

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph J. & Patricia A. Budinich :
: 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 - 1972 :

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 1st day of May, 1981, he served the within notice of Decision by certified mail upon Joseph J. & Patricia A. Budinich, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph J. & Patricia A. Budinich
26 Walnut St.
Teaneck, NJ 07666

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
1st day of May, 1981.

Ann P. Hagelund

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph J. & Patricia A. Budinich :
: 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 - 1972 :

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 1st day of May, 1981, he served the within notice of Decision by certified mail upon Harvey Plavin 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. Harvey Plavin
Kaplan & Plavin
150 Great Neck Rd.
Great Neck, NY 11021

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
1st day of May, 1981.

Conni A. Haglund

J. Vredenburg

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

May 1, 1981

Joseph J. & Patricia A. Budinich
26 Walnut St.
Teaneck, NJ 07666

Dear Mr. & Mrs. Budinich:

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
Harvey Plavin
Kaplan & Plavin
150 Great Neck Rd.
Great Neck, NY 11021
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JOSEPH J. BUDINICH and PATRICIA A. BUDINICH
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, 1971 and 1972.

DECISION

Petitioners, Joseph J. Budinich and Patricia A. Budinich, 26 Walnut Street, Teaneck, New Jersey 07666, 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, 1971 and 1972 (File No. 17824).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 23, 1979 at 1:15 P.M. and continued before Edward L. Johnson, Hearing Officer, on May 9, 1979 at 2:45 P.M. Petitioners appeared by David Kaplan, CPA, of the accounting firm of Kaplan & Plavin. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner Joseph J. Budinich was entitled to allocate compensation received as a pilot's agent to sources within and without New York State.

II. Whether petitioner Joseph J. Budinich's activities as a pilot's agent constituted the carrying on of an unincorporated business thereby subjecting the income received from said activities to unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Joseph J. Budinich and Patricia A. Budinich, timely filed a joint 1972 New York State Nonresident Return reporting total New York income of \$10,640.00. A joint nonresident return for 1970 was filed on November 21, 1973 reporting total New York income of \$8,213.00. A personal income tax return was not filed for the year 1971 nor were unincorporated business tax returns filed for any of said years in question. Both of the returns filed by petitioner Joseph Budinich listed his occupation as "pilot agent" and reported business income from said activity of \$24,638.00 for 1970 and \$31,911.00 for 1972. The aforementioned total New York income amounts were computed by allocating one-third of the business income to New York State sources.

2. Petitioners executed a consent which extended the period of limitation upon assessment for the year 1970 to April 15, 1977. A similar consent was also executed for the year 1972 which extended the assessment period to April 15, 1977.

3. On February 28, 1977, a Notice of Deficiency was issued against petitioners, Joseph J. Budinich and Patricia A. Budinich, for additional personal income tax of \$5,150.98, plus penalties [pursuant to sections 685(a)(1) and (a)(2)] and interest. Said deficiency was based on the disallowance of the allocation of business income to sources outside New York as claimed on the 1970 and 1972 returns. Also, although no return was filed for 1971, total New York income for said year was determined to be \$25,396.00. A second Notice of Deficiency was issued on February 28, 1977 against Joseph J. Budinich for unincorporated business tax of \$2,860.96, plus penalties [pursuant to sections 685(a)(1) and (a)(2)] and interest. The second deficiency is based on the determination that "...your business activities as a pilot's agent

constitute the carrying on of an unincorporated business of which the net income therefore is subject to the New York State unincorporated business tax". Net income subject to unincorporated business tax was determined to be \$24,638.00, \$25,396.00 and \$31,911.00 for the years 1970, 1971 and 1972, respectively.

4. Petitioner was a pilot's agent during the years in question for the Hudson River Pilots Association (hereinafter "Association"). Petitioner acted primarily as a dispatcher assigning licensed pilots from a rotation board to pilot various deep water vessels up the Hudson River to Albany, New York and back. Other duties performed by petitioner included bookkeeping, typing of bills and distributing payroll. He was also responsible for briefing the pilots on ice and weather conditions, tides and other vessel traffic on the river. Petitioner was responsible to the executive committee of the Association which closely supervised and controlled his activities.

5. Petitioner performed his duties Monday through Friday, 9:00 A.M. to 5:00 P.M. at the Association's office in Yonkers, New York. Since the maritime industry operated twenty-four hours a day, 365 days a year, it was necessary for the Association to maintain a telephone number so that steamship companies would be able to contact them after normal working hours. Accordingly, the Association had two telephones installed in petitioner's residence in Teaneck, New Jersey. The Association reimbursed petitioner for the monthly expense incurred in maintaining these telephones. Petitioner also had his own private telephone from which he or members of his family would make their personal calls and the expense for this telephone was borne solely by petitioner.

6. It was customary for petitioner to receive or initiate numerous phone calls concerning Association business at his personal residence into all hours of the night. Petitioner argued that he was "on call" 24 hours a day and that

he performed substantial services for his employer at his personal residence. The allocation of income referred to in Finding of Fact "3", supra, was determined by placing the number of hours worked in New York (8) over the total hours in a day (24). Petitioner was unable to produce any credible evidence as to the number of hours actually spent on Association business at his personal residence.

7. No argument or testimony was presented as to why the 1970 personal income tax return was late filed or why a 1971 personal income tax return was not filed.

CONCLUSIONS OF LAW

A. That the Hudson River Pilots Association exercised sufficient direction and control over petitioner's activities to establish an employee-employer relationship within the meaning and intent of section 703(b) of the Tax Law. Petitioner's activities as a pilot's agent for the Hudson River Pilots Association during the years 1970, 1971 and 1972 did not constitute the carrying on of an unincorporated business within the meaning of section 703 of the Tax Law and, therefore, the income derived from said activities is not subject to unincorporated business tax.

B. That the services performed by petitioner Joseph J. Budinich at his home in New Jersey during the years 1970, 1971 and 1972 were performed there for the necessity of his employer and not for his own convenience. Therefore, as an employee, he is entitled to allocate his income on the basis of a ratio, the numerator of which is total days worked in New York State and the denominator of which should be 365 total days worked in year (see Finding of Fact "5" supra) in accordance with the meaning and intent of section 632(c) of the Tax Law and 20 NYCRR 131.16.

C. That petitioners timely filed a 1972 personal income tax return on April 13, 1973 and, therefore, the penalties asserted for 1972 pursuant to sections 685(a)(1) and (a)(2) of the Tax Law are improper and accordingly cancelled.

D. That petitioners have not met the burden of proof imposed by section 689(e) of the Tax Law to show that the failure to timely file a 1970 personal income tax return and failure to file a 1971 personal income tax return was due to reasonable cause and not willful neglect and, therefore, the penalties asserted pursuant to sections 685(a)(1) and (a)(2) are sustained.

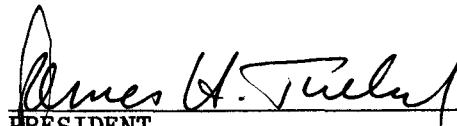
E. That the petition of Joseph J. Budinich and Patricia A. Budinich for redetermination of their personal income tax deficiency is granted to the extent shown in Conclusions of Law "B" and "C" supra; and that, except as so granted, the petition is in all other respects denied.

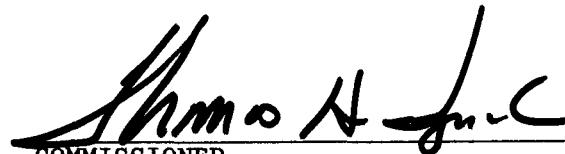
That the petition of Joseph J. Budinich for redetermination of his unincorporated business tax deficiency is granted and the Notice of Deficiency issued February 28, 1977 is hereby cancelled.

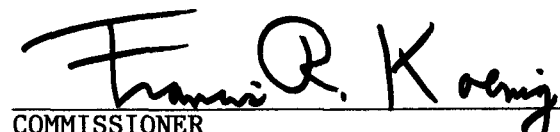
DATED: Albany, New York

STATE TAX COMMISSION

MAY 01 1981


PRESIDENT


COMMISSIONER


COMMISSIONER