

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Allan Gallaway :
: 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 1971 - 1973 :

State of New York
County of Albany

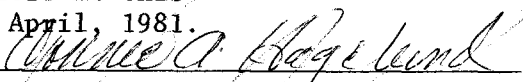
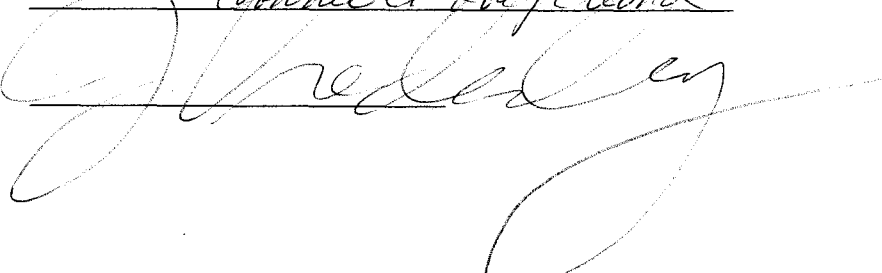
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 10th day of April, 1981, he served the within notice of Decision by certified mail upon Allan Gallaway, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Allan Gallaway
1725 York Ave.
New York, NY 10028

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
10th day of April, 1981.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Allan Gallaway :
: 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 1971 - 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 10th day of April, 1981, he served the within notice of Decision by certified mail upon Stephen R. Buschel 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. Stephen R. Buschel
4 Fox Ridge Ct.
Armonk, NY 10504

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
10th day of April, 1981.

Carrie A. Hagelund

[Signature]

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

April 10, 1981

Allan Gallaway
1725 York Ave.
New York, NY 10028

Dear Mr. Gallaway:

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
Stephen R. Buschel
4 Fox Ridge Ct.
Armonk, NY 10504
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ALLAN GALLAWAY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1971,	:	
1972 and 1973.	:	

Petitioner, Allan Gallaway, 1725 York Avenue, New York, New York 10028, 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 1971, 1972 and 1973 (File No. 19430).

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 January 7, 1980 at 10:45 A.M. Petitioner appeared by Stephen R. Buschel, C.P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether income derived by petitioner from his activities as a salesman for several fabric companies was subject to the imposition of unincorporated business tax.

II. Whether petitioner had reasonable cause for not filing unincorporated business tax returns.

FINDINGS OF FACT

1. Petitioner, Allan Gallaway, filed New York State income tax resident returns for the years 1971, 1972 and 1973 wherein he described his occupation as "outside salesman", "salesman" and "sales", respectively. He did not file unincorporated business tax returns for said years.

2. On March 11, 1976 the Audit Division issued a Statement of Audit Changes to petitioner wherein it held that income derived from his sales activities was subject to the unincorporated business tax. Furthermore, adjustments were made for the years 1971 and 1972 to conform to Federal audit adjustments made to business expenses for said years. These adjustments are not at issue. Accordingly, on April 11, 1977 a Notice of Deficiency was issued against petitioner asserting unincorporated business tax of \$3,226.96, additional personal income tax of \$659.00, penalty pursuant to section 685(a)(1) and 685(a)(2) of the Tax Law of \$1,459.12, and interest of \$1,100.86, for a total due of \$6,445.94.

3. Petitioner contended that during the years at issue he was a bona fide employee of Westboro Weaving Co., Inc., (hereinafter Westboro) 80 Broad Street, New York City, and, as such, the income derived therefrom was exempt from the imposition of unincorporated business tax. He further contended that commission income derived from his sales activities for other fabric companies was also exempt from said tax. The basis for such exemption was not offered during the course of the hearing held herein.

4. During the years 1971, 1972 and 1973, petitioner derived wages from Westboro in the amounts of \$11,033.81, \$12,791.23 and \$10,946.93 respectively. Westboro, a manufacturer of label tapes and other "narrow goods", withheld income and social security taxes from petitioner's compensation. Petitioner testified that Westboro covered him for workmen's compensation and unemployment insurance benefits. He was also covered under Westboro's medical plan and received a regular paid vacation. Petitioner's understanding with Westboro was that he was not to engage in any competitive activity.

5. Petitioner was assigned a territory by Westboro which consisted of New York, New Jersey, Connecticut, and locations in the southern part of the country. He received full reimbursement for all business expenses incurred on behalf of Westboro.

6. Petitioner contended that he was required to report to his office at Westboro at approximately 9:00 A.M. daily. He remained there until noon, at which time he began to visit "house accounts" assigned by Westboro.

7. During the years 1971, 1972 and 1973, petitioner also derived income from selling fabric goods, used in the intimate apparel industry, for several other principals. He was paid on a commission basis and received no reimbursement for business expenses from these principals. Petitioner testified that part of his time was devoted to sales activities for the other principals while he was in the field performing his duties for Westboro.

8. During the hearing, petitioner testified that he was not issued a W-2 form by these other principals since he was not considered to be an employee.

9. During the years 1971, 1972 and 1973 petitioner derived commission income from his other principals of \$31,664.33, \$49,387.00 and \$68,842.00 respectively.

10. None of petitioner's other principals withheld income taxes from his compensation.

11. Petitioner's representative, Stephen R. Buschel, CPA, prepared his 1972 and 1973 tax returns. He stated during the hearing that unincorporated business tax returns were not prepared for these years based on his professional opinion that petitioner's income was exempt from said tax.

CONCLUSIONS OF LAW

A. That wage income derived by petitioner, Allan Gallaway, from Westboro Weaving Co., Inc. during the years 1971, 1972 and 1973, was income received for services rendered as an employee.

B. That commission income derived by petitioner, Allan Gallaway, from his other principals during the years 1971, 1972 and 1973 was from activities engaged in as an independent contractor. Accordingly, such income is subject to the imposition of unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

C. That although petitioner's income derived from Westboro Weaving Co., Inc. was for services rendered as an employee, such income was interrelated and integrated with his regular business activities as an independent contractor, without a clear division of time, so as to constitute part of an unincorporated business regularly carried on by petitioner. Accordingly, petitioner's net income derived from his selling activities is deemed subject to the imposition of unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

D. That penalties imposed under sections 685(a)(1) and 685(a)(2) of the Tax Law, for failure to file an unincorporated business tax return and pay the unincorporated business tax due, are abated for the years 1971, 1972 and 1973 since petitioner has established reasonable cause.

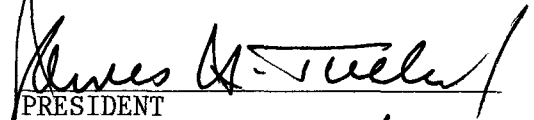
E. That the petition of Allan Gallaway is granted to the extent provided in Conclusion of Law "D"; and that, in all other respects, said petition is denied.


F. That the Audit Division is hereby directed to modify the Notice of Deficiency, dated April 11, 1977 to be consistent with the decision rendered herein.

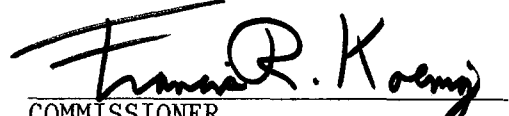
DATED: Albany, New York

APR 10 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER