

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
James E. & Mina Allen :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
& UBT under Article(s) 22 & 23 of the Tax Law :
for the Years 1977 & 1978.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 19th day of June, 1986, he/she served the within notice of Decision by certified mail upon James E. & Mina Allen the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James E. & Mina Allen
RD #2
Sayre, PA 18840

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
19th day of June, 1986.

Janet M. Snay

Daniel J. Raralli
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
James E. & Mina Allen :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
& UBT under Article(s) 22 & 23 of the Tax Law :
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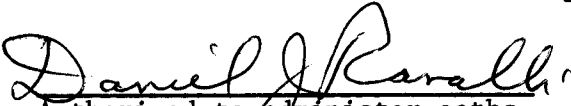
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 19th day of June, 1986, he served the within notice of Decision by certified mail upon John V. Moore, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John V. Moore
Denton, Keyser, LaBrecque & Moore
150 Lake Street
Elmira, NY 149021503

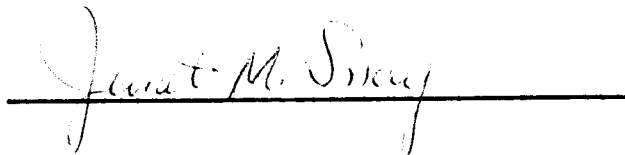
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
19th day of June, 1986.



Authorized to administer oaths
pursuant to Tax Law section 174



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

June 19, 1986

James E. & Mina Allen
RD #2
Sayre, PA 18840

Dear Mr. & Mrs. Allen:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
John V. Moore
Denton, Keyser, LaBrecque & Moore
150 Lake Street
Elmira, NY 149021503

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JAMES E. AND MINA ALLEN	:	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 Years 1977 and 1978.	:	

Petitioners, James E. and Mina Allen, RD #2, Sayre, Pennsylvania 18840, 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 years 1977 and 1978 (File Nos. 30959 and 31219).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on February 27, 1986 at 1:15 P.M. Petitioners appeared by Denton, Keyser, LaBrecque & Moore (John V. Moore, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioners correctly allocated unincorporated business income inside and outside New York State.

II. Whether the State Tax Commission is guilty of laches in scheduling a hearing four years and nine months after the original audit commenced.

FINDINGS OF FACT

1. On June 26, 1980, after an audit, the Audit Division issued against petitioners, James E. and Mina Allen, two notices of deficiency. The first asserted additional tax due of \$1,784.50, plus interest of \$481.57, for a total

of \$2,266.07 for the 1977 tax year. The second asserted a tax due of \$1,480.03, plus interest of \$273.59, for a total due of \$1,753.62. The period as stated on the notice is "07/87/67 to 06/77/77". However, the parties agree that this is a typographical error and the year covered by the second notice is 1978.

2. Petitioners, who are residents of the Commonwealth of Pennsylvania, owned and operated a paint supply business known as Gene's Auto Paint Supply ("Gene's"). Gene's sold primarily to automobile dealers located in New York and Pennsylvania. Petitioners maintained a daily journal in which they categorized sales by the state, county and city where merchandise was delivered. For the years 1977 and 1978, petitioners filed unincorporated business tax returns allocating to New York State only that portion of their business income arising from sales and deliveries made in New York State. The assessments under consideration are predicated upon the Audit Division's determination that petitioners had no regular place of business outside of New York State and, therefore, could not allocate any portion of their income, regardless of the fact that some deliveries were made in Pennsylvania.

3. Petitioners owned a combination store and warehouse located at 411 Baldwin Avenue, Elmira, New York. Sales invoices showed Elmira, New York as the only business address for Gene's. Sales were arranged at the customer's place of business or in the Elmira store; customers sometimes came into the store to pick up merchandise. Three part-time workers were employed to service customers. Mr. Allen managed the store and acted as an outside salesman. The majority of his time was spent outside the office making sales and deliveries to customers in the Elmira area. He spent every other Tuesday and Thursday conducting business exclusively in Pennsylvania.

4. Petitioners performed office work in their home in Pennsylvania. From there, Mrs. Allen prepared billings, maintained records of sales and purchases, prepared tax returns and performed other routine office work. In 1978, Gene's paid Mrs. Allen wages of \$1,430.00 for work she performed in Pennsylvania. The New York State Department of Labor sent correspondence to Gene's in Pennsylvania, and Mr. Allen's business card bears a New York and Pennsylvania address.

5. The room referred to by petitioners as an office also served as a child's bedroom. It contained a typewriter, adding machines, filing cabinets and other office supplies. There was no advertising sign outside or other indication that petitioners' home was also a place of business. On infrequent occasions, customers picked up their paint orders at petitioners' home. Approximately ninety percent of all billing and other office work was performed in Pennsylvania.

6. The Audit Division conceded that the unincorporated business tax returns under consideration would be correct as filed, if it is determined that petitioners had a regular place of business outside New York State.

CONCLUSIONS OF LAW

A. 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.... 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."

B. That petitioners maintained an office in their home in Pennsylvania which was systematically and regularly used in carrying on their business. Ninety percent of the business's paper work was done in Pennsylvania, business correspondence was received in Pennsylvania, customers picked up merchandise and contacted petitioners in Pennsylvania.


C. That in light of the above, the issue of laches is rendered moot. However, it is noted that in most instances, the State Tax Commission cannot be prevented from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority (Matter of McMahan v. State Tax Comm., 45 A.D.2d 624, mot. for lv. to app. den. 36 N.Y.2d 646).

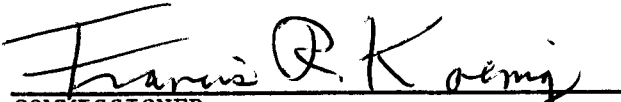
D. That the petition of James E. and Mina Allen is granted and the notices of deficiency issued on June 26, 1980 are cancelled.

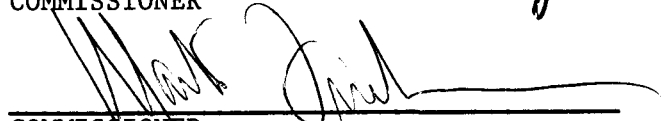
DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986


PRESIDENT


COMMISSIONER


COMMISSIONER