

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Anthony & Mary Desalva

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 22nd day of October, 1982, he served the within notice of Decision by certified mail upon Anthony & Mary Desalva, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony & Mary Desalva
1273 Hardscrabble Rd.
Box 221
Chappaqua, NY 10514

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
22nd 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 :
of :
Anthony & Mary Desalva :
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for Redetermination of a Deficiency or a Revision :
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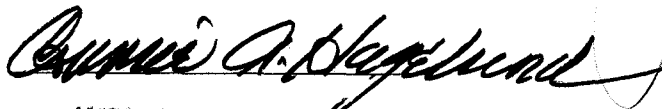
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 22nd day of October, 1982, he served the within notice of Decision by certified mail upon Harvey M. Lifset the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harvey M. Lifset
Lifset & Deily
112 State St., Suite 1300
Albany, NY 12207

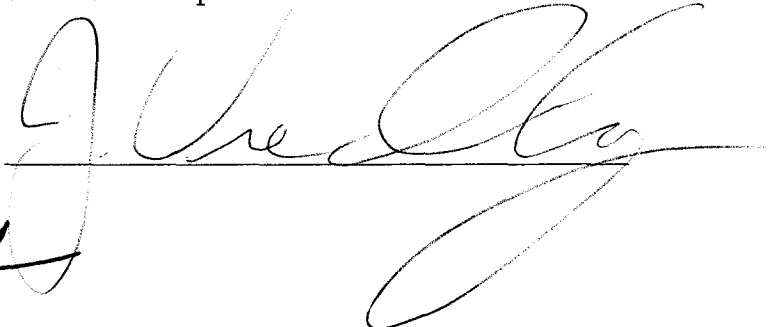
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
22nd 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 22, 1982

Anthony & Mary Desalva
1273 Hardscrabble Rd.
Box 221
Chappaqua, NY 10514

Dear Mr. & Mrs. Desalva:

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
Harvey M. Lifset
Lifset & Deily
112 State St., Suite 1300
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ANTHONY DESALVA and MARY DESALVA

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.

Petitioners, Anthony Desalva and Mary Desalva, 1273 Hardscrabble Road, Chappaqua, New York 10514, 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. 21737).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Albany, New York, on April 28, 1981 at 1:15 A.M. Petitioner Anthony Desalva appeared with Harvey M. Lefset, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUE

I. Whether petitioner Anthony Desalva's activities as an insurance agent constituted the carrying on of an unincorporated business.

II. Whether petitioner Mary Desalva, a housewife, is liable for unincorporated business tax.

III. Whether petitioner Anthony Desalva had reasonable cause for failing to file New York State unincorporated business tax returns.

FINDINGS OF FACT

1. Petitioners Anthony Desalva and Mary Desalva, filed New York State income tax resident returns for the years at issue. Petitioner Anthony Desalva did not file unincorporated business tax returns for said years.

2. On January 16, 1978, the Audit Division issued a Statement of Audit Changes against the petitioners. It was issued on the grounds that petitioner Anthony Desalva's activities during 1973 and 1974 constituted the carrying on of an unincorporated business, and that the income derived therefrom was subject to unincorporated business tax. On January 16, 1978, the Audit Division issued a Notice of Deficiency asserting unincorporated business tax of \$1,227.58 plus penalty of \$306.90 and interest of \$312.21.

3. During the years at issue petitioner Anthony Desalva worked under an agent's income builders contract as a life insurance soliciting agent for M.P. Arden Associates general agents for National Life Insurance Company. During the years at issue petitioner sold life insurance and various types of insurance for other principals. He reported the commission income which he received as business income on his New York State income tax returns.

4. During the period in question Mr. Desalva received an expense allowance, based on his first commission earnings from National Life Insurance Company, which he applied to his rental office space, office supply expenses, telephone service and secretarial help. To receive this expense allowance the petitioner had to submit documentation for these expenses to National Life Insurance Company. Petitioner's travel and entertainment expenses were not directly reimbursed, but rather petitioner paid these expenses from his commissions.

5. National Life Insurance Company paid petitioner on a commission basis and deducted social security taxes therefrom, but did not withhold Federal or

state withholding taxes. Petitioner was covered by group life insurance, a major medical plan and hospitalization insurance. He was also included in National Life Insurance Company's pension plan.

6. The petitioner maintained an office, which he rented, in Briarcliff Manor, New York. On a daily basis the petitioner reported directly to the general agent or assistant general agent for the National Life Insurance Company. Petitioner was required to attend regular sales meetings, was expected to meet standards established by National Life Insurance Company and was given specific quotas. Petitioner was required to give National Life Insurance Company the right of first refusal or acceptance of life insurance business. The company did not limit his territory.

7. Petitioner was encouraged by National Life Insurance Company to provide health insurance from other companies so as to complement its product since it did not sell that type of insurance. The petitioner's general agent received an override on most of the health insurance business sold by petitioner.

8. Petitioner conceded that activities as an insurance salesman for companies other than National Life Insurance Company constituted the carrying on of an unincorporated business. The gross commissions received from these companies were \$6,845.40 and \$15,773.59 for 1973 and 1974 respectively and the portions of business expense attributable to these commissions were \$2,683.08 and \$7,179.55, respectively.

9. In 1974, thirty seven and one half percent of petitioner's commission income from the sale of insurance was derived from sources other than National Life Insurance Company. The petitioner was unable to obtain a breakdown of his income for 1973.

10. During the years in issue, petitioner Mary Desalva was not engaged in any business activities.

11. The petitioner had been advised by his accountant that the income earned through his prime company was exempt from unincorporated business tax.

CONCLUSIONS OF LAW

A. That petitioner Anthony Desalva was not a full-time life insurance soliciting agent whose principal activity was the solicitation of insurance for one life insurance company. That sufficient direction and control was not exercised over the petitioner Anthony Desalva's activities by any of his principals so as to establish an employer-employee relationship within the meaning and intent of section 703(b) of the Tax Law. That in the instant case the petitioner does not meet the test set forth in Cohen v. Gallman, 48 AD2d 754, 368 NYS2d 336.

B. That petitioner's activities as an insurance salesman during the years 1973 and 1974 constituted the carrying on of an unincorporated business, within the meaning and intent of section 703 of the Tax Law. That the income derived from said activities is subject to the imposition of unincorporated business tax pursuant to section 701(a) of the Tax Law.

C. That petitioner Mary Desalva is not liable for any unincorporated business tax during the years at issue.

D. That petitioner had reasonable cause for his failure to file New York State unincorporated business tax returns for the years at issue.

E. That the petition of Anthony Desalva and Mary Desalva is granted to the extent of Conclusions of Law "C" and "D" for the years at issue. The Audit Division is hereby directed to so modify the Notice of Deficiency issued January 16, 1978 and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 22 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER

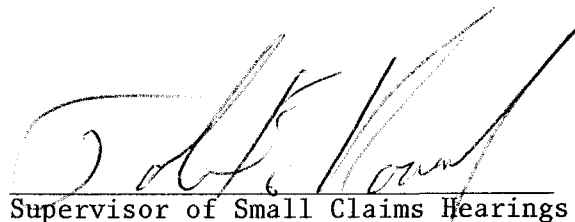
STATE TAX COMMISSION
TAX APPEALS BUREAU
MEMORANDUM

TO: Michael Alexander, Secretary of the
State Tax Commission
FROM: John F. Koagel
SUBJECT: Anthony DeSalva
UBT -1973 and 1974
DATE: July ~~14~~, 1982

Please see the letter of Harvey M. Lifset, Esq. attached, which was sent to this office, and concerns the above.

Records in this office show that the case has been with the State Tax Commission since August, 1981.

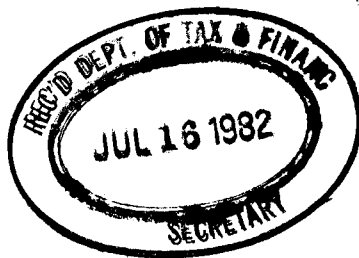
Is it possible to expedite this case for Mr. Lifset?


Supervisor of Small Claims Hearings

Attachment
JFK/meg

7/16/82

The above matter was handled over the telephone by Koagel & Alexander. The mentioned decision was sent to TAB on 1/6/82 for a rewrite; it was then received rewritten on 6/1/82. On 6/7/82 the decision was sent to STC and is now in circulation.



1rp.

STATE TAX COMMISSION
TAX APPEALS BUREAU

TO

MEG

Will you check and let me
know if this case is still with SRC?

(SRC)

2/8/81

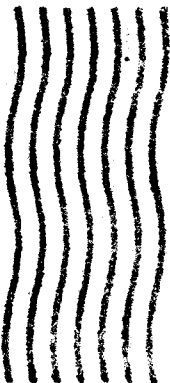
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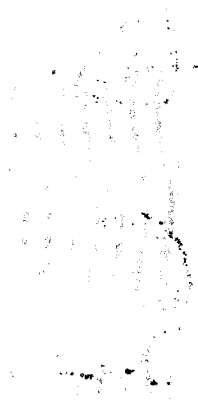
From John F. Koegel

LAW OFFICES
LIPSET AND DELLY

SUITE 1300
112 STATE STREET
ALBANY, NEW YORK 12207

Mr. Carl P. Wright
Hearing Officer
State Tax Commission
Tax Appeals Bureau
Building 9
State Campus
Albany, New York 12227





LAW OFFICES
LIFSET AND DEILY
SUITE 1300
112 STATE STREET
ALBANY, NEW YORK 12207

HARVEY M. LIFSET
JONATHAN D. DEILY

MARC J. LIFSET
LINDA T. TAVERNI

TELEPHONE
(518) 434-0114

July 2, 1982

Mr. Carl P. Wright
Hearing Officer
State Tax Commission
Tax Appeals Bureau
Building 9
State Campus
Albany, New York 12227

Re: Anthony *DeSilva*
Unincorporated Business Taxes 1973-1974

Dear Sir:

Would you kindly advise me as to the status of the above-entitled matter, which came on before you for formal hearing on April 28, 1981.

Very truly yours,

LIFSET AND DEILY

Harvey M. Lifset
Harvey M. Lifset

HML:cp

