

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gary S. Bergman : 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 Year 1973. :

State of New York
County of Albany

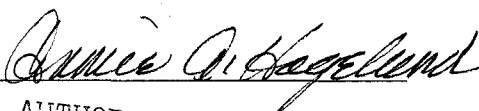
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of decision by certified mail upon Gary S. Bergman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gary S. Bergman
14 Hickory Lane.
N. Brunswick, NJ 08902

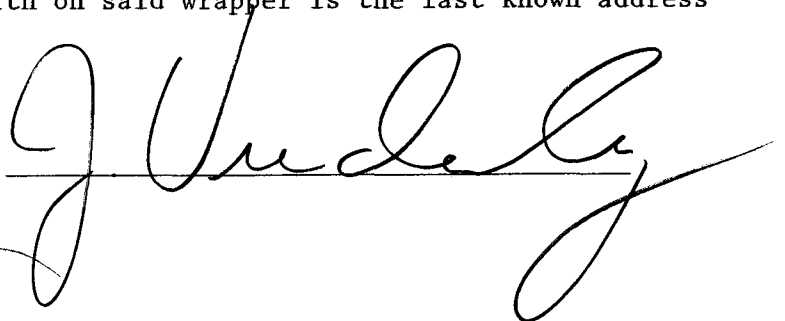
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
12th day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

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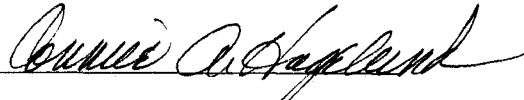
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of decision by certified mail upon Steven I. Sklar the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven I. Sklar
250 W. 57th St., Suite 70
New York, NY 10019

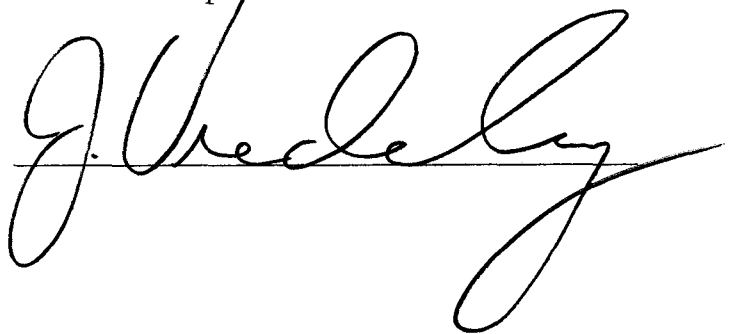
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
12th day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

October 12, 1982

Gary S. Bergman
14 Hickory Lane.
N. Brunswick, NJ 08902

Dear Mr. Bergman:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Steven I. Sklar
250 W. 57th St., Suite 70
New York, NY 10019
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
GARY S. BERGMAN
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1973.

DECISION

Petitioner, Gary S. Bergman, 14 Hickory Lane, North Brunswick, New Jersey 08902, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1973 (File No. 29541).

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 September 24, 1981 at 9:15 A.M. Petitioner appeared by Steven I. Sklar, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner worked as an employee during 1973 or rather as an independent contractor subject to the imposition of the unincorporated business tax.

II. Whether, in the event petitioner is found to be subject to the unincorporated business tax, there is reasonable cause to cancel penalties imposed against petitioner.

III. Whether the doctrine of laches estoppes the State Tax Commission from sustaining the deficiency.

FINDINGS OF FACT

1. Petitioner, Gary S. Bergman, together with his wife, Barbara E. Bergman, who is not a party to this proceeding, timely filed a New York State Combined Income Tax Return for the year 1973, and listed his occupation thereon as "Programmer". Petitioner did not file an unincorporated business tax return for 1973.

2. On January 30, 1980 the Audit Division issued a Notice of Deficiency asserting unincorporated business tax due of \$1,346.51 for 1973 plus penalty and interest. A Statement of Audit Changes dated March 23, 1977 provided, in explanation of the asserted deficiency, that "[t]he income from your business activities as a Programmer/Consultant is subject to the unincorporated business tax."

3. Petitioner, Gary S. Bergman, worked for the Federal Reserve Bank of New York ("the Bank") during the period January 1973 through March 1973, and thereafter worked for Railway Express Agency ("R.E.A.") from April 1973 through to the end of 1973. These were two separate jobs, and at no time did petitioner work simultaneously for both of the above concerns.

4. Petitioner's work involved computer programming, and his special talent or ability was in "system debugging". Due to his abilities in this field, petitioner was able to command a high rate of compensation for his work.

5. According to the petition and to statements made at the hearing by his representative, one Steven Sklar, petitioner worked solely at the premises of the Bank and of R.E.A. under the supervision and control of the head of the data processing department. The petition further stated petitioner worked specific days and hours, was paid only for those days worked, was required to furnish time sheets and to observe the same holidays as other workers. Any

expenses incurred in the course of his work were reimbursed. No documentary or testimonial evidence in support of these statements or detailing the supervision exercised over petitioner was introduced into the record.

6. Petitioner was hired and paid under the status of an independent contractor. Petitioner asserts this status was used due to the fact that the employers' existing salary limits for hiring employees in petitioner's field were not high enough to meet petitioner's salary requirements (see Finding of Fact "4"). However, by using funds set aside in their budgets for hiring independent contractors, the employers were able to meet petitioner's salary requirements and hire him.

7. Petitioner was hired on a temporary rather than full-time basis. Although at the hearing reference was made to a contract of employment between the Bank and petitioner (as an independent contractor), no such contract nor any contract with R.E.A. was offered in evidence. No evidence was offered detailing whether or not Federal taxes and F.I.C.A. charges were withheld from petitioner's pay, and whether or not he was covered by or included in any employee benefit plans.

8. On the advice of Mr. Sklar, who prepared petitioner's tax returns, petitioner did not file an unincorporated business tax return for 1973. Petitioner, on the advice of his representative, did file a return and pay unincorporated business tax for 1972. Subsequently, they discussed the possibility of seeking a refund for 1972, but decided the small amount of potential refund did not warrant the work involved in filing the claim.

9. Petitioner asserts that a delay of nearly two years between the date of a written request for a conference on this matter and the scheduling of that conference caused petitioner harm, in that he was unable (after such delay) to

locate potential witnesses or sources of information concerning his work at the Bank and at R.E.A.

CONCLUSIONS OF LAW

A. That "[i]t is the degree of control and direction exercised by the employer which determines whether the taxpayer is an employee or an independent contractor subject to the unincorporated business tax." Lieberman v. Gallman, 41 N.Y.2d 774. Furthermore, "[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case." 20 NYCRR 203.10(c), (adopted February 1, 1974).

B. That petitioner has failed to provide sufficient evidence concerning the degree of direction and control exercised over him as is necessary to sustain his burden of proving that he was an employee rather than an independent contractor subject to the unincorporated business tax within the meaning and intent of section 703(b) of the Tax Law.

C. That there was reasonable cause for petitioner's failure to file a return and pay unincorporated business tax for 1973, and thus penalties imposed pursuant to section 685(a)(1) and (2) of the Tax Law are cancelled.

D. That "...the State cannot be estopped from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority (Matter of McMahon v. State Tax Comm., 45 A.D.2d 624)." (Matter of Walker & Co. v. State Tax Comm., 62 A.D.2d 77, 80). See also Matter of Jamestown Lodge 1681 Loyal Order of Moose, Inc., v. Catherwood, 31 A.D.2d 981. Accordingly, the argument to dismiss on the ground of laches is hereby denied.

E. That the petition of Gary S. Bergman is granted to the extent noted in Conclusion of Law "C" and is in all other respects denied.


DATED: Albany, New York

OCT 12 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER