

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph M. Mullaly :
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. :

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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Joseph M. Mullaly, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph M. Mullaly
417 Ryder Rd.
Munsey Park, NY 11030

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
27th day of November, 1981.

Ann R. Hayden

J. Vredenburg

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

November 27, 1981

Joseph M. Mullaly
417 Ryder Rd.
Munsey Park, NY 11030

Dear Mr. Mullaly:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JOSEPH M. MULLALY
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.

DECISION

Petitioner, Joseph M. Mullaly, 417 Ryder Road, Munsey Park, New York 11030, 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. 25355).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 22, 1981 at 2:45 P.M. Petitioner Joseph M. Mullaly appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner's activities as a real estate and insurance broker constitute the practice of a profession and whether the income derived therefrom is exempt from the unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Joseph M. Mullaly and Kathleen C. Mullaly, his wife, timely filed New York State income tax resident returns for the years 1973 and 1974 on which net business income of \$30,069.00 and \$33,475.00, respectively,

was reported from petitioner's activities in construction, real estate and insurance brokerage.

2. Petitioner Joseph M. Mullaly timely filed a New York State Unincorporated Business Tax Return for the year 1973, on which net business income of \$10,289.00 was reported from his activities in construction. Petitioner did not file a New York State Unincorporated Business Tax Return for the year 1974.

3. On January 2, 1979 the Audit Division issued a Notice of Deficiency for \$2,270.91, plus penalties and interest, along with an explanatory Statement of Audit Changes, on which;

- (a) the net business income from all of petitioner's activities was held subject to the unincorporated business tax.
- (b) penalties were imposed in accordance with sections 685(a)(1) and 685(a)(2) of the Tax Law for petitioner's failure to file, and pay the unincorporated business tax for the year 1974.
- (c) a penalty was imposed for the year 1974 pursuant to section 685(c) of the Tax Law for underestimation of tax.

The sole issue raised by petitioner Joseph M. Mullaly was that his activities as a real estate and insurance broker constituted the practice of a profession and the income derived therefrom was exempt from the unincorporated business tax.

4. Petitioner Joseph M. Mullaly was the sole proprietor of a real estate and insurance brokerage office, which derived its gross income from commissions earned from the sale of real property and insurance. In the conduct of his brokerage business, petitioner retained the services of salesmen, who petitioner contended were self-employed sub-contractors, rather than employees.

CONCLUSIONS OF LAW

A. That the activities of petitioner Joseph M. Mullaly during the years 1973 and 1974 as a real estate broker and as an insurance broker did not

constitute the practice of a profession in accordance with the meaning and intent of section 703(c) of the Tax Law and 20 NYCRR 203.11.

B. That the activities of petitioner Joseph M. Mullaly during the years 1973 and 1974 as a contractor, real estate broker, and insurance broker, constituted 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 unincorporated business tax within the meaning and intent of section 701(a) of the Tax Law.


C. That the petition of Joseph M. Mullaly is denied and the Notice of Deficiency issued January 2, 1979 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER