

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
James M. Marsallo :  
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 1972 - 1974. :

AFFIDAVIT OF MAILING

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 2nd day of January, 1980, he served the within notice of Decision by certified mail upon James M. Marsallo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James M. Marsallo  
106 Colony Park Dr.  
Liverpool, NY 13088  
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  
2nd day of January, 1980.

Janne Krapp

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of

James M. Marsallo :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Unincorporated Business Tax :  
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for the Years 1972 - 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 2nd day of January, 1980, he served the within notice of Decision by certified mail upon Michael C. Koagel 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. Michael C. Koagel  
2023 Miton Ave.  
Syracuse, NY 13209

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  
2nd day of January, 1980.

Joanne Knapp

J. Vredenburg

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

January 2, 1980

James M. Marsallo  
106 Colony Park Dr.  
Liverpool, NY 13088

Dear Mr. Marsallo:

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  
Michael C. Koagel  
2023 Miton Ave.  
Syracuse, NY 13209  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
JAMES M. MARSALLO	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business Tax :	:	
under Article 23 of the Tax Law for the	:	
Years 1972, 1973 and 1974.	:	

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Petitioner, James M. Marsallo, 106 Colony Park Drive, Liverpool, New York 13088, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for 1972, 1973 and 1974 (File No. 14821).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on May 24, 1979 at 10:45 A.M. Petitioner appeared by Michael C. Koagel, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Katherine L. Sanderson, Esq., of counsel).

ISSUE

Whether petitioner's activities , first as a manufacturer's representative, and then as a salesman for the years at issue constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Petitioner, James M. Marsallo and Mary A. Marsallo, his wife, filed joint New York State income tax resident returns for 1972 through 1974. Petitioner, James M. Marsallo, did not file unincorporated business tax returns for said years.

2. On February 24, 1976, the Income Tax Bureau issued a Notice of Deficiency

against petitioner, asserting unincorporated business tax of \$890.97, plus interest of \$134.19, for a total of \$1,025.16, on the grounds that petitioner's activities as a manufacturer's representative and, thereafter, a salesman were subject to unincorporated business tax.

3. From January 1, 1972 through February 28, 1973, petitioner worked under contract for Henry Metzger, a manufacturer's representative for over twenty companies located in Rochester, New York. Petitioner's territory was eastern New York State. He sold housewares, gifts and electrical items to department stores, wholesalers and distributors for Henry Metzger with whom he placed all orders and from whom he received a commission. Pursuant to the terms of the contract, petitioner could not represent other principals. Petitioner was required to pay all business expenses and received no employment benefits. Petitioner was required, pursuant to this contract, to see specific customers within his territory, but could sell to other customers for Henry Metzger.

4. From April 1, 1973 through March, 1974, petitioner worked under contract for Gary Gibson, Inc. of Lenexa, Kansas. Petitioner's territory was upstate New York, selling women's apparel to specialty shops, for which he received a guaranteed draw against commission. Pursuant to the terms of the contract, petitioner was not permitted to represent other principals. Petitioner was paid a per diem allowance to cover part of his business expense, and in addition, received as an employment benefit, health insurance. The corporation withheld both State and Federal incomes taxes in addition to Federal social security taxes.

5. From April, 1974 through December 31, 1974, petitioner was employed by Angelo Gressani Construction Co. of Syracuse, New York, where he negotiated contracts for new commercial buildings. Petitioner received a salary plus

commission. He was ineligible for company benefits until the expiration of a year's employment. Petitioner worked in the office of Angelo Gressani Construction Co., and was instructed by the company how and with whom he could negotiate contracts. Petitioner could not represent other principals, and required company approval to take time off. The company withheld both State and Federal income taxes in addition to Federal social security taxes.

CONCLUSIONS OF LAW

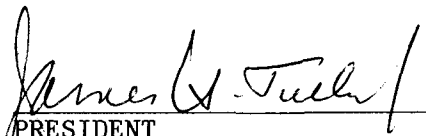
A. That petitioner's activities for Henry Metzger, Gay Gibson, Inc. and Angelo Gressani Construction Co. for 1972, 1973 and 1974 constituted the performance of service as an employee within the meaning and intent of section 703(b) of the Tax Law and 20 NYCRR 203.10(b); thus the income derived therefrom is not subject to unincorporated business tax.

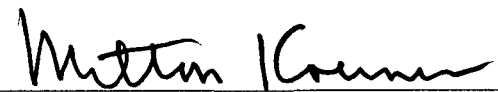
B. That the petition of James M. Marsallo is granted and the Notice of Deficiency issued February 24, 1976 for 1972, 1973 and 1974 is cancelled.

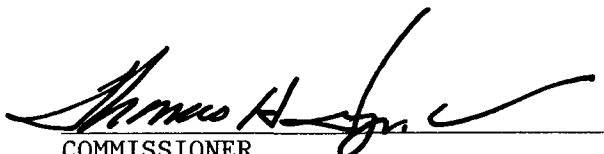
DATED: Albany, New York

STATE TAX COMMISSION

JAN 2 1980

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER