

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Gaylord M. Ten Eyck

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 :
Year 1974. :

State of New York
County of Albany

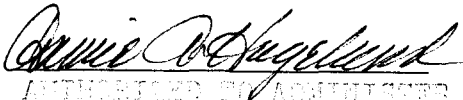
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Gaylord M. Ten Eyck, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

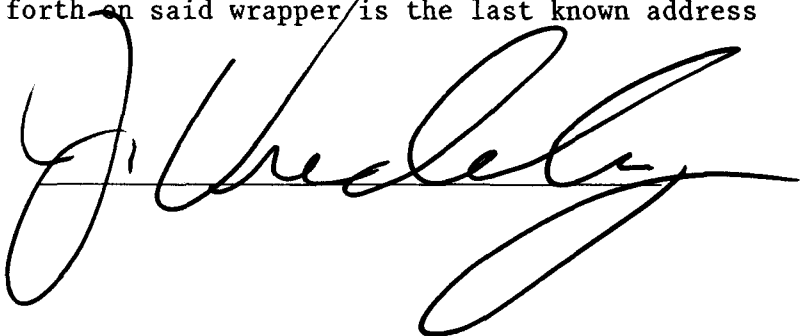
Gaylord M. Ten Eyck
124 Hebner St.
Jamestown, NY 14701

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 October, 1982.


COMMISSIONER OF TAXATION AND FINANCE
STATE OF NEW YORK



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

October 6, 1982

Gaylord M. Ten Eyck
124 Hebner St.
Jamestown, NY 14701

Dear Mr. Ten Eyck:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

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 :
GAYLORD M. TENEYCK : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax and Unincorporated :
Business Tax under Articles 22 and 23 of the :
Tax Law for the Year 1974. :
:

Petitioner, Gaylord M. TenEyck, 124 Hebner Street, Jamestown, New York 14701, filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the year 1974 (File No. 23023).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, One West Genesee Street, Buffalo, New York, on October 1, 1980 at 9:15 A.M. Petitioner, Gaylord M. TenEyck, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner's selling activities for Maurice Katz and/or United Steel and Wire, during the year 1974, were conducted as an employee or an independent contractor.

FINDINGS OF FACT

1. Petitioner, Gaylord M. TenEyck, filed a New York State Combined Income Tax Return for 1974, with his wife, and a New York State Unincorporated Business Tax Return for 1974 on income from his unincorporated business, the sale of shopping cart parts.

2. On March 24, 1978, the Audit Division issued a Notice of Deficiency against petitioner imposing unincorporated business tax of \$733.80, plus penalty pursuant to section 685(c) of the Tax Law of \$51.51 and interest of \$183.19 for a total due of \$968.50. This was done on the grounds that the commission income received by petitioner from Maurice Katz should also be subject to unincorporated business tax, since petitioner was an independent contractor. The penalty pursuant to section 685(c) of the Tax Law was imposed for failure to file a declaration of estimated tax for personal income tax.

3. During 1974, petitioner, Gaylord M. TenEyck, was a salesman for Maurice Katz who was a manufacturer's representative for United Steel and Wire. United Steel and Wire manufactures shopping carts, wire produce racks and wire display racks for the food industry. Petitioner sold these items to customers such as supermarkets.

4. Petitioner was paid on a commission basis by Maurice Katz for those sales which he consummated for United Steel & Wire. Petitioner received 70 percent of the total commission and Maurice Katz retained the remaining 30 percent. Federal and New York income taxes were not withheld from petitioner's compensation, nor were social security taxes. Petitioner was not provided with company benefits such as pension plan, medical benefits and disability insurance during the year at issue.

5. Petitioner did not have a written employment contract. He contended that during the period at issue he was not to represent other principals, but he did do so through his unincorporated business.

6. Business expense (such as office supplies, travel, entertainment and other miscellaneous costs) were paid for by petitioner, Gaylord M. TenEyck, without reimbursement from United Steel and Wire or Maurice Katz. Petitioner

filed a Federal Schedule C (Profit or Loss From Business or Profession). He maintained an office in his New York home where he also had an answering service.

7. Petitioner solicited orders in the name of United Steel and Wire. Sales orders were drawn at prices determined by United Steel and Wire and subject to the acceptance by said principal. All billing of petitioner's customers was done through United Steel and Wire.

8. United Steel and Wire and/or Maurice Katz had the right to assign territory and establish rules and sales quotas. They did not exercise direction or control over the sales techniques or methods used by petitioner in obtaining such results. Petitioner was required to report on the accounts visited and encouraged to seek new accounts within his territory.

9. Petitioner testified that, during the year at issue, he had reviewed the instructions for filing an unincorporated business tax return with his accountant, who advised him that his income from United Steel and Wire and/or Maurice Katz was not subject to said tax.

CONCLUSIONS OF LAW

A. That commission income received by petitioner, Gaylord M. TenEyck, from United Steel and Wire during 1974, constituted income from his regular business of selling wire products and did not represent compensation received as an employee in accordance with section 703(b) of the Tax Law.

B. That, although United Steel and Wire and/or Maurice Katz did assert some supervision to assure themselves that petitioner, Gaylord M. TenEyck, was covering his territory, they did not exercise sufficient direction and control in other areas so as to result in an employee-employer relationship, within the meaning and intent of section 703 of the Tax Law. Therefore, the activities of

petitioner during 1974 on behalf of United Steel and Wire and/or Maurice Katz constituted the carrying on of an unincorporated business within the meaning and intent of section 703 of the Tax Law and the income derived therefrom was subject to unincorporated business tax in accordance with the meaning and intent of section 701 of the Tax Law.

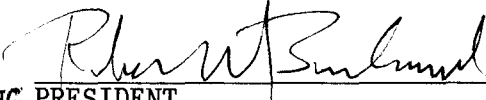
C. That the penalty imposed pursuant to section 685(c) for failure to file declaration or underpayment of estimated personal income tax is sustained, since petitioner paid no estimated tax as required by section 655 of the Tax Law.

D. That the petition of Gaylord M. TenEyck is denied and the Notice of Deficiency dated March 24, 1978 is sustained.

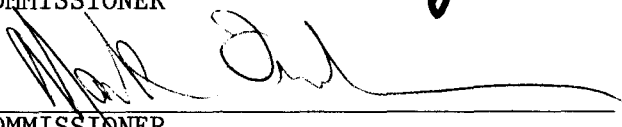
DATED: Albany, New York

STATE TAX COMMISSION

OCT 06 1982


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER