

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

WALTER H. BURGESS

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article(s) 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1967, 1968, 1969 and 1970.

State of New York
County of Albany

Catherine Steele, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 13th day of September, 1976, she served the within
Notice of Decision by (certified) mail upon Walter H. Burgess

~~(representative of)~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Mr. Walter H. Burgess
93 Joyce Road
Hartsdale, New York 10530

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)~~
~~or 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

13th day of September, 1976.

Catherine Steele

Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

ADDRESS YOUR REPLY TO

September 13, 1976

TELEPHONE: (518) **457-3850**

Mr. Walter H. Burgess
93 Joyce Road
Hartsdale, New York 10530

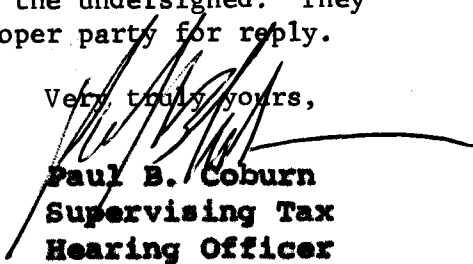
Dear Mr. Burgess:

Please take notice of the **DECISION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section **(a) 722** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned. They
will be referred to the proper party for reply.

Very truly yours,


Paul B. Coburn
Supervising Tax
Hearing Officer

Enc.

~~XX~~

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WALTER H. BURGESS	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Taxes under Article 23 of the Tax Law	:	
for the Years 1967, 1968, 1969 and 1970.	:	

Petitioner, Walter H. Burgess, of 93 Joyce Road, Hartsdale, New York 10530, has filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1967, 1968, 1969 and 1970. (File No. 00238). A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 17, 1976, at 3:00 P.M. Petitioner appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq. of Counsel).

ISSUES

I. Whether the business activities of the petitioner, Walter H. Burgess, as a manufacturers' representative during the years 1967, 1968, 1969 and 1970 constituted the conduct of an unincorporated business under section 703 of the Tax Law.

II. Whether the petitioner was properly subject to the penalties under former section 685(a) for the years 1967 and 1968 and sections 685(a)(1) and 685(a)(2) for the years 1969 and 1970.

FINDINGS OF FACT

1. Petitioner, Walter H. Burgess, timely filed income tax returns for each of the years 1967 through 1970, but did not file an unincorporated income tax return for any year.

2. A Notice of Deficiency for unincorporated business tax was issued May 22, 1972, against the petitioner, Walter H. Burgess, together with a Statement of Audit Changes detailing the deficiency as of that date as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
1967	\$247.07	\$ 61.77	\$ 60.82	\$ 369.66
1968	579.82	144.95	107.93	832.70
1969	674.64	239.49	85.11	999.24
1970	<u>800.53</u>	<u>236.16</u>	<u>52.96</u>	<u>1,089.65</u>
Total	\$2,302.06	\$682.37	\$306.82	\$3,291.25

3. The Income Tax Bureau determined that petitioner, Walter H. Burgess' activities as a manufacturers' representative were subject to unincorporated business taxes in the years 1967 through 1970 and that petitioner had failed to file unincorporated business tax returns and pay the unincorporated business taxes for those years. The Income Tax Bureau added penalties as itemized above.

4. Petitioner, Walter H. Burgess, timely filed a petition for redetermination of the tax and penalty for the years 1967 through 1970.

5. Petitioner, Walter H. Burgess, was a salesman for Rutt Custom Kitchens of Goodville, Pennsylvania, a manufacturer of wooden kitchen cabinets. He was assigned a specified territory which included the New York metropolitan market of New York City, Long Island, Westchester County and north Jersey from Monmouth County north. He was limited to that area. Beginning about 1966, petitioner sought and obtained from Rutt Custom Kitchens permission to carry a line of plastic kitchen cabinets for another manufacturer. Petitioner then took on the line of Kras Rose Line Products of Farmingdale, Long Island. He covered the same geographical territory for both principals. There was no written contract for services with either manufacturer.

6. Petitioner, Walter H. Burgess, had no formal office. Both of his principals had their offices out of town. Petitioner made up order reports and conducted business correspondence from his home. Petitioner had no employees.

7. Petitioner, Walter H. Burgess, filed his Federal income tax returns for 1967 through 1970 with a Schedule C. "Profit (or Loss) From Business or Profession". He described himself on these forms, as well as on the New York State income tax returns, as "self-employed". He filed a Federal pension "Keogh Plan" as self-employed.

Neither of petitioner's principals deducted social security, state or Federal income taxes. Petitioner was not included in the pension plans of his principals.

8. Neither principal exercised control or direction over the activities of the petitioner, Walter H. Burgess, other than limiting the area of his territory. The principals handled approval of credit, billing and collections. Petitioner was paid a straight commission on gross sales, without reimbursement for his expenses.

9. Petitioner, Walter H. Burgess, was advised by his accountant that he was not required to file unincorporated business tax returns for the years in issue.

CONCLUSIONS OF LAW

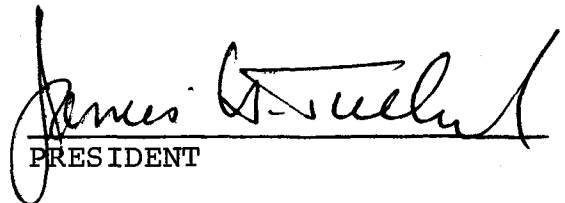
A. That petitioner, Walter H. Burgess, was a self-employed independent contractor subject to the unincorporated business tax for the years 1967 through 1970 in accordance with the meaning and intent of section 703 of the Tax Law. Section 703(f) of the Tax Law does not exempt petitioner from the unincorporated business tax. That section does not provide an exemption. It merely limits the factors which may be relied upon to conclude that the individual is self-employed as opposed to being a mere employee of his principals. Frishman v. New York State Tax Commission, 33 A.D. 2d 107, 307 NYS 2d 609.

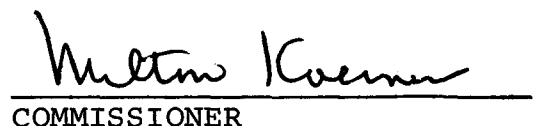
B. That petitioner, Walter H. Burgess, relied upon what he had reason to believe was competent advice of a certified public accountant that his business activities were not subject to the unincorporated business tax, and that petitioner was not required to file unincorporated business tax returns. The penalty under former section 685(a) for the 1967 and 1968 and sections 685(a)(1) and 685(a)(2) for the years 1969 and 1970 is cancelled.

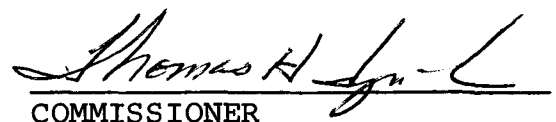
C. That the petition of Walter H. Burgess is granted to the extent that the penalties are cancelled; that the Income Tax Bureau is directed to modify the Notice of Deficiency issued May 22, 1972; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
September 13, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER