

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

FRANK ALBINO

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article (X) 23 of the :
Tax Law for the Year(s) ~~XXXX Period(s)~~ :
1969, 1970 and 1971.

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 24th day of January , 19 79, he served the within
Notice of Decision by (certified) mail upon Frank Albino

~~XXXXXXXXXXXXXXXXXXXX~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Frank Albino
77 East 24th Street
Huntington Station, New York

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 ~~XXXXXXXXXXXXXXXXXXXX~~
~~XXXXXX~~ petitioner herein and that the address set forth on said wrapper is the
last known address of the ~~(XXXXXXXXXXXXXXXXXXXX)~~ petitioner.

Sworn to before me this

24th day of January , 19 79.

Marilyn J. Papineau

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

January 24, 1978

Frank Albino
77 East 24th Street
Huntington Station, New York

Dear Mr. Albino:

Decision

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

You have now exhausted your right of review at the administrative
level. Pursuant to section(s) **EX 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 OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

FRANK ALBINO :

DECISION

for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years :
1969, 1970 and 1971.
:

Petitioner, Frank Albino, 77 East 24th Street, Huntington Station, New York 11746, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1969, 1970 and 1971 (File No. 13056).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 12, 1978 at 2:45 P.M. Petitioner appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq. of counsel).

ISSUES

I. Whether petitioner's activities as an insurance broker during 1969, 1970 and 1971 constituted the carrying on of an unincorporated business.

II. Whether the Income Tax Bureau properly asserted penalties on petitioner, pursuant to section 685 (a) (1) and (a) (2) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Frank Albino, timely filed New York State personal income tax returns for 1969, 1970 and 1971. He did not file unincorporated business tax returns for said years on advice of his accountant and due to his reliance on the decision of the State Tax Commission, Matter of Mortimer O'Kane, July 20, 1967, wherein, petitioner contended, the facts were similar.

2. The Income Tax Bureau contended that petitioner's activities as an insurance broker constituted the carrying on of an unincorporated business. Accordingly, it issued a Notice of Deficiency on December 23, 1974 for said years in the amount of \$1,251.51 in unincorporated business tax, plus \$538.26 in penalty (pursuant to section 685 (a) (1) and (a) (2) of the Tax Law) and \$258.13 in interest, for a total of \$2,047.90.

3. During the years at issue, petitioner's income was derived from his occupation as an insurance broker under a contractual agreement to the Hartford Insurance Company (hereinafter "Hartford"). Hartford was a multi-line insurance company, for which petitioner sold automobile, casualty, commercial, life and homeowners' insurance.

4. Petitioner maintained his own office, from which he represented Hartford. He occasionally hired secretarial help and was not reimbursed for any expenses. Income taxes and social security were not withheld from his commission compensation, nor was he covered by any company fringe benefits. During each month, petitioner deposited premiums received from clients in his premium account and at the end of the month, he received a statement from Hartford showing the gross amount and net commissions. Petitioner would retain his commission and send a check to Hartford for the amount due.

5. Petitioner contended that he was not permitted by Hartford to hire selling assistants, sub-broker insurance or accept business from other producers.

He worked full-time for Hartford and any insurance risk not accepted by Hartford was not offered to another company. He was given "canned" speeches, visual aids, sample approach letters and a sales presentation. He reported to the supervisor of each type of insurance he sold. He attended monthly seminars where his activities were discussed. Hartford sent a representative to petitioner's office weekly to examine petitioner's accounts and advise him as to what type of insurance to "push". Also, other matters and new matters were discussed. Petitioner's stationery indicated that he represented only Hartford.

CONCLUSIONS OF LAW

A. That although there was a certain amount of control exercised over petitioner's activities by Hartford, the nature of that control was that of one business entity over another business entity, under a contractual agreement to achieve mutually favorable financial results. It did not constitute control and direction as would be evidenced in an employer-employee relationship, in accordance with the meaning and intent of section 703 (b) of the Tax Law; therefore, considering all other indicia of self-employment, petitioner's insurance selling activities constituted the carrying on of an unincorporated business within the meaning and intent of section 703 (a) of the Tax Law.

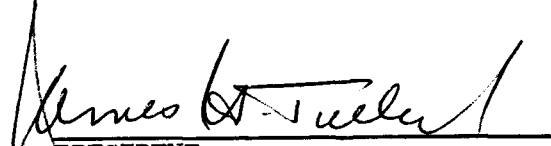
B. That petitioner's failure to file unincorporated business tax returns for 1969, 1970 and 1971 was due to reasonable cause and not due to willful neglect; therefore, the penalties imposed pursuant to sections 685 (a) (1) and (a) (2) of the Tax Law are cancelled.

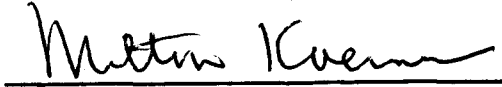
C. That the petition of Frank Albino is granted to the extent that the penalties imposed pursuant to sections 685 (a) (1) and (a) (2) of the Tax Law are cancelled; that the Income Tax Bureau is hereby directed to modify the Notice

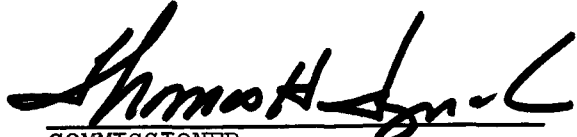
of Deficiency issued December 23, 1974, but that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
January 24, 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER