

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alfred L. Stevens :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Unincorporated :
Business Tax under Articles 16A & 23 of the Tax :
Law for the Years 1954, 1968-1972, 1976. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 17th day of June, 1983, he served the within notice of Decision by certified mail upon Alfred L. Stevens, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alfred L. Stevens
57 Vassar St.
Garden City, NY 11530

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
17th day of June, 1983.

David Parchuck

Kathy Pfaffenbach

Cunice C. Haglund
AUGUST 1983 TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

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_____ :

State of New York
County of Albany

David Parchuck, 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 17th day of June, 1983, he served the within notice of Decision by certified mail upon J. Michael Brandt the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. Michael Brandt
501 Fifth Ave.
New York, NY 10017

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
17th day of June, 1983.

Cornelia R. Haglund

David Parchuck
Kathy Pfaffenbach

AUDITOR GENERAL
OATHS PURSUANT TO TAX LAW
SECTION 174

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

June 17, 1983

Alfred L. Stevens
57 Vassar St.
Garden City, NY 11530

Dear Mr. Stevens:

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) 375-386j, 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 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
J. Michael Brandt
501 Fifth Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ALFRED L. STEVENS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Articles 16A and 23 of the Tax Law for the	:	
Years 1954, 1968 through 1972 and 1976.	:	

Petitioner Alfred L. Stevens, 57 Vassar Street, Garden City, New York 11530, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Articles 16A and 23 of the Tax Law for the years 1954, 1968 through 1972 and 1976 (File Nos. 29766, 29767 and 30350).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 27, 1981 at 1:30 P.M. and continued to conclusion before Allen Caplowaith, Hearing Officer, at the same location on September 24, 1982 at 10:30 A.M. Petitioner appeared with J. Michael Brandt, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. and Paul B. Coburn, Esq. (Anna D. Colello, Esq., of counsel).

ISSUES

I. Whether all deficiencies herein asserted against petitioner are in violation of a certain stipulation entered into on October 18, 1978.

II. Whether petitioner's activities as a jockey agent constituted the carrying on of an unincorporated business.

III. Whether the notices of deficiency should be dismissed on the ground of laches.

IV. Whether the notices of deficiency are barred by the period of limitations on assessment.

FINDINGS OF FACT

1. Alfred L. Stevens (hereinafter "petitioner") and his wife, Helen Stevens filed New York State income tax resident returns for the years 1954, 1968 through 1972 and 1976. On each return petitioner reported "business income" derived from his activities as a "Jockey Agent". Petitioner did not file unincorporated business tax returns for any of said years at issue.

2. On March 13, 1958 the Income Tax Bureau issued a Notice of Additional Assessment for the year 1954 wherein it held petitioner's jockey agent income and stable agent income subject to the unincorporated business tax. Pursuant to said notice, tax of \$250.14 was asserted.

3. On August 24, 1959, the State Tax Commission issued a decision in the Matter of the Applications of Alfred L. Stevens for the years 1952 and 1953.

Pursuant to such decision the State Tax Commission found that:

(a) "the jockey did not exercise sufficient control over the taxpayer's activities to create an employer-employee relationship between the parties."

(b) "the activities as jockey agent were rendered as an independent contractor."

(c) "said activities were carried on both within and without the state within the meaning of section 386-g of the Tax Law."

(d) "The taxpayer was engaged in the carrying on of an unincorporated business during the calendar years 1952 and 1953 with respect to his activities as a jockey agent."

(e) "for the year 1952 86.6% and for the year 1953 76.35% of the net income from such activity was derived from business activities carried on in New York State."

4. On November 12, 1959, petitioner filed a petition with the Supreme Court of the State of New York, County of Albany, for review of the State Tax

Commission decision of August 24, 1959, pursuant to Article 78 of the Civil Practice Act. By mutual consent of petitioner's representative and the Assistant Attorney General assigned to the case, the petition was never acted upon in the court. Subsequently, in 1978 Mr. Joseph F. Gibbons, Assistant Attorney General was assigned to the case.

5. On October 18, 1978 a stipulation was entered into in the New York Supreme Court, Appellate Division, Third Department In the Matter of the Applications of Alfred L. Stevens for the years 1952 and 1953. Such stipulation, which was executed by petitioner's representative, Mr. J. Michael Brandt, and Assistant Attorney General, Mr. Joseph F. Gibbons, provided that:

"It is hereby stipulated, consented to and agreed by and between the respective parties that this proceeding in the nature of an application for certiorari be and the same hereby is discontinued, without prejudice, and an order to that effect may be entered by either party without notice to or consent of the other."

6. In conjunction with said stipulation petitioner paid \$225.00 in full settlement of the 1952 and 1953 matter.

7. On July 6, 1979, the Audit Division issued two statements of audit changes to petitioner wherein it held that:

"The income from your activities as Jockey Agent is subject to the unincorporated business tax based on the State Tax Commission Decision¹ and stipulation of discontinuance dated October 18, 1978."

Accordingly, two notices of deficiency were issued against petitioner on May 21, 1980. One such notice, which was issued with respect to the years

1 See Matter of the Applications of Alfred L. Stevens, State Tax Commission decision, August 24, 1959

1968, 1969 and 1970,² asserted unincorporated business tax of \$2,137.88, plus penalties and interest of \$2,284.93, for a total due of \$4,422.81. The other notice, which was issued with respect to the years 1971, 1972 and 1976,³ asserted unincorporated business tax of \$1,936.39, plus penalties and interest of \$1,780.21, for a total due of \$3,716.60. Said penalties were asserted pursuant to sections 685(a)(1), 685(a)(2) and 685(c) of the Tax Law for failure to file unincorporated business tax returns, failure to pay the tax determined to be due and failure to file declarations of estimated tax respectively.

8. Petitioner believes, and accordingly argued that the stipulation constituted an agreement between the parties that the jockey agent income of petitioner Alfred L. Stevens, in particular, and all jockey agents, in general, would be treated as exempt from the unincorporated business tax for 1952 and 1953, as well as all future years. The Audit Division's position is that the stipulation constituted a mutually agreeable decision not to go forward with the pending Article 78 proceeding based on a settlement made for the years 1952 and 1953 and that said stipulation is applicable only to 1952 and 1953 for petitioner, Alfred L. Stevens exclusively.

9. Mr. Gibbons had no intent for said stipulation to be applicable to other years or other individuals. This is evidenced in his letters of May 3, 1979 and July 25, 1979 to Mr. Brandt, wherein he stated that:

"I have no independent recollection of our discussing any years other than the taxable year involved in the former

² Although the Notice of Deficiency lists only 1968, the tax deficiency stated thereon is the aggregate asserted for 1968, 1969 and 1970 pursuant to the Statement of Audit Changes.

³ Although the Notice of Deficiency lists only 1971, the tax deficiency stated thereon is the aggregate asserted for 1971, 1972 and 1976 pursuant to the Statement of Audit Changes.

proceeding." and "when we discontinued the prior petition by mutual consent without prejudice, you and I were doing nothing more than discontinuing what was a stale claim. I am sure you will recall that I advised you that I had no authority to bind the State Tax Commission or act independently on their behalf."

10. On January 16, 1979, petitioner's 1954 tax deficiency was reduced to \$88.95. Such reduction resulted from the removal of petitioner's stable agent income from the unincorporated business tax computation based on the State Tax Commission decision of August 24, 1959. Subsequently, on December 14, 1981, the remaining 1954 deficiency was abated. The record herein gives no indication of the basis for such abatement.

11. Petitioner argued that his 1960 deficiency was cancelled as a result of the stipulation; however, the record shows that said deficiency was reduced to zero as the result of allowing an allocation of petitioner's income to sources without the State.

12. Petitioner contended that the State Tax Commission is guilty of laches, has waived its rights and is estopped from proceeding against petitioner.

13. Petitioner contended that the deficiencies for all years except 1976 are barred by the "Statute of Limitations".

14. Petitioner contended that his activities as a jockey agent were so engaged in as an employee of a jockey. Accordingly, he argued that the income derived from such activities is exempt from the imposition of unincorporated business tax.

15. Petitioner's services as a jockey agent consisted of obtaining mounts for jockeys.

16. Pursuant to the policy of the New York Racing Association, Inc., petitioner, as a jockey agent, was permitted to represent only one journeyman jockey and one apprentice jockey at any given time.

17. Petitioner's compensation represented a percentage of the earnings of the jockey.

18. Petitioner did not enter into a written agreement with any jockey he represented during the years at issue herein.

19. Either the jockey or the jockey agent could terminate their relationship at any time.

20. Petitioner's services were rendered exclusively at the race track.

21. Petitioner contended that approximately one third of his income was derived from services rendered at out of town tracks; however, no evidence was submitted to support such contention.

CONCLUSIONS OF LAW

A. That the stipulation entered into on October 18, 1978 dealt only with the affairs of petitioner, Alfred L. Stevens, for the years 1952 and 1953 and cannot be used in defense of petitioner in subsequent years.

B. That the deficiency asserted for the year 1954 is abated (see Finding of Fact "10", supra).

C. That the determination whether services were performed by an individual as an "employee" or as an "independent agent" turns upon the unique facts and circumstances of each case.

"The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used.' (Matter of Morton, 284 N.Y. 167, 172). It is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee (e.g., Matter of Greene v. Gallman, 39 A.D.2d 270,272, aff'd. 33 N.Y.2d 778; Matter of Frishman v. New York State Tax Comm., 33 A.D.2d 1071, mot. for lv. to app. den. 27 N.Y.2d 483; Matter of Hardy v. Murphy, 29 A.D.2d 1038; see 20 NYCRR 203.10; cf. Matter of

Sullivan Co., 289 N.Y. 110,112)" Matter of Liberman v. Gallman,
41 N.Y.2d 774, 778.

D. That petitioner has failed to sustain his burden of proof, required pursuant to section 689(e), as incorporated into section 722 of the Tax Law, to show that the degree of direction and control exercised by the jockeys he represented over his activities was sufficient for the existence of a bona fide employer-employee relationship. Accordingly, petitioner's jockey agent activities did not constitute services rendered as an employee within the meaning and intent of section 703(b) of the Tax Law.

E. That petitioner's jockey agent activities constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701(a) of the Tax Law.

F. That laches, waiver or estoppel may not be imputed to the State in the absence of statutory authority. This rule is generally applied in connection with tax matters. (Matter of Jamestown Lodge 1681 Loyal Order of Moose, 31 A.D.2d 981). The record herein does not establish that petitioner has been damaged or prejudiced by delay. Accordingly, the remedy of laches claimed by petitioner is unfounded.

G. That section 683(a) of the Tax law, which is incorporated into section 722 of the Tax Law, provides that:

"Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed."

Accordingly, since no unincorporated business tax returns were filed by petitioner for the years at issue, the deficiencies herein asserted are not time barred.

H. That the petition of Alfred L. Stevens is granted to the extent provided in Conclusion of Law "B" supra, and except as so granted, said petition is, in all other respects denied.

I. That the notices of deficiency issued on May 21, 1980 with respect to taxable years 1968, 1969, 1970, 1971, 1972 and 1976 are hereby sustained together with such additional penalties and interest as may be lawfully owing.

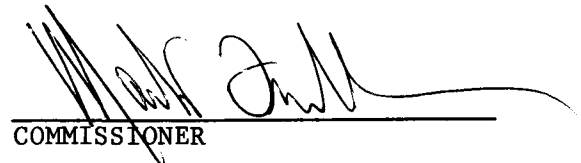
DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1983


PRESIDENT


COMMISSIONER


COMMISSIONER