

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

MULLIGAN and MC DONALD

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)~~ :
Ending March 31, 1965 through March 31, 1970.

State of New York
County of Albany

John Huhn , 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 20th day of September , 1978 , He served the within

Notice of Decision by (certified) mail upon Mulligan and McDonald

c/o R.P. Mulligan (~~representative of~~) the petitioner in the within proceeding,

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

as follows: Mulligan and McDonald

c/o R. P. Mulligan

P. O. Box 125

Pleasantville, New York 10570

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

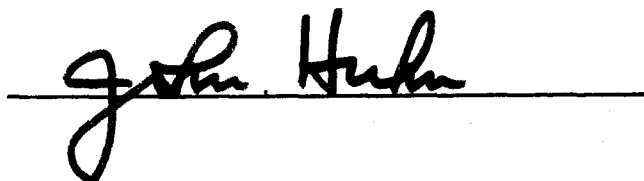
the United States Postal Service within the State of New York.

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

20th day of September , 1978





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

MULLIGAN and MC DONALD

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article (2) 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ Ending :
March 31, 1965 through March 31, 1970.

State of New York
County of Albany

John Huhn , 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 20th day of September , 1978 , she served the within

Notice of Decision by (certified) mail upon Charles F. Barrett, CPA

(representative of) the petitioner in the within proceeding,

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

as follows: Mr. Charles F. Barrett, CPA
275 Madison Avenue
New York, New York 10016

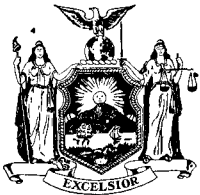
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

20th day of September , 1978

John Huhn



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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

September 20, 1978

Mulligan and McDonald
c/o R. P. Mulligan
P. O. Box 125
Pleasantville, New York 10570


Dear Mr. Mulligan:

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) **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 Laws 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


Joseph Chyrywat
Hearing Examiner

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE TAX COMMISSION

for Redetermination of a Deficiency or
for Refund of Unincorporated Business Tax
under Article 23 of the Tax Law for the
Years Ending March 31, 1965 through
March 31, 1970.

A small claims hearing was held before Philip Mercurio, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 2, 1977 at 9:15 A.M. Petitioner appeared by Charles F. Barrett, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

I. Whether petitioner (a partnership) properly allocated its net income to sources within and without New York State for the fiscal years ending March 31, 1965 through March 31, 1970.

II. Whether the business expenses claimed on petitioner's New York State partnership returns for fiscal years ending March 31, 1965 through March 31, 1970 are deductible and/or fully documented.

FINDINGS OF FACT

1. Petitioner, Mulligan and McDonald, timely filed New York State partnership returns for the fiscal years ending March 31, 1965 through March 31, 1970. On said returns, petitioner's income was allocated to sources within and without New York State, based on a factor method which included wages paid and sales made within and without New York State. On the same returns, petitioner listed New York, New York; Detroit, Michigan and Chicago, Illinois, as office locations where it regularly carried on its business.

2. On March 26, 1973, the Income Tax Bureau issued a Notice of Deficiency against petitioner, Mulligan and McDonald, for the fiscal years ending March 31, 1965 through March 31, 1970, asserting additional unincorporated business tax based on the results of a field audit. In accordance with the findings of the field audit, the Bureau disallowed the income allocation claimed by petitioner, Mulligan and McDonald, on the grounds that the offices located in Detroit, Michigan and Chicago, Illinois, were not bona fide offices of the partnership. It also disallowed \$1,200.00 in travel and sales promotion expenses for each of the years in question as being unsubstantiated. The Bureau also made other adjustments which are not being contested by petitioner.

3. Petitioner, Mulligan and McDonald (a partnership), was engaged in business as national publishers' representatives. During the years in question, the firm represented approximately twenty-five newspapers located primarily in smaller cities within a radius of five hundred miles of New York. The firm's principal function as a publishers' representative was to sell advertising space in the various papers it represented. The compensation derived by petitioner was usually in the form of commissions.

4. In the conduct of petitioner's business operations, the promotional selling of space in newspapers was directed by the partners, Ralph P. Mulligan and Gerald B. McDonald, from their New York City office. However, due to the fact that many large national advertisers were located in the midwest and in order to maintain a competitive edge, the firm employed publishers' representatives in Detroit, Michigan and Chicago, Illinois. Petitioner, Mulligan and McDonald, maintained that these publishers' representatives were employees of the firm and that the firm maintained offices and regularly carried on business at those locations.

5. Petitioner, Mulligan and McDonald, entered into both oral and written agreements with the publishers' representatives located in Detroit, Michigan and Chicago, Illinois. In accordance with those agreements, the publishers' representatives at the aforesaid locations were to staff and maintain an office at their

own expense. In addition, they were to be responsible for all the ordinary expenses incurred in the conduct of petitioner's business within the prescribed area of their sales responsibilities, including office rent, telephone service, employees' compensation, sales promotion, postage, travel and entertainment. The offices maintained at those locations by the publishers' representatives were to have petitioner's name publicly identified and listed on the building directory, for the direction of both mail and possible business visitors. Further, they were to have telephone service listed in the name of petitioner. They were also required to maintain copies of daily newspapers published by petitioner's clients.

6. In consideration for the services specified in Finding of Fact "5," above, petitioner paid the publishers' representatives a salary, commission and \$100.00 per month, which amount was identified as rent.

7. During the years in question, the publishers' representative located in Chicago, Illinois, represented other clients in addition to petitioner. However, petitioner maintained that the publishers' representative located in Detroit, Michigan, performed services only for petitioner.

8. Petitioner filed an employee wage and tax statement for the publishers' representative located in Detroit, Michigan, for 1965 and 1966. Said statement reflected Federal and social security withholding taxes, but did not reflect state or local withholding taxes.

9. Petitioner did not pay state taxes to any taxing jurisdictions outside New York State for the fiscal years ending March 31, 1965 through March 31, 1970.

10. Petitioner maintained that as further evidence of its bona fide conduct of business outside New York State, the leading trade manual "Standard Rate and Data Service" lists the firm with offices in three cities. In addition, the leading trade association (American Association of Newspaper Representatives) assessed the annual dues on the basis of offices maintained in three cities.

11. Petitioner contended that a similar question involving the same issue of allocation of income for the fiscal years ending March 31, 1952 through March 31, 1955 was the subject of an audit by the New York State Income Tax Bureau and that the Bureau accepted petitioner's allocations.

12. Petitioner disputes the disallowance of \$1,200.00 in each year in question as being unsubstantiated travel expenses, on the grounds that it's records supported, in detail, all expenses incurred in travel away from home. However, there were expenses incurred in the New York office by each partner and rather than submit periodic expense reports for small expenses, petitioner reimbursed each partner a round sum each year for such expenses.

CONCLUSIONS OF LAW

A. That petitioner, Mulligan and McDonald, did not exercise sufficient direction and control over the publishers' representatives located in Chicago, Illinois and Detroit, Michigan, so as to result in an employer/employee relationship.

B. That petitioner, Mulligan and McDonald, did not maintain a regular place of business outside New York State. An unincorporated entity does not have a regular place of business outside New York State merely because sales may be made to, or services performed for or on behalf of persons or corporations located without New York State. Therefore, all of the excess unincorporated business gross income over petitioner's unincorporated business deductions is allocable to New York State, within the meaning and intent of section 707(a) of the Tax Law.

C. That the State Tax Commission is not bound by conclusions made by the Income Tax Bureau on audits involving petitioner's allocation of income for prior fiscal years.

D. That petitioner, Mulligan and McDonald, has failed to meet the substantiation requirements for the claimed business expenses in accordance with Treasury Regulation section 1.274.5 and has failed to sustain its burden of proof in accordance with section 689(e) of New York's Tax Law.

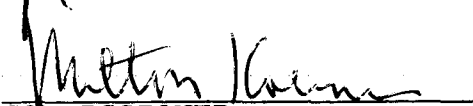
E. That the petition of Mulligan and McDonald is denied and the Notice of Deficiency issued March 26, 1973 is sustained, together with such interest as may be lawfully owing.

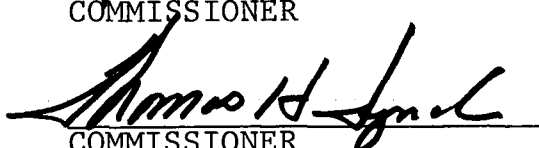
DATED: Albany, New York

September 20, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER