

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Merritt Truck Service and Concetta M. Merritt
& J. E. White, Individually & as Co-Partners : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income & UBT :
under Article 16, 16A, 22 & 23 of the Tax Law
for the Years 1959-1967. :

State of New York
County of Albany

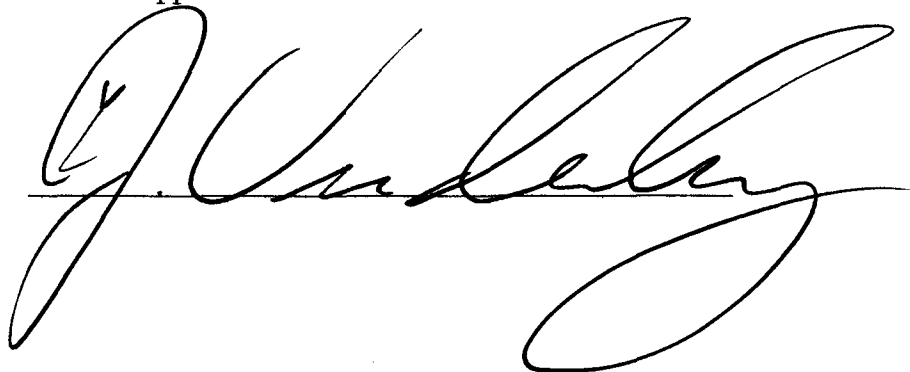
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of January, 1981, he served the within notice of Decision by certified mail upon Merritt Truck Service and Concetta M. Merritt, & J. E. White, Individually & as Co-Partners, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Merritt Truck Service and Concetta M. Merritt
& J. E. White, Individually & as Co-Partners
652 Main St.
Batavia, NY

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
9th day of January, 1981.

A large, stylized handwritten signature in black ink, likely belonging to Jay Vredenburg, is written over a horizontal line.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Merritt Truck Service and Concetta M. Merritt
& J. E. White, Individually & as Co-Partners : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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Personal Income & UBT :
under Article 16, 16A, 22 & 23 of the Tax Law
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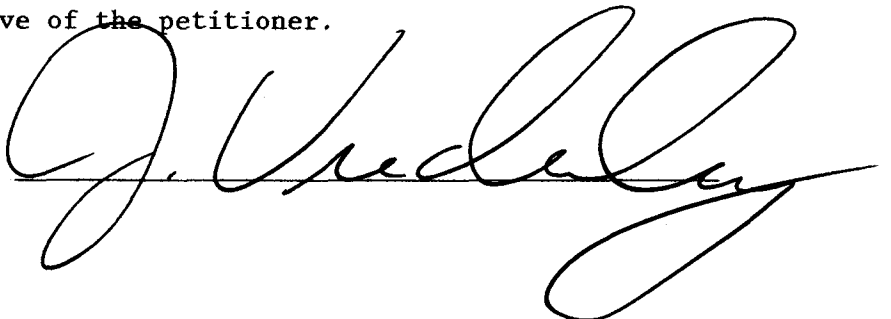
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of January, 1981, he served the within notice of Decision by certified mail upon Arthur A. Russ the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Arthur A. Russ
Albrecht, Maguire, Heffern & Gregg
2110 Main Place Tower
Buffalo, NY 14202

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
9th day of January, 1981.



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

January 9, 1981

Merritt Truck Service and Concetta M. Merritt
& J. E. White, Individually & as Co-Partners
652 Main St.
Batavia, NY

Gentlemen:

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) 375, 386, 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 90 days & 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
Arthur A. Russ
Albrecht, Maguire, Heffern & Gregg
2110 Main Place Tower
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MERRITT TRUCK SERVICE :
and :
CONCETTA M. MERRITT and J. E. WHITE :
Individually and as Co-Partners :
for Redetermination of a Deficiency or :
for Refund of Unincorporated Business :
Tax under Articles 16A and 23 of the Tax :
Law for the Years 1959 through 1967. :
:

In the Matter of the Petition :
of :
CONCETTA M. MERRITT : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Articles 16 and 22 of the Tax Law for :
the Years 1959 through 1964, 1966 and :
1967. :

In the Matter of the Petition :
of :
J. E. WHITE :
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Articles 16 and 22 of the Tax Law for :
the Years 1959 through 1967. :
:

Petitioners, Merritt Truck Service, Concetta M. Merritt and J. E. White, 652 East Main Street, Batavia, New York, filed petitions for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 16, 16A, 22 and 23 of the Tax Law for the years 1959 through 1967 (File No. 01557).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, 1 West Genesee Street, Buffalo, New York, on April 21, 1980 at 10:45 A.M. Petitioner J. E. White appeared with Arthur A. Russ, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioner Merritt Truck Service filed or was required to file New York State unincorporated business tax returns for 1959 through 1967.

II. Whether petitioner Concetta M. Merritt filed or was required to file New York State personal income tax returns for 1959 through 1964, 1966 and 1967.

III. Whether petitioner J. E. White filed or was required to file New York State personal income tax returns for 1959 through 1967.

FINDINGS OF FACT

1. On October 10, 1968 the Income Tax Bureau issued a Notice of Additional Assessment for 1959 against Merritt Truck Service imposing unincorporated business tax of \$177.80, plus interest of \$85.50, for a total of \$263.38. On November 8, 1968 the Income Tax Bureau issued a Notice of Deficiency and a Notice and Demand for Payment of Tax Due Under Jeopardy Assessment for 1960 through 1967 against Merritt Truck Service imposing unincorporated business tax of \$1,625.60, plus interest of \$342.49, for a total of \$1,968.09. The Bureau estimated the income of Merritt Truck Service on each of the notices because the Bureau contended the business had failed to file partnership tax returns for the years at issue. The Bureau based its estimate on a New York State Unincorporated Business Tax return (Form IT-202) for 1965 filed by petitioner Concetta M. Merritt with her 1965 personal income tax return. The Bureau further contended that Merritt Truck Service was a partnership between

Concetta M. Merritt and J. E. White and therefore, the Bureau doubled the income reported on the 1965 unincorporated business tax return filed by petitioner Concetta M. Merritt in determining its estimates for the years at issue.

2. On October 10, 1968 the Income Tax Bureau issued a Notice of Additional Assessment for 1959 against each of petitioners (Concetta M. Merritt and J. E. White) individually imposing normal tax of \$158.00, plus interest of \$75.94, for a total of \$233.94. On November 8, 1968, the Income Tax Bureau issued a Notice of Deficiency and a Notice and Demand for Payment of Tax Due Under Jeopardy Assessment against each of the petitioners, Concetta M. Merritt and J. E. White. Against petitioner Concetta M. Merritt, the Bureau imposed personal income tax of \$1,106.00, plus interest of \$247.18, for a total of \$1,353.18, for 1960 through 1964, 1966 and 1967. For the petitioner J. E. White, the Bureau imposed personal income tax of \$1,264.00, plus interest of \$266.24, for a total due of \$1,530.24, for 1960 through 1967. On each of the notices the Bureau estimated the income of the petitioners Concetta M. Merritt and J. E. White based on the 1965 New York State income tax return filed by petitioner Concetta M. Merritt because the Bureau contended that the petitioners Concetta M. Merritt and J. E. White had failed to file tax returns for the years at issue.

3. Petitioner Merritt Truck Service was a trucking brokerage business which was started in 1958 by Larry H. Merritt, husband of petitioner Concetta M. Merritt. The business's unincorporated business tax returns (Form IT-202) for 1959 through 1963 were filed under the name of Larry H. Merritt. At the time of Larry H. Merritt's death, the business had no substantial assets and the business bank account contained \$30.00.

Petitioner J. E. White, an old friend of Larry H. Merritt, came to Batavia, New York upon the death of Larry H. Merritt in 1963. Prior to that

time, petitioner J. E. White was a resident of Avon Lake, Ohio and had no connection with New York State or the Merritt Truck Service. Because of the desperate financial status of petitioner Concetta M. Merritt and the business, petitioner J. E. White agreed to move to Batavia, New York, and attempt to pull the business out of its financial problems. Petitioners J. E. White and Concetta M. Merritt ran the business after the death of Larry H. Merritt until its dissolution in bankruptcy in 1968. During this period, the business did not make a profit, and had a constant serious cash flow problem. The cash flow difficulty resulted from the fact that it took a considerable amount of money to operate the business as funds had to be advanced to the truck drivers, and there were always problems with collection of accounts receivable. Petitioner J. E. White put \$30,000.00 into the Merritt Truck Service as loans which continually operated at a substantial loss. The Merritt Truck Service was virtually out of business at the end of 1965 until the bankruptcies of the business, Concetta M. Merritt and J. E. White in 1968.

4. Larry H. Merritt filed personal income and unincorporated business tax returns for the years 1959 through 1963. Petitioner Concetta M. Merritt submitted copies of the returns which showed the returns had been filed under the name of Larry H. Merritt for the years 1959 through 1963 and under the name of Concetta M. Merritt of 1965. The amounts shown due on the returns are as follows:

<u>Tax Year</u>	<u>Personal Income Tax</u>	<u>Unincorporated Business Tax</u>
1959	\$ 86.12	\$ 62.11
1960	None	None
1961	686.51	366.06
1962	75.85	None
1963	14.75	None
1964	No copies of returns found	
1965 filed by petitioner	50.20	None
For 1966 and 1967 no returns filed because of no taxable income.		

Petitioner Concetta M. Merritt submitted the following cancelled checks paid to New York tax accounts.

<u>Tax Year</u>	<u>Number Of Checks</u>	<u>Total Amount</u>
1959	4	\$ 110.60
1960	1	.70
1961	2	1,002.57
1962	1	.40
1963	4	62.40
1964	4	101.00 *
1965	2	116.60
1966	0	-0-
1967	-0-	-0-

* Of the \$101.00, \$50.00 represented payments to an estimated tax account.

Petitioner Concetta M. Merritt timely filed a New York State income tax return for 1965 showing four exemptions, a statutory credit of \$25.00 for head of household or surviving spouse with dependent child and indicated \$50.50 was paid with the return. The \$6,400.00 reported on the New York State unincorporated business tax return for 1965 filed by petitioner Concetta M. Merritt, was her drawing from the business, which was in reality, a portion of loans made to the Merritt Truck Service by petitioner J. E. White. The business had, in fact, a loss in 1965. Petitioner Concetta M. Merritt had no other potential source of taxable income other than the business.

5. During the period that petitioner J. E. White was connected with Merritt Truck Service he never drew a salary nor did he draw from a drawing account. During the period of association with the business, the petitioner J. E. White lived off his personal savings. Petitioner J. E. White's only income during the period in question was in 1967, when he earned approximately \$3,200.00 from Batavia Trailers, Inc. of Batavia, New York. Petitioner J. E. White testified that he did not file a return for 1967; however, he contended that money had been withheld from his pay from Batavia Trailers, Inc. and that he believes he would be entitled to a refund if a return were filed for that

year. Petitioner J. E. White further contended that the Merritt Truck Service business loss must certainly have been greater than his Batavia Trailers, Inc. income.

6. The Audit Division's records disclosed that no standard audit techniques or procedures, such as net worth, application of funds, or bank deposit method were utilized in determining the tax liability of each of the petitioners. The Audit Division's position was based solely on petitioner Concetta M. Merritt's filed tax return for 1965. The Audit Division records introduced at the hearing did not reveal whether a file search had been conducted under the name of Larry H. Merritt for the personal income and unincorporated business taxes for the years 1959 through 1963 and the Audit Division did not raise the issue of his filing of returns in accordance with 689(d)(1) of the Tax Law.

CONCLUSIONS OF LAW

A. That the petitioners have sustained the burden of proof required by section 689(e) of the Tax Law, in establishing by a fair preponderance of all the available evidence, that unincorporated business tax returns were filed for the years 1959 through 1963 and that from 1964 through 1967 that there was no unincorporated business tax due for Merritt Truck Service.

B. That the petitioner Concetta M. Merritt has sustained the burden of proof required by section 689(e) of the Tax Law, in establishing by a fair preponderance of all the available evidence, that she filed personal income tax returns for 1959 through 1963 under the name of her late husband Larry H. Merritt and that for 1966 and 1967 her income did not exceed her exemptions. However, for 1964 the petitioner did not sustain the burden of proof required by section 689(e) of the Tax Law to show her income did not exceed her exemptions.

C. That the petitioner J. E. White has sustained the burden of proof required by section 689(e) of the Tax Law, in establishing by a fair preponderance

of all the available evidence, that he was not required to file tax returns for 1959 through 1962 based on the grounds he was not a resident nor did he have New York source income during those years at issue. That for 1963 through 1966, his income did not exceed his exemption; therefore, no returns are required to be filed. However, for 1967 the petitioner did not sustain the burden of proof required by section 689(e) of the Tax Law to show the exact amount of his loss from Merritt Truck Service nor the amount of withholding withheld on his behalf by Batavia Trailers, Inc.

D. (1) That the Audit Division is hereby directed to cancel the notices of additional assessment for 1959 against Merritt Truck Service, Concetta M. Merritt and J. E. White issued on October 10, 1968.

(2) That the Audit Division is hereby directed to cancel the Notice of Deficiency and Notice of Demand for Payment of Tax Due Under Jeopardy Assessment for 1960 through 1967 against Merritt Truck Service issued on November 8, 1968.

(3) That the Audit Division is hereby directed to modify the Notice of Deficiency and Notice and Demand for Payment of Tax Due Under Jeopardy Assessment issued on November 8, 1968 against Concetta M. Merritt, so as to cancel all tax years at issue other than 1964. However, the tax is to be recomputed for 1964 in allowing the petitioner four exemptions, a statutory credit of \$25.00 and \$50.00 in estimated tax payments.

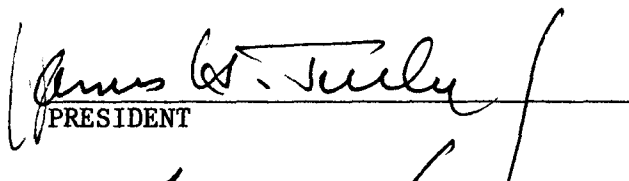
(4) That the Audit Division is hereby directed to modify the Notice of Deficiency and Notice and Demand for Payment of Tax Due Under Jeopardy Assessment issued on November 8, 1968 against J. E. White, so as to cancel all tax years at issue other than 1967. For 1967, the New York income shall be reduced from \$6,400.00 to \$3,200.00, the amount of income earned from Batavia Trailers, Inc. and the tax recomputed accordingly.

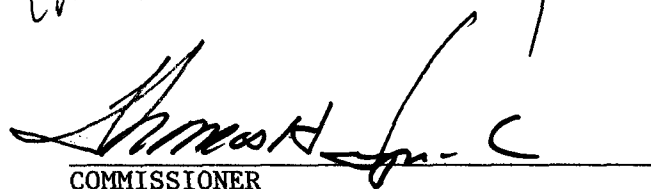
E. That the petitions of Merritt Truck Service, Concetta M. Merritt and J. E. White are granted to the extent indicated in Conclusion of Law "D"; except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 09 1981


PRESIDENT


COMMISSIONER

COMMISSIONER