

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Toby & Lilyan Miller :

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 - 1972. :

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 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Toby & Lilyan Miller, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Toby & Lilyan Miller
39 Shore Dr.
Huntington Bay, NY 11743

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
3rd day of October, 1980.

Richard Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Toby & Lilyan Miller :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

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Unincorporated Business Tax :

under Article 23 of the Tax Law

for the Years 1970 - 1972. :

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 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Stanley Graber 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. Stanley Graber
Alexander Grant & Co.
1185 Ave. of the Americas
New York, NY 10036

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
3rd day of October, 1980.

Heather Bruck

J. Vredenburg

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

October 3, 1980

Toby & Lilyan Miller
39 Shore Dr.
Huntington Bay, NY 11743

Dear Mr. & Mrs. Miller:

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
Stanley Graber
Alexander Grant & Co.
1185 Ave. of the Americas
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
TOBY MILLER and LILYAN MILLER	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1970, 1971 and 1972.	:	

Petitioners, Toby Miller and Lilyan Miller, 39 Shore Drive, Huntington Bay, New York 11743, 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 1970, 1971 and 1972 (File No. 20294).

A formal hearing was held before David L. Evans, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 19, 1979 at 10:45 A.M. Petitioners appeared by Alexander Grant & Co. (Stanley Graber, CPA). The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether petitioners were engaged in activities that constituted the carrying on of an unincorporated business.

II. Whether "reasonable cause" exists for the cancelling of penalties imposed for failure to file unincorporated business tax returns and pay unincorporated business tax for 1970, 1971 and 1972.

FINDINGS OF FACT

1. Petitioners, Toby Miller and Lilyan Miller, timely filed New York State income tax resident returns for 1970, 1971 and 1972. Petitioners did not file New York State unincorporated business tax returns for said years.

2. On June 27, 1977, the Audit Division issued to petitioners, Toby Miller and Lilyan Miller, a Notice of Deficiency and a Statement of Audit Changes detailing an unincorporated business tax deficiency for the years 1970, 1971 and 1972 on the grounds that income from consulting activities was subject to unincorporated business tax.

3. The Notice of Deficiency showed unincorporated business tax due for the years 1970, 1971 and 1972 of \$9,221.28, plus penalty and interest of \$7,323.49, for a total of \$16,544.77.

4. Mr. Miller, during the tax years involved, acted as a motel consultant for several corporations and partnerships. These entities included Westbury Associates, Limi Realty Corp., Jilbet Realty Corp., YMF Holding and Yarby Associates. From these, Mr. Miller received compensation for supervising the financing, construction and leasing of motels as well as the rendering of general advice.

5. The State of New York, Department of Labor has determined, for purposes of unemployment insurance, that Mr. Miller is an employee of some of the entities described in Finding of Fact "4".

6. Petitioners offered no other credible evidence that Mr. Miller was an employee of or was controlled by the entities listed in Finding of Fact "4", or that Mr. Miller had a substantial equity interest in the aforementioned entities and offered no credible evidence as to the extent to which the aforementioned entities held, leased or managed real property. Petitioners were allowed 30 days for submission of evidence concerning the aforementioned. No such evidence was forthcoming.

7. Petitioner Lilyan Miller was not involved in her husband's consulting activities.

8. Information was adduced to show that petitioners' failure to file and pay unincorporated business tax was due to reasonable cause.

CONCLUSIONS OF LAW

A. That the rulings of other State agencies, which employed different criteria for entirely different purposes, are not decisive insofar as the instant petition is concerned. The Tax Commission is not bound by the rulings of other State agencies.

B. That regardless of petitioner Toby Miller's claimed employee status, he has failed to sustain the burden of proof imposed under sections 722 and 689(e) of the Tax Law to show that his activities as a motel consultant did not constitute an unincorporated business within the meaning and intent of section 703 of the Tax Law.

C. That since petitioner Lilyan Miller was not involved with the consulting activities, the Audit Division is directed to remove her name from the Notice of Deficiency issued June 27, 1977.

D. That reasonable cause existed for petitioner's failure to file unincorporated business tax returns and pay unincorporated business tax, therefore, the penalties imposed pursuant to sections 685(a)(1) and (2) of the Tax Law and are cancelled.

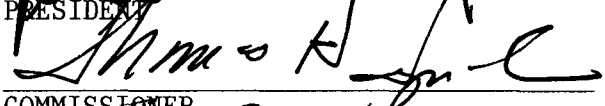
E. That the petition of Toby Miller and Lilyan Miller is granted to the extent provided in Conclusions of Law "C" and "D" and except as so granted it is in all other respects denied and the Notice of Deficiency is sustained.

DATED: Albany, New York

OCT 03 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER