

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Mark L. Davison :

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 - 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 March, 1981, he served the within notice of Decision by certified mail upon Mark L. Davison, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mark L. Davison
95 Christopher St.
New York, NY 10014

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 March, 1981.

Carmie P. Hagellund

J. Vredenburg

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

March 13, 1981

Mark L. Davison
95 Christopher St.
New York, NY 10014

Dear Mr. Davison:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MARK L. DAVISON : 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, 1971 1972 :
and 1973.

Petitioner, Mark L. Davison, 95 Christopher Street, New York, New York 10014, 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, 1971, 1972 and 1973 (File No. 19376).

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 July 22, 1980 at 9:15 A.M. Petitioner, Mark L. Davison, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether income derived from petitioner's activities as a staff meteorologist is subject to the unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Mark L. Davison, timely filed New York State income tax resident returns for the years 1969, 1970, 1971, 1972 and 1973, on which he reported income from his activities as a "meteorologist and consultant".

Petitioner did not file unincorporated business tax returns for the years 1969, 1970, 1971, 1972 and 1973.

2. On March 28, 1977, the Audit Division issued a Notice of Deficiency for \$4,312.60, plus penalties and interest of \$2,784.18 for the years 1969, 1970, 1971, 1972 and 1973, along with an explanatory Statement of Audit Changes, which indicated:

- (a) that \$548.32 in additional personal income taxes was due for the years 1972 and 1973 based on unreported Federal audit adjustments. On June 28, 1973, \$548.32 was remitted, which did not include interest. This item was conceded by petitioner and is not at issue.
- (b) that the income derived from petitioner's activities as a meteorologist and consultant during the years 1969, 1970, 1971, 1972 and 1973 was held subject to the unincorporated business tax.
- (c) that penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law were imposed. This item was not challenged by petitioner.

3. Petitioner, Mark L. Davison, was trained by the United States Air Force in meteorology and became a military weather forecaster. In 1948, petitioner was assigned to the White House to prepare weather reports for President Harry S. Truman. This assignment continued until 1952, when petitioner left the United States Air Force and obtained employment with a television station as a "weatherman".

4. In 1960, at the urging of the National Broadcasting Company, Inc., (NBC) petitioner, Mark L. Davison, obtained authorization from the United States Weather Bureau (which subsequently became known as the "National Weather Service" operating under the United States Department of Commerce) to maintain a receiving-only weather teletypewriter system in order to receive their meteorological information and data. Upon obtaining the aforementioned authorization, petitioner was retained by NBC as a staff meteorologist for the TODAY show, under a standard personal service contract utilized within the television industry.

5. During the years at issue, the standard personal service contract referred to petitioner as an "artist" and a "contractor" doing business under the name of "Weather Services Company". In addition, these contracts provided, in part, that:

- (a) NBC had exclusive rights to petitioner's services and that such services constituted "full-time employment".
- (b) Petitioner could not have, or claim any right, title or interest in any material produced by him, or used in any program.
- (c) Petitioner's services were to be performed under the "Producer's direction and control" and in a competent and artistic manner.
- (d) Any material furnished by petitioner was subject to the Producer's approval.
- (e) Petitioner was required to devote all of his time and attention to the performance of his services and was required to "render his services at the times and places designated by Producer and in the manner specified and required by Producer.
- (f) In the event of conditions beyond the Producer's control he was unable to fully utilize petitioner's services, the producer had the right to suspend petitioner's services without compensation upon twenty-four hours prior notice to petitioner.
- (g) Petitioner was required to maintain a standard of ethics and conduct.
- (h) Petitioner was entitled to reimbursement of "reassumable and authorized" out-of-pocket expenses.

6. Petitioner was compensated a flat fee on a weekly basis, without the withholding of payroll taxes. However, the withholding of payroll taxes was an option available to petitioner, which he chose not to exercise. Petitioner maintained a self-employed retirement plan (Keogh Plan) during the years 1972 and 1973.

7. NBC supplied petitioner with office facilities, secretarial services and desk assistants. Petitioner was required to report to the Producer on a daily basis and to attend staff meetings each and every Friday.

8. Petitioner does not have a degree in meteorology, but had sufficient military training and experience to fulfill the professional requirements of the American Meteorological Society, of which he was a member. In addition, petitioner was a member of the Writers Guild of America, which provided him with group hospitalization insurance.

9. Petitioner, Mark L. Davison, reported to the Chief News writer at the offices of NBC at 3 a.m. each and every morning for a daily briefing on the current routine scheduled for the TODAY show. Upon completion of the briefing, petitioner would report to the National Weather Service, where NBC maintained desk space for him, to collect and analyze meteorological data, and to subsequently create, in written form, a weather report for use on the TODAY show.

10. Since 1960, petitioner has not rendered services as a meteorologist to anyone except NBC, which represented his sole source of income from personal services.

11. Subsequent to the years at issue, petitioner abandoned the business name of "Weather Service Company," and utilized solely his own name on his contracts with NBC, which basically remained the same except for the amount of compensation.

CONCLUSIONS OF LAW

A. That sufficient direction and control was exercised by the National Broadcasting Company, Inc., during the years 1969, 1970, 1971, 1972 and 1973 so as to cause petitioner, Mark L. Davison, to become an employee within the meaning and intent of section 703(b) of the Tax Law.

B. That the income derived from petitioner's activities with the National Broadcasting Company, Inc., during the years 1969, 1970, 1971, 1972 and 1973 is not subject to the unincorporated business tax in accordance with the meaning and intent of section 703(b) of the Tax Law.

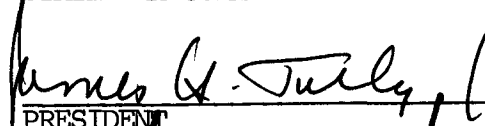
C. That the petition of Mark L. Davison is granted to the extent that the unincorporated business tax, along with the related penalties imposed under sections 685(a) (1) and 685(a) (2) are cancelled in full.

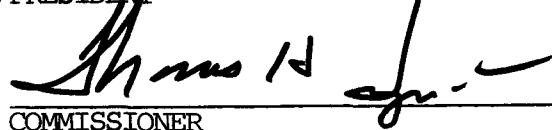
D. That the Audit Division is hereby directed to modify accordingly the Notice of Deficiency issued March 28, 1977; and that except as so granted, the petition is in all other respects denied.

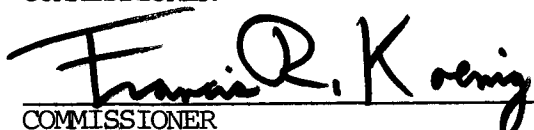
DATED: Albany, New York

MAR 13 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER