

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas & Rita Volpe :
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. :

AFFIDAVIT OF MAILING

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 22nd day of October, 1982, he served the within notice of Decision by certified mail upon Thomas & Rita Volpe, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas & Rita Volpe
142-18 58th Avenue
Flushing, NY 11355

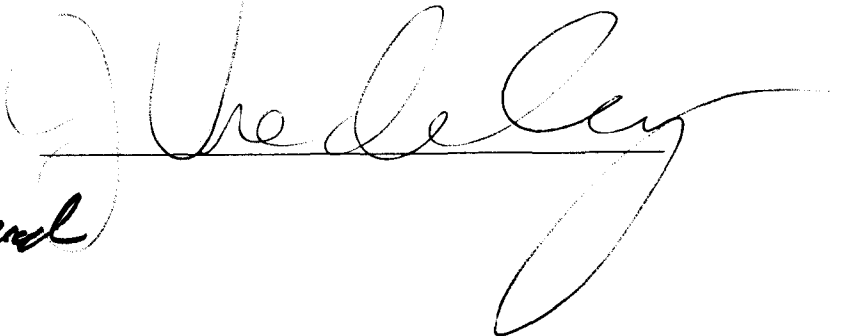
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
22nd day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas & Rita Volpe :
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 22nd day of October, 1982, he served the within notice of Decision by certified mail upon Herbert Grodin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert Grodin
32 Delaware Ave.
Jericho, NY 11753

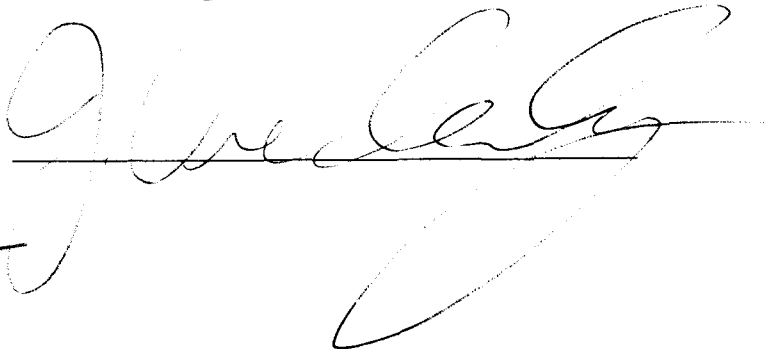
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
22nd day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

October 22, 1982

Thomas & Rita Volpe
142-18 58th Avenue
Flushing, NY 11355

Dear Mr. & Mrs. Volpe:

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
Herbert Grodin
32 Delaware Ave.
Jericho, NY 11753
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
THOMAS VOLPE AND RITA VOLPE	:	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 Year 1974.	:	

Petitioners, Thomas Volpe and Rita Volpe, 142-18 58th Avenue, Flushing, New York 11355, 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 year 1974 (File No. 22828).

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 28, 1981 at 1:15 P.M. Petitioners Thomas Volpe and Rita Volpe appeared by Herbert Grodin, C.P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (I. Levy, Esq., of counsel).

ISSUES

I. Whether a Notice of Deficiency was issued within the period of limitation pursuant to section 683(a) of the Tax Law.

II. Whether petitioner Thomas Volpe's activities as a real estate salesman were conducted as an employee, of which the income derived therefrom would not be subject to the unincorporated business tax.

FINDINGS OF FACT

1. Petitioners Thomas Volpe and Rita Volpe timely filed a joint New York State Income Tax Resident Return for the year 1974, on which net business income was reported from commissions earned from the sales activities of

petitioner Thomas Volpe. Petitioner Thomas Volpe contended that an unincorporated business tax return was filed for the year 1974, indicating that the income from his sales activities was not subject to the unincorporated business tax. The Audit Division did not have a record of the 1974 unincorporated business tax return contended to have been filed by petitioner Thomas Volpe.

2. On April 4, 1978 the Tax Compliance Bureau issued a Notice of Deficiency for the year 1974 against petitioners Thomas Volpe and Rita Volpe for additional personal income tax of \$188.56, plus interest of \$47.26. This deficiency was subsequently paid and is not at issue.

3. On April 4, 1978, the Tax Compliance Bureau issued a Notice of Deficiency for the year 1974 against petitioner Thomas Volpe for unincorporated business tax of \$675.62, plus interest, along with an explanatory Statement of Audit Changes, a Tax Computation Schedule, and a Schedule of Audit Adjustments, which indicated, in part, that the net business income, as adjusted by the Audit Division, was held subject to the unincorporated business tax.

4. Petitioner Thomas Volpe contended that he was employed by Michael A. Volpe, Inc., also referred to as Volpe Enterprises, Inc. (hereinafter the corporation) as a real estate commission salesman and that he was compensated on a commission basis from the sale of homes, apartment rentals, appraisals and mortgages. Petitioner also contended that he was provided with office facilities, and that he was subject to the control of the Corporation. Petitioner Thomas Volpe did not render sworn testimony and did not submit documentary evidence establishing his contentions.

5. Petitioner Thomas Volpe received commissions and fees directly from his clients. However, petitioner contended that this income was turned over to the corporation, who would subsequently pay petitioner a commission. In

addition, the corporation paid for Blue Cross medical insurance, accident and health insurance, and withheld from petitioner's commissions amounts under the Federal Insurance Contributions Act (FICA).

6. Petitioner contended that the statute of limitations had expired for the issuance of a deficiency, since he timely filed an unincorporated business tax return for the year 1974. In support of his contentions, petitioner submitted, for exhibition only, a copy of the unincorporated business tax return filed for the year 1974. The aforementioned copy contained the name and address of both petitioners Thomas Volpe and Rita Volpe, the social security number of petitioner Thomas Volpe, and the notations, "not subject" and "commission-employee". However, no items of income, deductions, or expenses were filled in or reported.

CONCLUSIONS OF LAW

A. That although an unincorporated business tax form filed without items of income, deductions, and expenses properly included does not constitute the filing of an unincorporated business tax return, the Notice of Deficiency issued April 4, 1978 was issued within the three year period of limitation required by section 683(a) of the Tax Law.

B. That petitioner Thomas Volpe has failed to sustain the burden of proof required by sections 722 and 689(e) of the Tax Law in establishing that he was an employee, (as defined by 20 NYCRR 203.10(b)) of Michael A. Volpe, Inc., or Volpe Enterprises, Inc. or of any of his clients or principals.

C. That petitioner Thomas Volpe's activities as a real estate salesman during the year 1974 constituted the regularly carrying on of an unincorporated business and the income derived therefrom is subject to the unincorporated

business tax in accordance with the meaning and intent of section 703 of the Tax Law.

D. That the petition of Thomas Volpe and Rita Volpe is denied and the notices of deficiency issued April 4, 1978 are sustained together with such interest as may be lawfully owing.

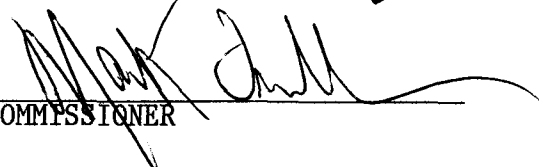
DATED: Albany, New York

OCT 22 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER