

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Frank Caggiano	:	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 1975 & 1976.	:	

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Frank Caggiano, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

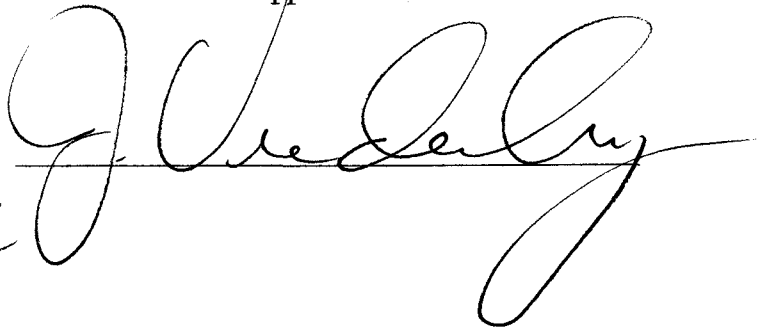
Frank Caggiano
181 Bay 41st St.
Brooklyn, NY 11214

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
4th day of August, 1982.





STATE OF NEW YORK

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of :
Frank Caggiano :
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Business Tax under Article 23 of the Tax Law for :
the Years 1975 & 1976. :
:

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Murray Appleman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

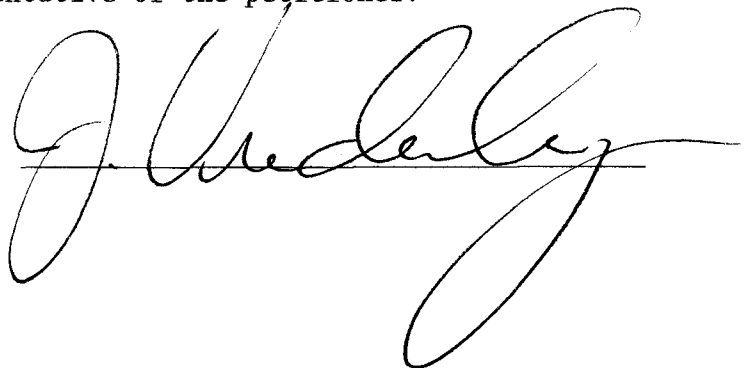
Murray Appleman
225 Broadway
New York, NY 10007

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
4th day of August, 1982.





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

August 4, 1982

Frank Caggiano
181 Bay 41st St.
Brooklyn, NY 11214

Dear Mr. Caggiano:

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
Murray Appleman
225 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
FRANK CAGGIANO
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1975
and 1976.

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DECISION

Petitioner, Frank Caggiano, 181 Bay 41st Street, Brooklyn, New York 11214, 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 1975 and 1976 (File No. 27677).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 6, 1981 at 2:45 P.M. Petitioner appeared by Murray Appleman, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

- I. Whether petitioner Frank Caggiano's income from certain activities for 1975 and 1976 is subject to unincorporated business tax.
- II. Whether petitioner Frank Caggiano's right to remain silent as to his source of income bars imposition of unincorporated business tax asserted thereon.

FINDINGS OF FACT

1. Petitioner, Frank Caggiano, filed New York State income tax resident returns for 1975 and 1976. He reported under "Other Income" the amounts \$27,000.00 and \$28,000.00 respectively. He did not file unincorporated business tax returns for said years.

2. On March 13, 1978 the Audit Division issued a letter to the petitioner which stated that an examination of his New York State income tax returns for the years 1975 and 1976 did not provide sufficient information to enable the Audit Division to determine his liability for the unincorporated business tax under Article 23 of the Tax Law. It therefore requested the petitioner to describe the exact nature of his business activities.

3. On April 4, 1978 the petitioner responded to the Audit Division through his attorney as follows:

"Reference is made to your letter...wherein you request information regarding income earned in 1975 and 1976. Taxpayer is relying on the rationale as promulgated by the United States Supreme Court in U.S. v. Sullivan, 274 U.S. 259 (1927) and Garner v. U.S., 424 U.S. 648 (1976) in refusing to respond to the questions posed by your department.

The Tax Court in recent decisions i.e., Gentile, 65 T.C. 1, and Barrett, 58 T.C. 284 (1972), while agreeing that the characteristics of continuity, regularity and profit motive are elements of carrying on a trade or business, decided that a taxpayer must in addition to the above hold himself out as offering goods and services to others, the *sine qua non* (sic) for determining whether a taxpayer is carrying on a trade or business, which is lacking in the extant situation.

Thus the taxpayer is not liable for the unincorporated business tax."

4. On June 7, 1978, the Audit Division issued a Statement of Audit Changes for 1975 and 1976 on the grounds that since you failed to submit information to establish that you were not subject to New York Unincorporated Business Tax, the other income is being considered taxable for unincorporated

business tax purposes. Accordingly, the Audit Division issued a Notice of Deficiency against petitioner on April 5, 1979 in the amount of \$1,925.00 for unincorporated business tax, plus interest of \$401.80, for a total of \$2,326.80 for the tax years 1975 and 1976.

5. At the hearing petitioner contended that he is protected under the Fifth Amendment of the Federal Constitution from being required to divulge his source of "other income". That his disclosure of same would result in a waiver of his privilege against self-incrimination, and this privilege he will not waive unless the State Tax Commission grants him immunity from criminal prosecution under state and federal statutes.

6. The petitioner argued that the Audit Division was using the Fifth Amendment as a sword in that the Audit Division was forcing him to pay unincorporated business tax in order for him to assert his Fifth Amendment rights.

CONCLUSIONS OF LAW

A. That petitioner Frank Caggiano failed to sustain the burden of proof required under section 689(e) of the Tax Law to show that his income was not subject to unincorporated business tax in accordance with the meaning and intent of section 701 of the Tax Law.

B. That the requirements that taxpayers shall prepare and file their tax returns do not violate taxpayers' privilege against self-incrimination under the Fifth Amendment or amount to involuntary servitude, prohibited by the Thirteenth Amendment (J. B. Kasey (CA-9) 72-1 USTC par 9307, 457 F2d 369). The fact that individuals are required to file Federal income tax returns is not a violation of their rights against self-incrimination (D. C. Irwin (CA-10), 77-2 USTC par. 9627, 561 F2d 198). A subjective fear, without basis in fact, of criminal prosecution for tax evasion is not a ground for claiming the Fifth

Amendment or refusing to testify concerning the tax deductions (G. Locke, 38 TCM 669, TC Memo 1979-153). Accordingly, the petitioner's right to remain silent as to his source of income which is his constitutional privilege against self-incrimination under the Fifth Amendment of the Federal Constitution, does not estop the State Tax Commission from imposing unincorporated business tax.

C. That the petition of Frank Caggiano is denied and the Notice of Deficiency issued April 5, 1979 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York


STATE TAX COMMISSION

AUG 04 1982

ACTING


PRESIDENT


COMMISSIONER


COMMISSIONER