

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Anthony M. Fusco :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Unincorporated Business Tax :

under Article 23 of the Tax Law

for the Years 1970 - 1974. :

State of New York

County of Albany

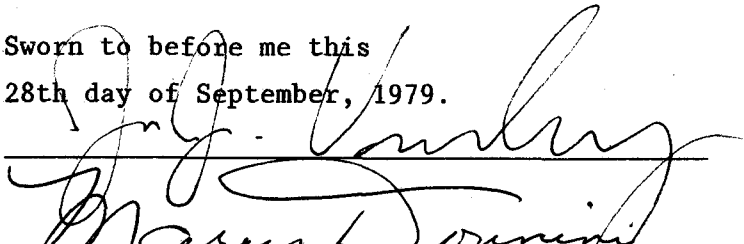
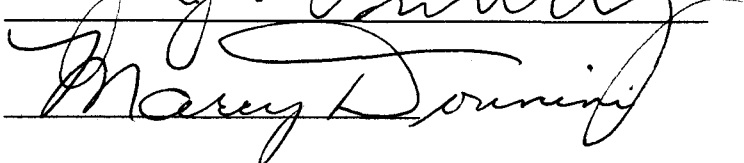
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon Anthony M. Fusco, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony M. Fusco
360 Bradhurst Ave.
Hawthorne, NY 10532

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
28th day of September, 1979.

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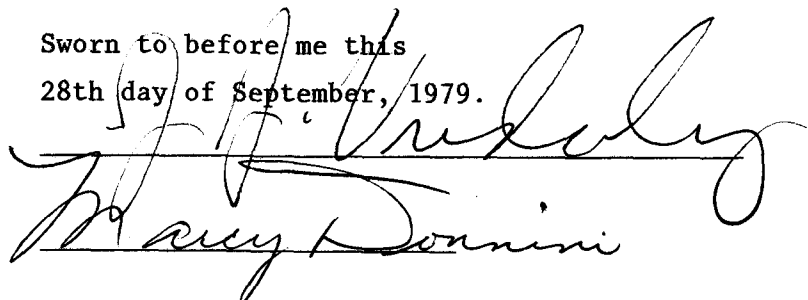
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon Arthur Hauer the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Arthur Hauer
29 Milford Lane
Suffern, NY 10901

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
28th day of September, 1979.



Mary Donnini

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

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

Anthony M. Fusco
360 Bradhurst Ave.
Hawthorne, NY 10532

Dear Mr. Fusco:

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,



cc: Petitioner's Representative
Arthur Hauer
29 Milford Lane
Suffern, NY 10901
Taxing Bureau's Representative

2. On December 22, 1975, a Notice of Deficiency was issued against Anthony M. Fusco for unincorporated business tax of \$11,358.22, plus penalty and interest, for 1970, 1971, 1972 and 1973. On June 28, 1976, a Notice of Deficiency was issued against Anthony M. Fusco and Joan (sic) Fusco for unincorporated business tax of \$2,905.25, plus penalty and interest, for 1974. The notices of deficiency were issued on the grounds that the management fees earned by Anthony M. Fusco were subject to unincorporated business tax for the years at issue. The penalties were imposed under sections 685(a) (1) and (a) (2) of the Tax Law.

3. Petitioner performed management services for five corporations of which he was either president or vice-president, as well as stockholder. Each corporation owned a motel. Petitioner's services encompassed the overall administration of the motels owned by the corporate entities. In each instance, petitioner was one of a group of investors who constructed and operated the motel.

4. Petitioner's working hours, work procedure and vacations were within his own discretion. No withholding or social security taxes were deducted from the management income he received. The management income was reported as "miscellaneous income" or "other income" on petitioner's tax return.

5. The New York State Department of Labor, Unemployment Insurance Appeal Board, and the State Insurance Fund, have formally determined that petitioner is an employee for purposes of unemployment and workmen's compensation insurance. Petitioner relied on these determinations and on the advice of his accountant in not filing unincorporated business tax returns for the years at issue.

6. The tax returns indicate that petitioner also earned income as a real estate broker, as well as partnership income during the years at issue.

7. Petitioner's wife was not involved in his management service activities.

CONCLUSIONS OF LAW

A. That petitioner was engaged in an unincorporated business with respect to the management services performed for the various corporations of which he was an officer and stockholder, and that the management income derived therefrom constituted business income and not compensation as an employee, within the meaning of section 703(b) of the Tax Law.


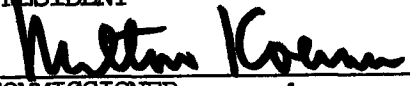
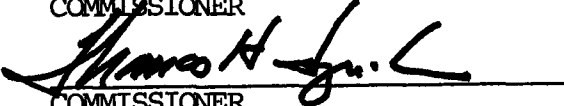
B. That the prior rulings of other State agencies which employed different criteria for entirely different purposes are not decisive insofar as the instant petitions are concerned. The Tax Commission is not bound by such rulings in these proceedings.

C. That the Income Tax Bureau erroneously included the name Joan Fusco in the Notice of Deficiency dated June 28, 1976, and it is hereby directed to amend said Notice by removing her name from it.

D. That the petitions of Anthony M. Fusco are granted to the extent that the penalties imposed under section 685(a)(1) and (a)(2) of the Tax Law for the years at issue are cancelled. The Income Tax Bureau is directed to modify the notices of deficiency issued on December 22, 1975 and on June 28, 1976, respectively, in accordance with this decision; except as so granted, however, the petitions are in all other respects denied.

DATED: Albany, New York

SEP 28 1979

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER