

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Nicholas Botta :

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 - 1973. :

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 14th day of March, 1980, he served the within notice of Decision by certified mail upon Nicholas Botta, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nicholas Botta
4191-E Tremont Ave.
Bronx, NY 10465

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
14th day of March, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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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 14th day of March, 1980, he served the within notice of Decision by certified mail upon Louis Gallo 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. Louis Gallo
2213 Westchester Ave.
Bronx, NY 10462

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
14th day of March, 1980.

Joanne Knapp

J. Vredenburg

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

March 14, 1980

Nicholas Botta
4191-E Tremont Ave.
Bronx, NY 10465

Dear Mr. Botta:

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
Louis Gallo
2213 Westchester Ave.
Bronx, NY 10462
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NICHOLAS BOTTA	:	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, 1971, 1972 and 1973.	:	

Petitioner Nicholas Botta, 4191 E. Tremont Avenue, Bronx, New York 10465, 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 through 1973 (File Nos. 13878, 13879).

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 March 19, 1979 at 10:45 A.M. Petitioner appeared by Michael Sibilio, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq., (Alizia Schwadron, Esq., of counsel).

ISSUE

Whether income derived from petitioner's activities as a salesman was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner Nicholas Botta, and Rose Botta, his wife, timely filed joint New York State income tax resident returns for 1969 through 1973. Petitioners reported net commission income, after expenses, of \$12,820.00, \$12,298.00, \$20,506.00, \$25,936.00, and \$25,490.00, respectively. Petitioner did not file unincorporated business tax returns for the years at issue.

2. On June 24, 1974, the Income Tax Bureau issued a Notice of Deficiency, along with an explanatory statement of audit changes, on which petitioners' net commission income for the years 1969, 1970 and 1971 was held subject to unincorporated business tax. On February 24, 1975, the Income Tax Bureau issued another Notice of Deficiency, also with an explanatory statement of audit changes, on which petitioners' net commission income for 1972 and 1973 was held subject to unincorporated business tax. The aforementioned deficiencies asserted the following amounts to be due:

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
1969	\$289.08	\$ 72.69	\$361.77
1970	266.11	50.95	317.06
1971	627.26	82.47	709.73
1972	876.48	122.46	998.94
1973	851.95	55.13	907.08

3. Petitioner Nicholas Botta is a commission salesman of church goods and religious articles. During the year 1969, petitioner represented, and received commissions from William J. Hirten Company, Inc. ("Hirten"), Catholic Manufacturing Company, Inc. and Cathedral Art Metal Company, Inc. ("Cathedral"). Catholic Manufacturing Company, Inc. was a wholly owned subsidiary of Hirten and was subsequently absorbed by Hirten.

4. While representing Cathedral in 1969, petitioner also represented Hirten, without Cathedral's knowledge or approval. Both firms did not permit its salesmen to represent others, regardless of the product sold, whether noncompetitive or unrelated.

5. During 1970, Cathedral discovered that petitioner was also selling for Hirten, and requested that petitioner either cease representing Hirten, or resign. Petitioner chose to resign because of what he considered excessive paperwork and supervision imposed by Cathedral. Subsequent to his resignation in 1970, petitioner only represented Hirten for fear of jeopardizing his position with the firm.

6. Petitioner was restricted to a particular territory and to specific accounts by both Hirten and by Cathedral for the years at issue. Both Hirten and Cathedral instructed the petitioner when to service an account, and also frequently changed petitioners' accounts without his prior approval. In addition, petitioner was required to service "house accounts" for which he did not earn a commission.

7. Petitioner was required to submit written reports of his selling activities by both firms and to frequently call the firms' office for messages and additional instructions.

8. Payroll taxes were not withheld from petitioner's commission income. Petitioner filed a federal schedule "C" as a sole proprietor, and paid self-employment taxes.

9. Petitioner was provided by both firms with samples, catalogues and price lists.

10. Petitioner was often required by both firms to pick up merchandise, make deliveries to customers, or make collections for goods previously delivered.

CONCLUSIONS OF LAW

A. That petitioner Nicholas Botta's activities was subject to sufficient direction and control by Cathedral Art Metal Company, Inc. during 1969 and 1970, and by William J. Hirten Company, Inc. during the years 1969, 1970, 1971, 1972 and 1973, as to cause him to be deemed an employee as defined in 20 NYCRR 203.10(b).

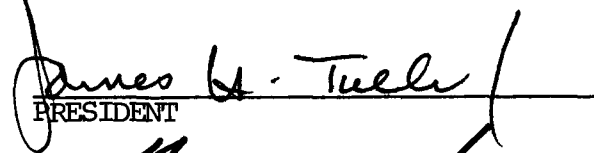
B. That petitioner's income was derived from activities as an employee and, therefore is exempt from unincorporated business tax under section 703(b) of the Tax Law.

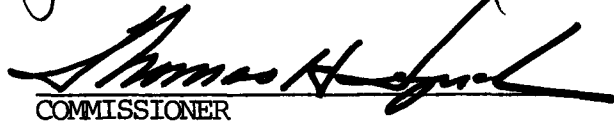
C. That the petition of Nicholas Botta is granted and the notices of deficiency issued June 24, 1974, and February 24, 1975 are cancelled.

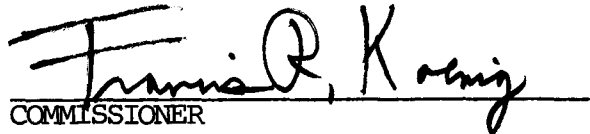
DATED: Albany, New York

MAR 14 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER