

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Walter Davis :
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 1973 & 1974. :

State of New York
County of Albany

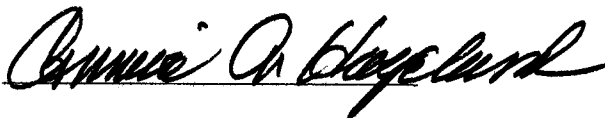
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 30th day of October, 1981, he served the within notice of Decision by certified mail upon Walter Davis, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

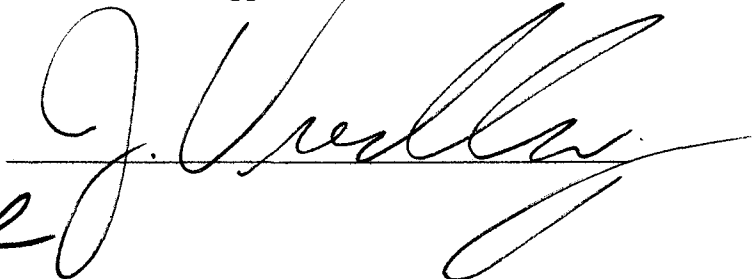
Walter Davis
17189 Palisades Circle
Pacific Palisades, CA 90272

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
30th day of October, 1981.





STATE OF NEW YORK
STATE TAX COMMISSION

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of :
Walter Davis :
AFFIDAVIT OF MAILING
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Business Tax under Article 23 of the Tax Law for :
the Years 1973 & 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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Melvin A. Stein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Melvin A. Stein
Stein & Stein, P.C.
1 Frederick Place
Hicksville, NY 11801

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
30th day of October, 1981.

Annex A. Hayland.

J. Vredenburg

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

October 30, 1981

Walter Davis
17189 Palisades Circle
Pacific Palisades, CA 90272

Dear Mr. Davis:

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
Melvin A. Stein
Stein & Stein, P.C.
1 Frederick Place
Hicksville, NY 11801
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WALTER DAVIS	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1973	:	
and 1974.	:	

Petitioner, Walter Davis, 17189 Palisades Circle, Pacific Palisades, California 90272, 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 1973 and 1974 (File No. 23254).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 6, 1981 at 10:45 A.M. Petitioner appeared by Melvin A. Stein, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq., (Kevin Cahill, Esq., of counsel).

ISSUE

Whether petitioner's activities as a salesman constituted the carrying on of an unincorporated business of which the income derived therefrom is subject to the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Walter Davis, timely filed a joint New York State Income Tax Resident Return with his wife for the year 1973. For taxable year 1974 they timely filed a New York State Combined Income Tax Return. On each of said returns petitioner reported "business income" derived from his activities as a

salesman. He did not file an unincorporated business tax return for either year at issue.

2. On September 6, 1977 the Audit Division issued a Statement of Audit Changes to petitioner whereon his reported "business income" was held subject to the imposition of unincorporated business tax for the years 1973 and 1974. Accordingly, a Notice of Deficiency was issued against petitioner on January 16, 1978 asserting unincorporated business tax of \$2,282.45, plus interest of \$563.93, for a total due of \$2,846.38.

3. Petitioner contended that during the years at issue he was a bona fide employee of Ernest H. MacLeod & Associates, Inc. (hereinafter MacLeod), a manufacturers representative, and as such, his income derived therefrom is exempt from the imposition of unincorporated business tax.

4. During the first part of 1973, petitioner was a salaried employee of MacLeod. (The income derived during this period is not at issue herein). During the balance of 1973 and all of 1974, petitioner rendered services to MacLeod as a salesman, for which he was compensated on a commission basis.

5. In addition to the sales activities engaged in on behalf of MacLeod, petitioner derived commission income of \$1,892.00 from activities engaged in for one other principal in 1973. Petitioner derived commission income of \$16,218.56 from two other principals in 1974. Although petitioner contended that his income derived from such other principals was for services rendered on a one time, non recurring basis, the record is void of any substantial evidence which would corroborate such contention.

6. Federal and New York State personal income taxes were not withheld from petitioner's commission income derived from MacLeod or his other principals.

7. MacLeod reimbursed petitioner for certain business expenses incurred during 1973 but did not reimburse petitioner for business expenses incurred during 1974. Such 1974 nonreimbursed expenses were claimed by petitioner on an attachment to his Federal return entitled "Business Schedule of Profit (or loss)," which is tantamount to a Federal Schedule C.

8. Petitioner was free to represent other principals during the years at issue.

9. Petitioner maintained a Keough plan during taxable year 1974.

10. No evidence was submitted to indicate the degree of direction and control exercised by MacLeod or his other principals over the day-to-day activities of petitioner.

CONCLUSIONS OF LAW

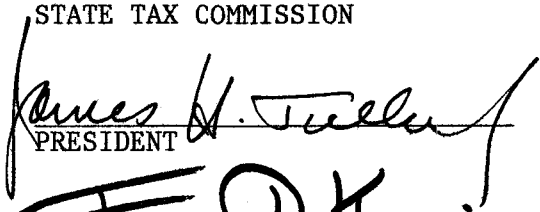
A. That petitioner, Walter Davis, has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that the degree of direction and control exercised by MacLeod or his other principals over his activities was sufficient for the existence of a bona fide employer-employee relationship. Accordingly, petitioner's activities are deemed to constitute the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law, and the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701 of the Tax law.


B. That the petition of Walter Davis is denied and the Notice of Deficiency dated January 16, 1978 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER