

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Anthony & Josephine Fimiano :
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal Income :
Taxes and New York State Unincorporated Business :
Taxes under Articles 22, 23 and 30 of the Tax Law :
for the Year 1976. :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon Anthony & Josephine Fimiano, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony & Josephine Fimiano
2170 81st Street
Brooklyn, NY 11214

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
20th day of December, 1983.

Daniel Parchuck

James A. Thompson
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

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AFFIDAVIT OF MAILING

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon John W. Hughes, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John W. Hughes
Matays, Hughes & Franzino
58 East 55th St.
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
20th day of December, 1983.




pursuant to Tax Law section 174

Authorized to administer oaths

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

December 20, 1983

Anthony & Josephine Fimiano
2170 81st Street
Brooklyn, NY 11214

Dear Mr. & Mrs. Fimiano:

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 & 1312 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
John W. Hughes
Matays, Hughes & Franzino
58 East 55th St.
New York, NY 10022
Taxing Bureau's Representative

STATE TAX COMMISSION

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 22, 1982 at 1:30 P.M., with all briefs to be submitted by April 25, 1983. Petitioners appeared by Matays, Hughes & Franzino, Esqs. (John W. Hughes and Frank Franzino, Esqs., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner Anthony Fimiano conducted any business in New York State which was subject to unincorporated business tax.

II. Whether the trucking consulting services provided by petitioner Anthony Fimiano were rendered as an employee of various corporations and therefore the income therefrom was not subject to unincorporated business tax.

III. Whether petitioner maintained a bona fide office outside New York if it is concluded that he conducted an unincorporated business in New York.

IV. Whether petitioner had reasonable cause for not filing and paying unincorporated business tax.

V. Whether the Audit Division properly computed petitioners' New York City and New York State personal income tax deficiencies as the result of federal audit changes.

FINDINGS OF FACT

1. On June 29, 1979, the Audit Division issued a Statement of Audit Changes against petitioners, Anthony Fimiano and Josephine Fimiano,¹ alleging a New York City personal income tax deficiency of \$3,374.38, a New York State personal income tax deficiency of \$12,065.37 and an unincorporated business tax deficiency of \$5,883.55 for the 1976 taxable year. The following explanation was provided:

"Under authorization of Federal Law [Section 6103(b) of the Internal Revenue Code], we received notification of Federal Audit Changes and the following deficiency is based on failure to report such changes.

In our review of your New York State personal income tax return, the business income reported should have been \$17,399.76 rather than \$17,299.76. Adjustment \$100.00.

As no reply was received to our letter dated March 10, 1978 and our follow-up letter dated June 21, 1978, your New York State unincorporated business tax liability is computed based on information available.

Penalty under section 685(c) of the New York State Tax Law is imposed for underpayment of personal and unincorporated business estimated taxes.

Also, penalty under Section 685(a)(1) and (2) is imposed for failure to file and pay unincorporated business taxes."

¹ Josephine Fimiano is a party in this matter merely because she is the wife of Anthony Fimiano. Therefore, references to "petitioner" in this decision are to Anthony Fimiano.

2. On April 14, 1980, the Audit Division issued a Notice of Deficiency against petitioners alleging a total personal income and unincorporated business tax deficiency of \$21,323.30 plus penalty and interest. Attached thereto was a copy of the Statement of Audit Adjustment described in Finding of Fact "1", supra.

3. On October 5, 1982, the Audit Division recomputed petitioners' tax liability based on revised federal audit changes, and thereby reduced petitioners' total personal income and unincorporated business tax deficiency from \$21,323.30 to \$18,306.86 which includes a New York City personal income tax deficiency of \$2,859.16, a New York State personal income tax deficiency of \$10,223.15 and an unincorporated business tax deficiency of \$5,224.55. Penalties were correspondingly reduced.

4. Petitioner Anthony Fimiano on his Schedule C, "Profit Or (Loss) From Business Or Profession", which was attached to his 1976 United States Form 1040, showed gross receipts or sales of \$96,173.76 from his business activities as a trucking consultant against which he deducted \$78,374.00 in business expenses. The Internal Revenue Service initially disallowed the entire deduction of \$78,374.00. It later allowed \$11,982.00 of the \$78,374.00 which resulted in the recomputation of the deficiencies herein as noted in Finding of Fact "3", supra. On this Schedule C, petitioner listed his business address as being in Elizabeth, New Jersey. None of the business expenses claimed by petitioner were related to the maintenance of an office in New York.

5. Petitioner conceded that he was liable for additional New York City and New York State personal income taxes as the result of federal audit changes.

6. Petitioner provided trucking consulting services primarily for the following companies: Top Value Enterprises of Dayton, Ohio; E.F. MacDonald of

Dayton, Ohio; Continental Can of Atlanta, Georgia; Gorham Chicago of Chicago, Illinois; and Bee Plastics of Pittsburgh, Pennsylvania. Petitioner testified that he conducted his business activities in Elizabeth, New Jersey; Cincinnati, Ohio; Atlanta, Georgia; and Orlando, Florida. He testified that the services he provided consisted primarily of planning freight distribution for the companies noted above including the distribution of goods from warehouses to retail stores.

7. Petitioner contends that he performed his trucking consulting services as an employee of three corporations: All Best Transfer and Warehouse, Inc., Anthony's Consolidators, Inc. and A.J.F. Consolidators, Inc. Petitioner was the president and sole stockholder of each of these corporations. He did not introduce any evidence to show that any of these corporations withheld income taxes from his compensation. In addition, petitioner had complete discretion concerning his activities and planned his own schedule.

8. Petitioner resided in Brooklyn, New York during the year at issue. He did not maintain any office facilities in his home and did not conduct any work from his home. Furthermore, there is nothing in the record showing that petitioner conducted any trucking consulting activities in New York.

9. Petitioner in his petition argues that penalties under Tax Law section 685(a)(1) and (2) should not be imposed based upon his failure to report federal audit changes. However, the record shows that no such penalties were imposed. Rather, penalties under Tax Law section 685(a)(1) and (2) were imposed based upon petitioner's failure to file and pay unincorporated business taxes.

CONCLUSIONS OF LAW

A. That the Personal Income Tax imposed by Article 30 of the Tax Law is by its own terms tied into and contains essentially the same provisions as

Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Article 30.

B. That Tax Law section 701(a) provides in part as follows:

"A tax is hereby imposed for each taxable year on the unincorporated business taxable income of every unincorporated business wholly or partly carried on within this State."

C. That petitioner sustained his burden of proof under Tax Law section 722, which incorporates Tax Law section 689 into Article 23 of the Tax Law, to show that he did not wholly or partly carry on his business of trucking consulting within New York State. It cannot be said that petitioner carried on such activity in New York merely because his home was in this state. Therefore, income derived from such activity is not subject to New York State unincorporated business tax.

D. That the second, third and fourth issues are rendered moot.

E. That the Audit Division properly recomputed petitioner's New York City and New York State personal income tax deficiencies as noted in Finding of Fact "3", supra.

F. That the petition of Anthony and Josephine Fimiano is granted and the Audit Division is directed to modify the Notice of Deficiency described in Finding of Fact "2" to conform to the recomputation noted in Finding of Fact "3" and to cancel the alleged unincorporated business tax deficiency.

DATED: Albany, New York

DEC 20 1983

STATE TAX COMMISSION

Roderic A. Cline
PRESIDENT

Francis P. Kolm
COMMISSIONER

Mark J. O'Connell
COMMISSIONER