

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Harry Benson :

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 1969, 1970 & 1971. :

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 13th day of February, 1980, he served the within notice of Decision by certified mail upon Harry Benson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry Benson
181 E. 73rd St.
New York, NY 10021

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
13th day of February, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Harry Benson

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 1969, 1970 & 1971. :

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 13th day of February, 1980, he served the within notice of Decision by certified mail upon Jason Jacobs 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. Jason Jacobs
666 Fifth Ave.
New York, NY 10019

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
13th day of February, 1980.

Joanne Knapp

J. Vredenburg

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

February 13, 1980

Harry Benson
181 E. 73rd St.
New York, NY 10021

Dear Mr. Benson:

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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Jason Jacobs
666 Fifth Ave.
New York, NY 10019
Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 11, 1978 at 10:45 A.M. Petitioner appeared by Jason Jacobs, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether the income derived from petitioner's activities as a photographer for Time, Inc. was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Harry Benson, and Dian Benson, his wife, timely filed New York State combined income tax resident returns for 1969, 1970 and 1971. A New York State unincorporated business tax return was submitted for 1969, in blank form, signed by petitioner and his wife, with the notation "Not Subject." Unincorporated business tax returns were not filed for 1970 and 1971.

2. On March 31, 1975, the Income Tax Bureau issued a Notice of Deficiency to petitioner, asserting unincorporated business tax of \$1,185.91, plus interest of \$287.92, for a total of \$1,473.83. Said Notice stated that petitioner's activities as a photographer were subject to unincorporated business tax.

3. Petitioner, Harry Benson, was a photographer whose primary source of income was from Time, Inc., which was located in New York City.

4. Petitioner's contractual agreement with Time, Inc. provides the following:

- (a) He had a guaranteed minimum amount of compensation.
- (b) There was a "first call" for petitioner's services.
- (c) When petitioner was not on assignment for Time, Inc., he was free to render services for anyone else except Look and Newsweek magazines.

5. When on assignment for Time, Inc., petitioner was required to report to a designated location and was usually given specific instructions by an editor as to the subject, nature, and type of photographs needed. Petitioner was reimbursed for all expenses which he incurred while on assignment, including travel, lodging and meals. When he was on assignment, petitioner was usually accompanied by a writer who also represented Time, Inc.

6. Petitioner was compensated at a rate of \$150.00 per day plus a page rate in the form of commissions, with no withholding of payroll taxes.

7. Petitioner was provided with the use of the photographers' "lounge" and the photographic developing laboratory located in the Time-Life Building in New York City. The use of the lounge included a telephone and secretarial service.

8. Time, Inc. kept possession and title to all photographs which petitioner took while on assignment during 1969 and 1970. In 1971 Time, Inc. continued to retain possession of petitioner's photographs, but allowed petitioner a copyright on them with the stipulation that he would be paid a fee for any photographs which were reused.

9. When petitioner was not on assignment for Time, Inc., he occasionally rendered services for other magazines on a fee basis. The income from fees, less the expenses applicable thereto, have been conceded by petitioner to be subject to unincorporated business tax. The net income from said fees for the years at issue was as follows:

| | |
|------------|-------------|
| 1969 | \$ 9,240.00 |
| 1970 | 17,439.48 |
| 1971 | 3,431.59 |

10. Petitioner was covered by accident and health insurance when he was on assignment for Time, Inc.

11. Petitioner filed Federal Schedule "C" and paid self-employment tax for 1969, 1970 and 1971.

CONCLUSIONS OF LAW

A. That the unincorporated business tax return submitted for 1969, in blank form, with a copy of Federal Schedule "C" attached, constituted the filing of a New York State unincorporated business tax return, in accordance with the meaning and intent of section 722 of the Tax Law. This was sufficient to start the statutory period of limitation on assessment. (Matter of Arbesfeld, Goldstein et al. v. State Tax Commission, 62 AD2d 627.)

B. That proper direction and control was exercised over petitioner's activities by Time, Inc., so as to create an employee-employer relationship; therefore, the income which was so derived is not subject to unincorporated business tax, in accordance with the meaning and intent of section 703(b) of the Tax Law.

C. That the net income which petitioner derived from other activities, as stated in Findings of Fact "9", constituted income which was subject to unincorporated business tax, within the meaning and intent of section 703 of the Tax Law.

D. That the petition of Harry Benson is granted to the extent that the income received from Time, Inc. was not subject to unincorporated business tax, and that the filing of his 1969 unincorporated business tax return, as stated in Findings of Fact "1", was sufficient to start the running of the statutory period of limitations on assessment.

E. That the Income Tax Bureau is hereby directed to modify the Notice of Deficiency issued March 31, 1975, but that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 13 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER