

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
HERBERT BRIGHAM

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)~~ :  
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 6th day of April, 1979, he served the within  
Notice of Decision by (certified) mail upon Herbert Brigham  
(~~representative of~~) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows:

Herbert Brigham  
237 Old Niskayuna Road  
Latham, NY 12110

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

6th day of April, 1979.

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

April 6, 1979

12100

Mr. Herbert Brigham  
237 Old Niskayuna Road  
Latham, NY 12100


Dear Mr. Brigham:

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

In the Matter of the Petition :  
of :  
HERBERT BRIGHAM : DECISION  
for Redetermination of a Deficiency :  
or for Refund of Unincorporated :  
Business Tax under Article 23 of :  
the Tax Law for the Year 1971. :  
:

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Bldg. #9, State Campus, Albany, New York, on May 2, 1978 at 1:15 P.M. Petitioner appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (Francis Cosgrove and Paul Lefebvre, Esqs., of counsel).

Whether petitioner's selling activities during 1971 constituted the carrying on of an unincorporated business or whether he was engaged in the practice of a profession or the performance of services in the capacity of an employee, thereby exempting him from the imposition of unincorporated business tax.

1. Petitioner, Herbert Brigham, timely filed a New York State personal income tax return for 1971. He did not file an unincorporated business tax return for said year.

2. The Income Tax Bureau contended that petitioner was engaged in the carrying on of an unincorporated business and that the income derived therefrom was subject to unincorporated business tax. Accordingly, it issued a Notice of Deficiency on February 25, 1974 in the amount of \$388.75 in unincorporated business tax, plus \$132.18 in penalty [pursuant to sections 685(a)(1) and (a)(2)] and \$43.30 in interest, for a sum of \$564.33.

3. Petitioner contended that his income was exempt from unincorporated business tax because he either a) performed services in the capacity of an employee or b) was engaged in the practice of a profession.

4. Petitioner performed services as a sales representative for three principals during the years at issue, on a commission basis of compensation. He mainly sold rug shampoo to retail hardware stores. He also helped his customers in the repair and maintenance of the rug shampooing machines and helped them set up advertising programs.

5. Petitioner was not reimbursed by his principals for the selling expenses which he incurred. He filed a Federal Schedule "C" to claim these expenses and the expenses he incurred in maintaining

an office in his home. His principals did not withhold income taxes or social security from his compensation, nor did they cover him for disability insurance and workmen's compensation.

6. Petitioner's principals permitted him to perform services for other principals. There was no agreement between his principals as to the division of his time. Except for occasional trade shows and sales meetings, petitioner controlled his own work hours. There was little supervision exercised over his day-to-day activities and sales technique.

7. Petitioner contended that he derived his professional status from many years of experience in his field of endeavor.

8. Petitioner filed unincorporated business tax returns for 1969 and 1970, at which time he was also engaged in the sale of a product for his own account. Since he no longer was engaged in the sale of the product in 1971, he believed that he was no longer subject to unincorporated business tax.

#### CONCLUSIONS OF LAW

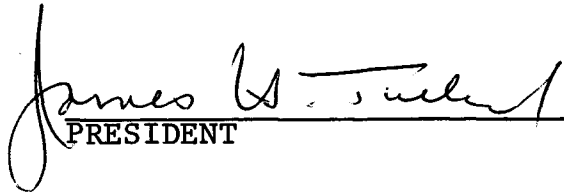
A. That petitioner, Herbert Brigham, was engaged in the carrying on of an unincorporated business during 1971 in accordance with the meaning and intent of section 703(a) of the Tax Law, and that he did not perform services as an employee in accordance with section 703(b) of the Tax Law, nor did his activities constitute the practice of a profession within the meaning and intent of section 703(c) of the Tax Law.

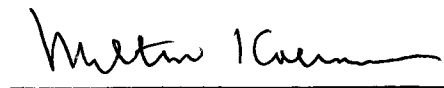
B. That petitioner, Herbert Brigham's failure to file an unincorporated business tax return for 1971 was due to reasonable cause and not willful neglect; therefore, the penalties imposed on him pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are canceled.

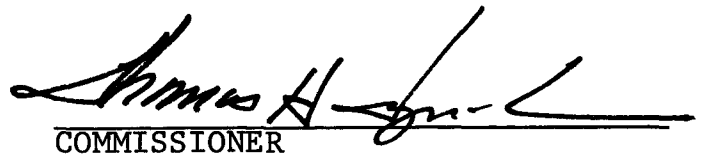
C. That the petition of Herbert Brigham is granted only to the extent that all penalties are canceled. The Income Tax Bureau is hereby directed to so modify the Notice of Deficiency issued February 25, 1974 and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
April 6, 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER