

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert L. Mazzeo :
and Ramona A. Mazzeo :
: 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 3rd day of April, 1981, he served the within notice of Decision by certified mail upon Robert L. Mazzeo, and Ramona A. Mazzeo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert L. Mazzeo
and Ramona A. Mazzeo
15 Westcott Blvd.
Staten Island, NY 10314

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
3rd day of April, 1981.

Connie A. Haglund

J. Vredenburg

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

April 3, 1981

Robert L. Mazzeo
and Ramona A. Mazzeo
15 Westcott Blvd.
Staten Island, NY 10314

Dear Mr. & Mrs. Mazzeo:

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	:	
ROBERT L. MAZZEO and RAMONA A. MAZZEO	:	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.	:	

Petitioners, Robert L. Mazzeo and Ramona A. Mazzeo, 15 Westcott Blvd., Staten Island, New York 10314, 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. 16620).

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 August 16, 1979 at 10:45 A.M. Petitioner Robert L. Mazzeo appeared pro se. The Audit Division appeared by Peter Crotty, Esq. (A. Schwadron, Esq., of counsel).

ISSUE

Whether the income derived from petitioner's activities of operating an agency office is subject to the unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Robert L. Mazzeo and Ramona A. Mazzeo, filed joint New York State income tax resident returns for the years 1969, 1970, and 1971 on which net business income from a sole proprietorship was reported. Petitioner

Robert L. Mazzeo did not file unincorporated business tax returns for the years 1969, 1970, and 1971.

2. On December 21, 1973, petitioners notified the Audit Division of Federal audit adjustments to taxable income for the year 1969 and paid additional personal income tax due, along with applicable interest in the sum of \$1,932.05.

3. On June 28, 1976, the Audit Division issued a Notice of Deficiency for the years 1969, 1970, and 1971 in the sum of \$3,900.93, along with an Explanatory Statement of Audit Changes, on which;

- (a) corrections to petitioners' notification of Federal audit adjustments were made and resulted in a net overpayment of \$70.39. These corrections were conceded by petitioners and are not at issue.
- (b) income derived from petitioner's activities as an insurance agent was held subject to the unincorporated business tax for the years 1969, 1970, and 1971.
- (c) penalties pursuant to sections 685(a) (1) and 685(a) (2) of the Tax Law were imposed for the years 1969, 1970, and 1971. These penalties were not challenged by petitioners.

4. Petitioner Robert L. Mazzeo was a general agent representing the State Mutual Assurance Company of America ("State Mutual") during the years 1969, 1970, and 1971. Petitioner conducted his activities under the name and style of the Robert L. Mazzeo Agency, pursuant to a written agreement which provided, in part, that;

- (a) petitioner would personally and through agents solicit business within "greater New York and vicinity with headquarters in New York City".

- (b) petitioner was required to devote his full working time, and act exclusively for State Mutual in conducting a general agency.
- (c) petitioner was required to recruit, license, train, and supervise soliciting agents and to develop a sales force. Any contracts between a soliciting agent and petitioner was subject to the approval of State Mutual.
- (d) petitioner was required to maintain books and records of all transactions and keep them available for inspection by State Mutual.
- (e) all funds collected were required to be held by petitioner "as a fiduciary trust and shall not be used by him for any purpose whatsoever, nor mingled with his personal funds".
- (f) nothing contained in the written agreement "shall be construed to create the relationship of employer and employee" between petitioner and State Mutual.
- (g) except for territorial limits, petitioner "shall be free to exercise his own judgement as to the time, place, and manner of solicitation".
- (h) State Mutual was required to furnish a printed supply of advertising material, stationery, books, records, and forms.
- (i) petitioner was entitled to a commission on orders placed by him, and to an overriding commission placed by his soliciting agents.

5. Petitioner Robert L. Mazzeo had the responsibility of running the agency office and was given a fixed expense allowance over and above his commissions. However, if his actual expenses were less than the allowance, he kept the difference. If they were more, petitioner was required to pay the difference. These expenses included office rent, postage, telephone, advertising, promotion expenses, printing expenses, and salaries for secretarial and/or clerical services rendered by employees hired by petitioner.

6. State Mutual paid all commissions generated by the agency to petitioner with a breakdown of amounts due to the soliciting agents. All income information forms (such as Forms 1099, 941, etc.) were filed by petitioner to each individual soliciting agent.

7. Petitioner also rendered services for Noah Clark, Inc. in the field of casualty insurance. Subsequently, petitioner purchased Noah Clark, Inc. and reorganized the business under the name and style of The Robert L. Mazzeo Agency, Inc., which operated within the same agency office as operated by petitioner.

8. State Mutual, in compliance with their written agreement, held petitioner responsible "for the acts and the collections" of his soliciting agents and other employees.

9. State Mutual provided petitioner with disability insurance, a retirement plan, life insurance, and medical insurance.

10. Petitioner was compensated by State Mutual without the withholding of payroll taxes, or F.I.C.A. (Federal Insurance Contributions Act). However, petitioner paid self-employment taxes during the years at issue.

CONCLUSIONS OF LAW

A. That sufficient direction and control was not exercised by the State Mutual Assurance Company during the years 1969, 1970, and 1971 so as to cause petitioner Robert L. Mazzeo to become its employee within the meaning and intent of section 703(b) of the Tax Law.

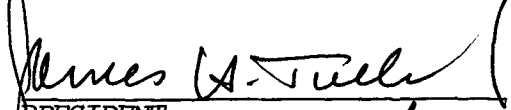
B. That the activities of petitioner Robert L. Mazzeo during the years 1969, 1970, and 1971 of operating an agency office constituted the carrying on of an unincorporated business in accordance with the meaning and intent of section 703(a) of the Tax Law.

C. That the petition of Robert L. Mazzeo and Ramona A. Mazzeo is denied and the Notice of Deficiency issued June 28, 1976 for the years 1969, 1970, and 1971 is sustained, together with penalty stated thereon and such additional interest as may be lawfully owing.

DATED: Albany, New York

APR 03 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER