 1981.

*Bernie A. Haglund*

*J. Vredenburg*

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

November 6, 1981

Milton Beck  
2330 Ocean Ave.  
Brooklyn, NY 11229

Dear Mr. Beck:

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  
Albert F. Ciancimino  
223 Avenue J  
Brooklyn, NY 11230  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
MILTON BECK	:	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 1969, 1970 and 1971.	:	

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Petitioner, Milton Beck, 2330 Ocean Avenue, Brooklyn, New York 11229, 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 1969, 1970 and 1971 (File No. 15993).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 6, 1981 at 1:15 P.M. Petitioner appeared with Albert F. Ciancimino, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether the income derived from petitioner's activities as a sales representative is subject to the unincorporated business tax.

II. Whether penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law should be abated.

III. Whether petitioner's additional personal income tax liability for 1971, based on adjustments pursuant to a Federal audit, was previously paid.

FINDINGS OF FACT

1. Petitioner, Milton Beck, timely filed joint New York State income tax resident returns with his wife for the years 1969, 1970 and 1971 whereon he reported miscellaneous income from his activities engaged in as a "traveling salesman". He did not file unincorporated business tax returns for said years.

2. On January 2, 1974 the Audit Division issued a Statement of Audit Changes to petitioner wherein the income derived from his sales activities was held subject to the unincorporated business tax for the years 1969, 1970 and 1971. Additionally, a personal income tax adjustment was made for 1971 as the result of previously unreported Federal audit changes. Accordingly, a Notice of Deficiency was issued against petitioner on September 30, 1974 asserting unincorporated business tax of \$3,606.42, additional personal income tax of \$112.63, penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law, for failure to file unincorporated business tax returns and failure to pay the tax determined to be due, respectively of \$1,713.05, plus interest of \$719.14, for a total due of \$6,151.24.

3. During the years at issue herein, petitioner was engaged in activities as a sales representative for the Prestolite Company (hereinafter Prestolite). He was given the title "Regional Manager", and as such, he was responsible for transacting sales within his region, which consisted of several northeastern states. He was compensated on a commission basis of five percent and although Prestolite paid petitioner's expenses attributable to his required attendance at occasional shows and conventions, it did not reimburse him for his day-to-day ordinary and necessary business expenses incurred.

4. Prestolite, a manufacturer of automobile batteries and related accessories, was located in Toledo, Ohio. Petitioner reported to the company by

telephone on a daily basis and corresponded on a regular basis with his immediate supervisor at weekly intervals. Petitioner personally visited the Prestolite office three or four times per year.

5. Prestolite prohibited petitioner from selling competitive products but had no such restrictions with respect to the sale of noncompetitive products.

6. Petitioner was not supplied with office space by Prestolite. Necessary paperwork was completed by petitioner at his personal residence.

7. Petitioner, who contended that he was a bona fide employee of Prestolite, was required to attend periodic sales meetings. Additionally, he was instructed, on occasion, to "straighten out" accounts in other regions, for which services he received no additional compensation.

8. Prestolite did not withhold Federal or New York State personal income taxes from petitioner's compensation. Furthermore, it did not provide petitioner with paid vacation or sick leave, nor did it cover petitioner for workmen's compensation or unemployment insurance. Since no pension plan was provided, petitioner maintained a self-employed retirement plan.

9. During the years 1969, 1970 and 1971, petitioner represented between four and seven other principals in addition to Prestolite. Petitioner did not claim that an employee-employer relationship was maintained with such other principals. Gross income derived from these principals during 1969, 1970 and 1971 was \$14,727.00, \$15,687.00 and \$13,842.00, respectively. Gross income derived from Prestolite during said years was \$33,765.00, \$49,619.00 and \$57,817.00, respectively.

10. Petitioner sold products of such other principals only to his Prestolite accounts.

11. During the years at issue petitioner employed an assistant salesman to whom he paid commissions for opening new accounts. This assistant sold products of Prestolite as well as those of petitioner's other principals. Total compensation paid to such assistant was not made available by petitioner.

12. The issue of penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law was conceded by the Audit Division during the hearing held herein.

13. No evidence, documentary or otherwise, was presented to establish that petitioner's personal income tax liability for 1971 had been previously paid.

#### CONCLUSIONS OF LAW

A. That the degree of direction and control exercised by petitioner's principals over his activities was insufficient for the existence of a bona fide employer-employee relationship. Furthermore, petitioner engaged in activities on behalf of all his principals without a clear division of time. Accordingly, his sales activities cannot be construed as services rendered as an employee within the meaning and intent of section 703(b) of the Tax Law.

B. That the sales activities engaged in by petitioner for Prestolite, as well as his other principals, constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

C. That the penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are hereby abated, since such penalties were conceded by the Audit Division.

D. That petitioner has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that the 1971 personal income

tax liability at issue had been previously paid. Accordingly, that part of the deficiency relating thereto is sustained.

E. That the petition of Milton Beck is granted to the extent provided in Conclusion of Law "C" supra, and except as so stated, said petition is, in all other respects, denied.

F. That the Audit Division is hereby directed to modify the Notice of Deficiency dated September 30, 1974 to be consistent with the decision rendered herein.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER