

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert J. & Ninette J. Viggiani :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income & :
UBT under Article 22 & 23 of the Tax Law for the :
Year 1978. :
_____:

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 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Robert J. & Ninette J. Viggiani, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert J. & Ninette J. Viggiani
70 Holmes Ave.
Hartsdale, NY 10530

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
2nd day of May, 1984.

David Parchuck

James A. Hays
Authorized to administer oaths
pursuant to Tax Law section 174

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

May 2, 1984

Robert J. & Ninette J. Viggiani
70 Holmes Ave.
Hartsdale, NY 10530

Dear Mr. & Mrs. Viggiani:

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, 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ROBERT J. VIGGIANI AND NINETTE J. VIGGIANI : 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 1978.

Petitioners, Robert J. Viggiani and Ninette J. Viggiani, 70 Holmes Avenue, Hartsdale, New York 10530, 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 1978 (File No. 38197).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 27, 1983 at 9:15 A.M. Petitioner Robert J. Viggiani appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner Robert J. Viggiani may allocate a portion of his unincorporated business income to sources without New York State.

FINDINGS OF FACT

1. Petitioners, Robert J. Viggiani and Ninette J. Viggiani, timely filed a joint New York State Income Tax Resident Return for the year 1978. In conjunction therewith, Robert J. Viggiani, d/b/a Irv & Vic Sportswear, filed a 1978 New York State Unincorporated Business Tax Return whereon he allocated

\$21,293.00 to sources without New York State. His total business income reported from sources both within and without New York State was \$27,709.35.

2. On March 19, 1982, the Audit Division issued a Statement of Audit Changes to petitioners wherein the business allocation claimed by Robert J. Viggiani (hereinafter petitioner) was disallowed in its entirety. Additionally, an adjustment was made to petitioners' claimed deductions for personal income tax purposes. Accordingly, two notices of deficiency were issued to petitioners on April 6, 1982. One such notice asserted unincorporated business tax of \$885.47, plus interest of \$252.81 for a total due of \$1,138.28. The second notice asserted additional personal income tax of \$100.68, plus interest of \$28.75, for a total due of \$129.43.

3. Subsequently, the personal income tax issue had been resolved at a pre-hearing conference, resulting in full cancellation of the deficiency asserted with respect to such tax. Accordingly, only the unincorporated business tax issue remains to be decided herein.

4. Petitioner was engaged in the activity of manufacturing and selling apparel for harness race drivers. Both its manufacturing and sales activities were conducted at 927 Yonkers Avenue, Yonkers, New York 10704.

5. Petitioner also sold his product to retailers in various other states. When a retailer ordered a garment for one of its customers it would submit an order form to petitioner. Such form would detail the fabric, color scheme and sizing requirements. Petitioner would produce the garment to specifications and ship it to the retailer. Petitioner billed the retailers he dealt with on a monthly basis.

6. Petitioner did not have a contractual relationship with any of the retailers he dealt with. The retailer was free to set his own price for the garments he ordered from petitioner.

7. The garments manufactured by petitioner were shipped to retailers without labels. The retailers were free to incorporate their own labels into the garments and sell them as their products.

8. Petitioner alleged that the out-of-state retailers he did business with constituted his agencies. As such, he argued that the income derived from sales to the out-of-state retailers is allocable to sources without New York State and accordingly is nontaxable for unincorporated business tax purposes. As authority for his position, petitioner cited a portion of the General Instructions for the New York State Business Allocation Schedule, which states that:

"Business is carried on outside the State if you have, maintain, operate or occupy desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where your affairs are systematically and regularly carried on outside New York State."

9. Petitioner claimed he spent every Saturday at the Meadowlands in New Jersey where he sold and delivered his garments during qualifying races. He contended that he should properly be entitled to an allocation for the sales made at the Meadowlands.

10. Petitioner offered no records to establish the volume of sales made to points without New York State.

CONCLUSIONS OF LAW

A. That section 707(a) of the Tax Law provides that:

"If an unincorporated business is carried on both within and without this State, as determined under regulations of the tax commission, there shall be allocated to this state a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions. If the unincorporated

business has no regular place of business outside this state, all of such excess shall be allocated to this state."

B. That 20 NYCRR 207.2(a) provides that:

"In general, an unincorporated business is carried on at any place either within or without New York State where the unincorporated business entity has a regular place of business. The occasional consummation of an isolated transaction in or at a place where no regular place of business is maintained does not constitute the carrying on of a business at such place. A regular place of business is any bona fide office, factory warehouse or other place which is systematically and regularly used by the unincorporated business entity in carrying on its business."

C. That an agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. [2 N.Y. Jur.2d, Agency §1, citing Brilliant v. Raidy 189 Misc. 561 (1947)].

D. That the relationship petitioner maintained with the out-of-state retailers was a wholesaler-retailer relationship rather than an agency relationship as contended by petitioner.

E. That petitioner maintained no regular place of business outside New York State during the year 1978 within the meaning and intent of section 707(a) of the Tax Law and 20 NYCRR 207.2(a). Accordingly, an allocation of business income to sources without New York State is not permissible.

F. That the Notice of Deficiency issued April 6, 1982 with respect to personal income tax is cancelled (See Finding of Fact "3", supra).

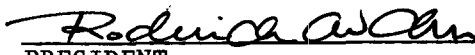
G. That the petition of Robert J. Viggiani and Ninette J. Viggiani is denied and the Notice of Deficiency issued April 6, 1982 with respect to

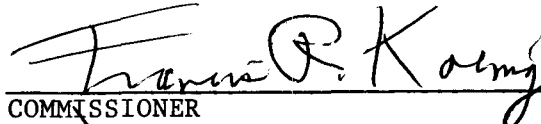
unincorporated business tax is hereby sustained together with such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 02 1984


PRESIDENT


COMMISSIONER


COMMISSIONER