

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Michael J. Cassidy

:

:

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 1973 & 1974.

State of New York
County of Albany

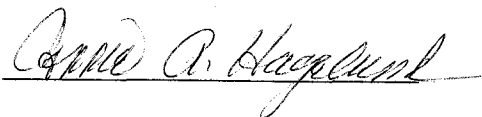
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of March, 1982, he served the within notice of Decision by certified mail upon Michael J. Cassidy, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

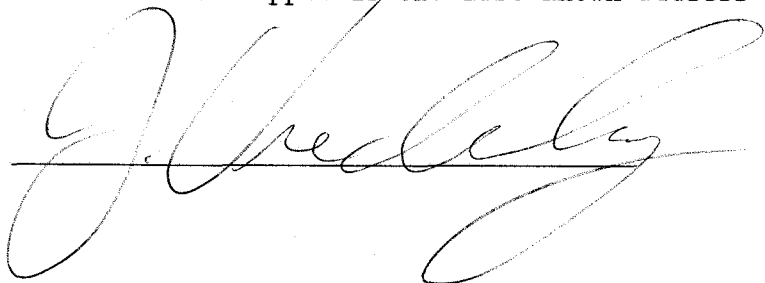
Michael J. Cassidy
P.O. Box 149
2 Cedar Point Dr.
West Islip, NY 11795

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
26th day of March, 1982.





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

March 26, 1982

Michael J. Cassidy
P.O. Box 149
2 Cedar Point Dr.
West Islip, NY 11795

Dear Mr. Cassidy:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MICHAEL J. CASSIDY	:	DECISION
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.	:	

Petitioner, Michael J. Cassidy, Box 149, West Islip, New York 11795, 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. 23655)

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 June 2, 1981 at 1:15 P.M. Petitioner Michael J. Cassidy appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (S. Freund, Esq., of counsel).

ISSUE

Whether the income derived from petitioner's activities as a salesman is subject to the unincorporated business tax, and if so, whether he may allocate his income based on sales consummated within and without New York State.

FINDINGS OF FACT

1. Petitioner, Michael J. Cassidy, and Evelyn C. Cassidy, his wife, timely filed joint New York State income tax resident returns for the years 1973 and 1974, on which petitioner reported commission income from his activities as a factory representative.

2. On or after May 30, 1978, petitioner and his wife filed "amended" New York State income tax resident returns for the years 1973 and 1974, on which he included New York State unincorporated business tax returns for the years 1973 and 1974, and self-imposed the unincorporated business tax on the commission income previously reported for personal income tax purposes. In addition, petitioner deducted business expenses against the commission income reported. However, the unincorporated business tax shown to be due of \$1,123.66 for the year 1973, and \$1,655.51 for the year 1974 was not paid.

3. On June 2, 1978, the Audit Division issued a Notice of Deficiency for the years 1973 and 1974 for \$3,522.81 plus interest, along with an explanatory Statement of Audit Changes on which petitioner's income from his activities as a sales representative was held to be subject to the unincorporated business tax. No allowances were made for business expenses incurred or deducted on the personal income tax returns filed for 1973 and 1974. However, the Audit Division conceded that the business expenses should be applied against the gross commission income reported for the years 1973 and 1974.

4. Petitioner, Michael J. Cassidy, contended that regardless of the unincorporated business returns filed, he was an employee and not subject to the unincorporated business tax.

5. During the period in issue petitioner was a salesman representing approximately four to six firms, all located outside the State of New York. He was compensated strictly on a commission basis without any reimbursement of selling expenses and without the withholding of payroll taxes

6. Each firm restricted petitioner to its own particular sales territory, which included the states of Virginia, New York and those states within the New England area. Although petitioner did not always represent each firm in each

area, at times the sales territories overlapped and petitioner would represent more than one firm while visiting a client.

7. Petitioner was not required to visit the firms' factory, or to attend sales meetings. Petitioner attended trade shows at his own expense and serviced several booths attended by the individual firms he represented.

8. Petitioner maintained an office at his home. He did not maintain a regular place of doing business outside the State of New York. Petitioner contended that a percentage of his commission income was derived from sales consummated without New York State, and if it was determined that the income from his activities was subject to the unincorporated business tax, the sole income subject to such tax should be that derived from New York sales, and the selling expenses prorated accordingly.

9. At the small claims hearing of June 2, 1981 petitioner submitted another set of amended returns for the years 1973 and 1974, which included the following breakdown of income:

1973 Tax Year

<u>Firms</u>	<u>New York State</u>	<u>Outside</u>
Binney Smith	\$5,295.29	\$ 7,942.94
Bee Paper	-0-	11,484.85
Frameway Co.	698.02	1,047.03
Blair	712.31	1,068.46
Myers Craft	1,783.30	6,705.66
Totals (\$36,737.86)	<u>\$8,488.92</u>	<u>\$28,248.94</u>

1974 Tax Year

<u>Firms</u>	<u>New York State</u>	<u>Outside</u>
Binney Smith	\$ 9,172.38	\$13,758.57
Bee Paper	-0-	13,993.79
Frameway Co.	630.62	945.93
Blair	890.89	1,336.33
Myers Craft	1,430.94	5,153.66
Totals (\$47,313.11)	<u>\$12,124.83</u>	<u>\$35,188.28</u>

The amended returns of June 2, 1981 were submitted for consideration in the event a decision was rendered holding the income subject to the unincorporated business tax.

10. Petitioner, Michael J. Cassidy, paid self employment taxes and contributed to a Keogh plan during the years 1973 and 1974.

CONCLUSIONS OF LAW

A. That petitioner, Michael J. Cassidy, was not an employee of any of the firms he represented during the years 1973 and 1974 within the meaning and intent of section 703(b) of the Tax Law and 20 NYCRR 203.10(b).

B. That petitioner, Michael J. Cassidy's, activities as a salesman, or manufacturers representative constituted the regularly carrying on of an unincorporated business within the meaning and intent of section 703 of the Tax Law and the income derived therefrom is subject to the unincorporated business tax in accordance with the meaning and intent of section 701 of the Tax Law.

C. That petitioner, Michael J. Cassidy, did not maintain a regular place of business without New York State and is not entitled to allocate business income based on sales consummated within and without New York State (20 NYCRR 207.2).

D. That the petition of Michael J. Cassidy is granted to the extent that gross commission income is reduced by the business expenses claimed pursuant to the first amended returns filed for the years 1973 and 1974 (Finding of Fact #2) and conceded to by the Audit Division.

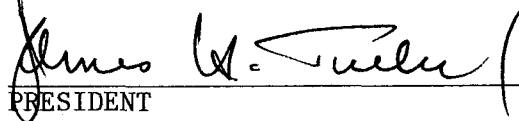
E. That the Audit Division is hereby directed to accordingly modify the Notice of Deficiency issued June 2, 1978, along with such interest as may be

lawfully owing and that, except as so granted, the petition is in all other respects denied.

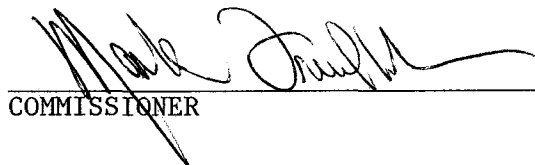
DATED; Albany, New York

MAR 26 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER