

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Thomas G. Sawyer :

: 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 1972 - 1975.

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 October, 1981, he served the within notice of Decision by certified mail upon Thomas G. Sawyer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas G. Sawyer  
2954 Niagara Falls Blvd.  
N. Tonawanda, NY 14120

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 October, 1981.

*Annie A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Thomas G. Sawyer :

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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 - 1975

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 October, 1981, he served the within notice of Decision by certified mail upon Louis M. Cacciato the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis M. Cacciato  
Cassata and Cacciato  
535 Delaware St.  
Tonawanda, NY 14150

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 October, 1981.

*Conrad R. Haglund*

*J. Vredenburg*

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

October 2, 1981

Thomas G. Sawyer  
2954 Niagara Falls Blvd.  
N. Tonawanda, NY 14120

Dear Mr. Sawyer:

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,  
*Kathy Pfaffenbach*

STATE TAX COMMISSION

cc: Petitioner's Representative  
Louis M. Cacciato  
Cassata and Cacciato  
535 Delaware St.  
Tonawanda, NY 14150  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions	:	
	:	
of	:	
	:	
THOMAS G. SAWYER	:	DECISION
	:	
for Redetermination of Deficiencies or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1972	:	
through 1975.	:	

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Petitioner, Thomas G. Sawyer, 2954 Niagara Falls Boulevard, North Tonawanda, New York 14120, filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1972 through 1975 (File No. 26791).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on January 29, 1981 at 1:15 P.M. Petitioner Thomas G. Sawyer appeared with Louis M. Cacciato, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioner's claim for refund of unincorporated business tax for 1972 was filed within the period of limitation on credit or refund.

II. Whether petitioner's activities as an owner/driver constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Petitioner, Thomas G. Sawyer and Jane L. Sawyer, his wife, timely filed New York State income tax resident returns for 1972 through 1975.

Petitioner Thomas G. Sawyer timely filed unincorporated business tax returns for said years.

2. On April 30, 1976, petitioner Thomas G. Sawyer filed claims for refund of unincorporated business tax for 1972 through 1975. The claims were filed on the grounds that the petitioner had an exclusive long-term lease agreement with Chemical Leaman Tank Lines, Inc., used its decals on his vehicles and therefore was not subject to unincorporated business tax.

3. On September 26, 1977, the Audit Division issued a Notice of Disallowance in full of the petitioner's claims for 1972 through 1975.

4. On September 12, 1967, the petitioner entered into a long-term equipment lease agreement with Chemical Leaman Tank Lines, Inc. This agreement provided for lease of a tractor truck by petitioner and as part of the agreement the petitioner would furnish competent, experienced and qualified drivers necessary for the proper and lawful operation of the equipment. The company had exclusive control of the equipment leased.

5. The compensation paid to the petitioner was based on a percentage of the dollar value of the loads hauled by the equipment that was leased. No state income taxes, federal income taxes or social security taxes were withheld from said compensation.

6. The petitioner was required to pay all expenses for the vehicles which he leased to Chemical Leaman Tank Lines, Inc. These expenses included repairs, maintenance (so as to comply with all local, state and/or federal regulatory bodies), fuel, oil, grease, tires, insurance, tolls and expenses of drivers, helpers and others.

7. The petitioner contended that Chemical Leaman Tank Lines, Inc. directed him when and where he was to take its freight and how the chemicals were to be

loaded or unloaded. He also contended that he could not solicit business on his own and was not authorized to use the truck except in the business of Chemical Leaman Tank Lines, Inc. Therefore, he reasoned that there was an employee-employer relationship.

CONCLUSIONS OF LAW

A. That petitioner's claim for refund of unincorporated business tax for 1972 was not filed within the period of limitation set forth in section 687 of the Tax Law, and thus, was not timely filed.

B. That the compensation paid to the petitioner was for the rental of tangible personal property and not for services of the petitioner. That although the agreement called for an operator of the equipment such language does not change the income into a stipend for the petitioner. That since the income was from a rental of equipment, there was no employee-employer relationship in accordance with the meaning and intent of section 703(b) of the Tax Law.

C. That the rental of tangible personal property is a business within the meaning and intent of section 703 of the Tax Law and subject to the imposition of unincorporated business tax in accordance with section 701 of the Tax Law.

D. That the petition of Thomas G. Sawyer is denied and the Notice of Disallowance issued September 26, 1977 is sustained.

DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER