

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Alan & Mary Fitelson :

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 1971 - 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 6th day of March, 1981, he served the within notice of Decision by certified mail upon Alan & Mary Fitelson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alan & Mary Fitelson
8400 Shore Front Pkwy.
Rockaway Beach, NY 11613

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 March, 1981.

Carrie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Alan & Mary Fitelson :

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 1971 - 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 6th day of March, 1981, he served the within notice of Decision by certified mail upon Alan J. Marokneck 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. Alan J. Marokneck
666 Fifth Ave.
New York, NY 10019

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 March, 1981.

Annice P. Hagelund

J. Vredenburg

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

March 6, 1981

Alan & Mary Fitelson
8400 Shore Front Pkwy.
Rockaway Beach, NY 11613

Dear Mr. & Mrs. Fitelson:

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
Alan J. Marokneck
666 Fifth Ave.
New York, NY 10019
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|--|---|----------|
| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| ALAN FITELSON and MARY FITELSON | : | 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 1971, 1972 and 1973. | : | |

Petitioners, Alan Fitelson and Mary Fitelson, 8400 Shore Front Parkway, Rockaway Beach, New York 11693, 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 1971, 1972 and 1973 (File No. 17136).

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 January 10, 1980 at 9:15 A.M. Petitioner Alan Fitelson appeared with Alan J. Marokneck, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether, and if so, to what extent, petitioners received additional unreported income during the years 1971, 1972 and 1973.

II. Whether such additional unreported income, if in fact derived by petitioner Alan Fitelson during 1971, is subject to the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Alan Fitelson and Mary Fitelson, delinquently filed joint New York State income tax resident returns for the years 1971, 1972 and

1973. They did not file New York State unincorporated business tax returns for any of said years.

2. On November 22, 1976, the Audit Division issued a Statement of Audit Changes to petitioners wherein, as the result of a field audit conducted, adjustments were made increasing petitioners' reported taxable income for each of the years 1971, 1972 and 1973, by amounts determined to be additional unreported income as follows: \$10,592.00 for 1971, \$3,387.00 for 1972 and \$1,333.00 for 1973. Additionally, an adjustment was made for each year allowing petitioners the standard deduction in lieu of itemized deductions claimed, but since these adjustments were not contested by the petitioners, they are not at issue herein. Accordingly, on November 22, 1976, a Notice of Deficiency was issued against the petitioners asserting additional personal income tax of \$1,389.80, section 685(b) negligence penalties of \$69.49, and interest of \$369.34, for a total due of \$1,828.63.

3. On November 22, 1976 a second Statement of Audit Changes was issued to petitioner Alan Fitelson wherein an adjustment was made imposing unincorporated business tax for the year 1971 on the amount previously determined to be additional unreported income attributable to said year. Accordingly, on November 22, 1976 a second Notice of Deficiency was issued against the petitioner asserting unincorporated business tax of \$443.13, section 685(a)(1) penalty of \$110.78, and interest of \$122.37, for a total due of \$676.28.

4. In computing the amount of additional unreported income derived by petitioner Alan Fitelson during each year at issue, the Audit Division used an indirect method of income reconstruction whereby his net wages were reduced by deposits to three bank accounts which he maintained. The resulting available cash was then offset by \$5,200.00 for each year, said amount representing the

Audit Division's estimate of petitioner's yearly out-of-pocket expenditures.

5. During the years 1971, 1972 and 1973, petitioner Alan Fitelson was employed by New York News, Inc. as a printer. His gross wages earned each year from said employment was \$11,394.00, \$14,599.85 and \$14,684.89 respectively. No other earned income was reported on his tax returns during the years at issue herein.

6. During the years at issue petitioner Alan Fitelson resided, together with his wife and son, in a cooperative apartment maintained by his father, Max Fitelson, who also resided there. Petitioner Alan Fitelson made no contribution toward the maintenance of the apartment and spent relatively nominal amounts to feed and clothe his family, since his father contributed toward the major portion of such expenses.

7. Petitioner Alan Fitelson contended that his out-of-pocket living expenses for each year at issue were approximately \$30.00 per week, not \$100.00 per week as estimated by the Audit Division in its computation.

8. Petitioner Alan Fitelson submitted evidence to establish nontaxable sources of income, which were deposited in his bank accounts, during the year 1971 as follows:

| <u>SOURCE</u> | <u>AMOUNT</u> |
|--|---------------|
| A - 1970 Federal tax refund, received in 1971 | \$ 469.95 |
| B - 1970 New York State tax refund, received in 1971 | 122.33 |
| C - 1970 New York City tax refund, received in 1971 | 20.18 |
| D - proceeds from sale of personal automobile | 950.00 |
| E - proceeds from sale of stereo system | 900.00 |

Petitioner Alan Fitelson made loans to a friend and to his sister. During 1971 the petitioner received payments on the loans he made to his friend and sister of \$2,000.00 and \$900.00 respectively. He deposited the receipt of these payments in his bank accounts.

9. Petitioner submitted evidence purported to establish nontaxable sources of income, which he testified were deposited in his bank accounts during the year 1972 as follows:

| <u>SOURCE</u> | <u>AMOUNT</u> |
|--|---------------|
| A - Workmen's compensation award | \$ 532.00 |
| B - Insurance recovery for stolen automobile | 1,320.00 |
| C - 1971 Federal tax refund, received in 1972 | 228.15 |
| D - 1971 New York State tax refund, received in 1972 | 73.49 |
| E - 1971 New York City tax refund, received in 1972 | 26.28 |
| F - Wages received from jury duty | 72.00 |

Review of the file indicated that petitioners' 1971 New York State Income Tax Return was delinquentlly filed on April 15, 1975.

10. Petitioner submitted evidence purported to establish nontaxable sources of income, which he testified were deposited in his bank accounts during the year 1973 as follows:

| <u>SOURCE</u> | <u>AMOUNT</u> |
|--|---------------|
| A - Workmen's compensation award | \$112.45 |
| B - Repayment of check written by petitioner to pay friend's automobile insurance premium | 135.50 |
| C - 1972 Federal tax refund, received in 1973 | 458.16 |
| D - 1972 New York State tax refund, received in 1973 | 83.05 |

Review of the file indicated that petitioners' 1972 New York State Income Tax Return was delinquentlly filed on April 15, 1975.

11. Petitioner Alan Fitelson testified that the amounts he received from the repayment of loans, sale of automobile and sale of stereo equipment, were received in inconsistent installments rather than as lump sum payments in full.

12. Petitioner had previously accounted for "receipt of additional income from insurance, workmen's compensation, and tax refunds amounting to \$2,080.00 for 1972 and \$458.16 for 1973".

13. Unincorporated business tax was imposed on the amount determined to

represent additional unreported income for 1971 on the sole basis that the Audit Division rejected petitioner's explanation of the sources of said income.

14. Petitioner was not engaged in any unincorporated business activity during the years at issue herein.

CONCLUSION OF LAW

A. That for the year 1971, petitioner has substantiated nontaxable bank deposits of \$5,362.46. Said amount represents the aggregate of the sources enumerated in Finding of Fact "8" (supra).

B. That during the year 1971, considering petitioner's lifestyle and financial circumstances, he is deemed to have incurred average weekly out-of-pocket expenses of \$40.00.

C. That incorporating the adjustments determined in Conclusions of Law "A" and "B" (supra), petitioner is deemed to have derived additional unreported income of \$2,109.54 for the year 1971.

D. That for the year 1972, petitioner has substantiated nontaxable bank deposits of \$2,106.43. Said amount represents the aggregate of the sources enumerated in Finding of Fact "9" (supra), with the exception of the amount claimed as "1971 New York State tax refund, received in 1972" since the corresponding return was not filed until April 15, 1975, and the amount claimed as "wages received from jury duty" since said income is taxable.

E. That during the year 1972, considering petitioner's lifestyle and financial circumstances, he is deemed to have incurred average weekly out-of-pocket expenses of \$45.00.

F. That incorporating the adjustments determined in Conclusions of Law "D" and "E" (supra), petitioner is deemed to have derived \$72.00 additional unreported income from jury duty services for the year 1972.

G. That for the year 1973, petitioner has substantiated nontaxable bank deposits of \$706.11. Said amount represents the aggregate of the sources enumerated in Finding of Fact "10" (supra), with the exception of the amount claimed as "1972 New York State tax refund, received in 1973" since the corresponding return was not filed until April 15, 1975.

H. That during the year 1973, considering petitioner's lifestyle and financial circumstances, he is deemed to have incurred average weekly out-of-pocket expenses of \$50.00.

I. That incorporating the adjustments determined in Conclusions of Law "G" and "H" (supra), petitioner is deemed to have derived no additional unreported income for the year 1973.

J. That the adjustments with respect to the uncontested conversion from itemized deductions to the standard deduction for the years 1971, 1972 and 1973 are sustained.

K. That the section 685(b) negligence penalties imposed for each of the years 1971, 1972 and 1973 are abated.

L. That the petition of Alan Fitelson and Mary Fitelson, with respect to personal income taxes, is granted to the extent provided in Conclusions of Law "A" through "K" (supra) and that said petition is in all other respects denied.

M. That the Audit Division is hereby directed to modify the Notice of Deficiency dated November 22, 1976, with respect to personal income taxes, to be consistent with the decision rendered herein.

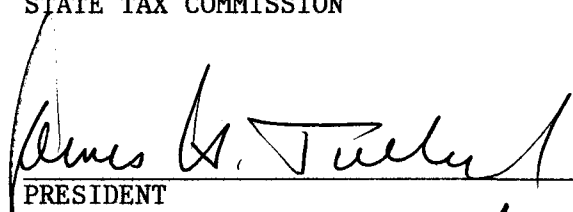
N. That petitioner Alan Fitelson was not engaged in any unincorporated business activities during the year 1971. Accordingly, his income derived during said year is not subject to the imposition of unincorporated business tax.

0. That the petition of Alan Fitelson, with respect to unincorporated business tax for the year 1971 is granted and the Notice of Deficiency with respect to same, dated November 22, 1976 is hereby cancelled.


DATED: Albany, New York

MAR 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER