

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Archie P. Antonelli & Sons, Inc.	: : : : : :	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision of a Determination or Refund of Sales & Use Tax under Article 28 & 29 of the Tax Law for the Period Ended 5/31/79.		

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Archie P. Antonelli & Sons, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Archie P. Antonelli & Sons, Inc.
1 Farmstead Rd.
New Windsor, NY 12550

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
21st day of August, 1985.

David Parchuck

James R. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Archie P. Antonelli & Sons, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period Ended 5/31/79. :
:

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Thomas R. DiGovanni, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas R. DiGovanni
P.O. Box 2553
Newburgh, NY 12550

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
21st day of August, 1985.

David Parchuck

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

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

August 21, 1985

Archie P. Antonelli & Sons, Inc.
1 Farmstead Rd.
New Windsor, NY 12550

Gentlemen:

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) 1138 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
Thomas R. DiGiovanni
P.O. Box 2553
Newburgh, NY 12550
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PHILIP BIRNBACH AND ROSANNE BIRNBACH	:	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 Years 1979 and 1980.	:	

Petitioners, Philip Birnbach and Rosanne Birnbach, 483 Todt Hill Road, Staten Island, New York 10304, 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 years 1979 and 1980 (File No. 45379).

A 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 March 20, 1985 at 1:15 P.M. with all briefs to be submitted by April 20, 1985. Petitioner Philip Birnbach appeared pro se and for his wife, Rosanne Birnbach. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether petitioner Philip Birnbach properly reported 100% of his business net profit as personal service income in computing the maximum tax on personal service income for each of the years 1979 and 1980.

II. Whether petitioner Philip Birnbach is properly entitled to allocate a portion of his unincorporated business income to sources without New York State.

FINDINGS OF FACT

1. Philip Birnbach (hereinafter "petitioner") timely filed a New York State Income Tax Resident Return with his wife, Rosanne Birnbach, for each of the years 1979 and 1980 under filing status "Married filing separately on one return". On such returns, petitioner reported business income (net profit) of \$80,196.00 (1979) and \$95,222.00 (1980) derived from the operation of his unincorporated business; Birnbach Gear Co., 47 Columbia Place, Brooklyn, New York. In computing the maximum tax on personal service income for each of said years petitioner reported 100% of the aforestated business net profit as personal service income.

2. Petitioner also timely filed a New York State Unincorporated Business Tax Return for each of said years whereon he allocated a portion of his reported business net profit to sources without New York State. For 1979 \$19,427.00 was allocated to sources without New York State and for 1980 \$42,987.00 was allocated to sources without New York State. On each return petitioner noted that the "New York Income (was) determined from books". His business address reported on each return was 47 Columbia Place, Brooklyn, New York.

3. On December 10, 1982, the Audit Division issued a Statement of Personal Income Tax Audit Changes to petitioner whereon his computed maximum tax on personal service income was adjusted for each year at issue based on the following explanation:

"Since capital is a material income producing factor, your personal service income is deemed to be 30% of the net profit from business."

4. On December 10, 1982, the Audit Division also issued a Statement of Unincorporated Business Tax Audit Changes to petitioner whereon his claimed allocation for each year at issue was disallowed based on the following explanation:

"Since you have failed to substantiate that you have a place of business outside New York, it is determined that there is no allocation allowable. Therefore, all income is deemed to be from New York sources."

5. On April 14, 1983, the Audit Division issued two (2) notices of deficiency to petitioner and his wife based on the aforestated statements of audit changes. One such notice asserted additional personal income tax of \$2,796.00, penalty of \$55.92 and interest of \$778.20, for a total due of \$3,630.12. The other notice asserted additional unincorporated business tax of \$2,594.00, penalty of \$51.88, plus interest of \$720.32, for a total due of \$3,366.20.

6. Although petitioner contested the adjustment made for personal income tax purposes, he offered no explanation as to why he believes he is properly entitled to claim the maximum tax rate on his entire business net profit. His only argument was that his accountant advised him that the tax was correctly computed for each year at issue.

7. During the years at issue petitioner owned and operated Birnbach Gear Co. at the aforestated business address. On occasion, when certain orders were received for special gears or sprockets which he was unable to produce with his equipment, he used a friend's machine shop in Elizabeth, New Jersey, which was outfitted with the necessary machinery. He reciprocated by allowing his friend to use his machinery when the need arose. Petitioner's claimed allocation of business income to sources without New York State relates solely to the use of his friend's New Jersey machine shop.

8. Petitioner had no ownership interest in the New Jersey machine shop. He did not pay a rental charge or fee for its use.

9. Rosanne Birnbach was not involved in petitioner's unincorporated business.

CONCLUSIONS OF LAW

A. That section 603-A of the Tax Law provides a maximum tax rate on New York personal service income. Subsection (b)(1) of section 603-A provides that for purposes of said section the term "New York personal service income" means:

"(A) wages salaries, or professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income-producing factors, under regulations prescribed by the tax commission, a reasonable allowance as compensation for the personal services rendered by the taxpayer shall be considered as earned income".

B. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that the percentage of his net profit from business for 1979 and 1980 determined by the Audit Division to be attributable to personal services rendered was erroneous or improper. Accordingly, the adjustment made with respect to personal income taxes is sustained.

C. 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."

D. 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.

E. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of Article 22 of the Tax Law, as incorporated into Article 23 by section 722(a), to show that he had a regular place of business without New York State during the years 1979 and 1980. Accordingly, petitioner's entire net business income is allocated to New York State.

F. That the two (2) notices of deficiency issued April 14, 1983 with respect to both personal income tax and unincorporated business tax are cancelled insofar as they apply to Rosanne Birnbach, since she was not involved in the business.

G. That the petition of Philip Birnbach and Rosanne Birnbach is granted to the extent provided in Conclusion of Law "F", supra, and except as so granted, said petition is, in all other respects, denied.

H. That except as provided in Conclusion of Law "F", supra, the two (2) notices of deficiency issued April 14, 1983 are sustained together with such additional interest as may be lawfully owing.

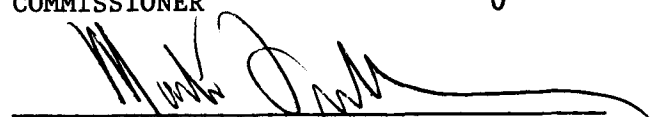
DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 153 387 508

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

Sent to <i>Thomas A. Di Giovanni</i>	
Street and No. <i>PO Box 8552</i>	
P.O. State and ZIP Code <i>Newburg NY 12550</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 153 387 507

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

Sent to <i>Orville J. Antonelli & Sons Inc</i>	
Street and No. <i>1 Farmstead Rd</i>	
P.O. State and ZIP Code <i>New Bedford NY 12550</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982