

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

Arnold Grahame

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 1968, 1969 & 1970. :

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 11th day of April, 1980, he served the within notice of Decision by certified mail upon Arnold Grahame, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arnold Grahame  
225 Hillturn Ln.  
Roslyn Heights, NY 11577

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  
11th day of April, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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Unincorporated Business Tax  
under Article 23 of the Tax Law  
for the Years 1968, 1969 & 1970.

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 11th day of April, 1980, he served the within notice of Decision by certified mail upon Bertrand Leopold 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. Bertrand Leopold  
18 Joseph St.  
New Hyde Park, NY 11040

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  
11th day of April, 1980.

Joanne Knapp

[Signature]

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

April 11, 1980

Arnold Grahame  
225 Hillturn Ln.  
Roslyn Heights, NY 11577

Dear Mr. Grahame:

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  
Bertrand Leopold  
18 Joseph St.  
New Hyde Park, NY 11040  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
ARNOLD GRAHAME	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1968,	:	
1969 and 1970.	:	

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Petitioner, Arnold Grahame, 225 Hillturn Lane, Roslyn Heights, New York 11577, 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 1968, 1969 and 1970 (File No. 00220).

A formal hearing was held before Harry Issler, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 13, 1977 at 1:15 P.M. Petitioner appeared by Bertrand Leopold, Tax Accountant. The Income Tax Bureau appeared by Peter Crotty, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the business activities of petitioner, Arnold Grahame, as a sales representative during the years 1968 through 1970 constituted the carrying on of an unincorporated business.

II. Whether petitioner is entitled to deduct contributions and payments to a self-employed retirement plan from unincorporated business gross income, if he is subject to unincorporated business tax.

III. Whether, during the formal hearing before the Hearing Officer, petitioner had the burden of proof.

FINDINGS OF FACT

1. Petitioner, Arnold Grahame, timely filed New York State personal income tax returns for the years 1968, 1969 and 1970. He did not file unincorporated business tax returns for said years.

2. The Income Tax Bureau issued a Statement of Audit Changes against petitioner for the years 1968 through 1970 imposing unincorporated business tax on the grounds that his activities during said years constituted the carrying on of an unincorporated business. The Bureau accordingly issued a Notice of Deficiency on December 28, 1973 for \$2,346.21 in unincorporated business tax, plus \$482.54 in interest, for a total due of \$2,828.75.

3. Petitioner, Arnold Grahame, sold scarfs and blouses for Vera Industries during the years at issue on a commission basis. Vera Industries did not withhold taxes or social security from his compensation. Petitioner did not receive any fringe benefits from said principal. He was not reimbursed by his principal for substantial expenses which included telephone, advertising, entertainment of customers, gifts, postage, supplies, sample insurance and a deduction for office space in his home. He was required to pay his principal for his sample line.

4. Petitioner made up his own itinerary without review or approval by his principal. During 1969 and 1970, he financed his own retirement plan. There was little control over his day to day activities by Vera Industries.

5. Petitioner deducted on his personal income tax return charitable contributions of \$392.50, \$462.50 and \$470.00 in 1968, 1969 and 1970 respectively.

6. Petitioner, Arnold Grahame, contended that his income was derived from services performed as an employee during the years at issue and therefore,

exempt from imposition of unincorporated business tax. He contended further that he maintained no office of his own, did not employ assistants, he was closely supervised and the conditions of his employment were set and maintained by his principal.

7. Petitioner, Arnold Grahame, contended that since no unincorporated business tax returns were filed, there was an omission of income in excess of twenty-five percent of unincorporated business gross income thereby placing the burden of proof on the State Tax Commission.

CONCLUSIONS OF LAW

A. That Vera Industries did not exercise that degree of control and supervision over petitioner's activities so as to establish an employee-employer relationship within the meaning and intent of section 703(b) of the Tax Law (see Lieberman v. Gallman, 41 NY 2d 774).

B. That the selling activities of petitioner, Arnold Grahame, during the years 1968, 1969 and 1970 constituted the carrying on of an unincorporated business and that the income derived therefrom is subject to unincorporated business tax in accordance with section 703(a) of the Tax Law.

C. That the burden of proof shall be on petitioner except for those instances as described in section 689(e) of the Tax Law. Omission of income is not one of those instances which would place the burden of proof on the State Tax Commission.

D. That petitioner, Arnold Grahame, is allowed unincorporated business tax deduction for charitable contributions in accordance with section 706(1) of the Tax Law. Accordingly, unincorporated business taxable income is reduced by \$392.50, \$462.50 and \$470.00 in the years 1968, 1969 and 1970 respectively.

E. That petitioner, Arnold Grahame, is not allowed a deduction for payments to a self-employed retirement plan in computing unincorporated business taxable income. These payments are not considered as a business deduction with in the meaning and intent of section 404(a) of the Internal Revenue Code but, instead, are treated as a deduction in arriving at adjusted gross income for personal income tax purposes in accordance with section 62(7) of the Internal Revenue Code.

F. That the petition of Arnold Grahame is granted to the extent determined in Conclusion of Law "D", supra. The Audit Division is hereby directed to modify accordingly the Notice of Deficiency issued on December 28, 1973. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

APR 11 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER