

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Albert G. Lomber

:

:

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 1968.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Albert G. Lomber, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert G. Lomber
Box 167
Brownsville, NY 13615

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
9th day of April, 1982.

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

April 9, 1982

Albert G. Lomber
Box 167
Brownsville, NY 13615

Dear Mr. Lomber:

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
ALBERT G. LOMBER
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1968.

DECISION

Petitioner Albert G. Lomber, Box 167, Brownsville, New York 13615 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 1968 (File No. 01530).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Governmental Civic Center, 44 Hawley Street, Binghamton, New York, on September 11, 1979 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by Peter Crotty, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the petitioner's activities as a refrigeration service repairman constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Petitioner, Albert G. Lomber, did not file an unincorporated business tax return for 1968.

2. On January 31, 1972, the Income Tax Bureau issued a Notice of Deficiency against petitioner, Albert G. Lomber, asserting unincorporated business tax for 1968 of \$224.90, plus interest of \$37.70, for a total of \$262.60. The notice

asserted that the income derived from his activities as a refrigeration service repairman was subject to unincorporated business tax.

3. During the year at issue, petitioner was retained by Loblaws Supermarkets to perform routine maintenance and emergency service on refrigeration equipment owned by the company at its many store locations within New York State. Petitioner was available to perform services during the normal eight hour working day for the company. His regular routine was to call the executive offices of Loblaws in Syracuse, New York each workday morning and they would instruct him where to report. The executive office would then call the petitioner at the store he was working at, so as to tell him to what store he was to proceed to next. Petitioner was also required to be available to perform emergency service on a twenty-four hour per day basis. Upon completion of a service call at a store, petitioner would present to the store manager a billing for the job done.

4. Loblaws Supermarkets paid petitioner on an hourly rate basis which would be paid to him from the time he left his home until he returned. It did not withhold taxes or social security from his compensation.

5. Petitioner was reimbursed by Loblaws Supermarkets for all parts he replaced plus an additional twenty-five percent above the cost of the parts to cover any other business expenses.

6. Petitioner was not allowed to work for any other principal other than Loblaws Supermarkets. He did not hold himself out to the general public as a refrigeration service repairman.

7. On January 21, 1969, the Income Tax Bureau had withdrawn a proposed Statement of Audit Changes where it had found the petitioner subject to unincorporated business tax for the year 1965 through 1967. Petitioner contended that

if he was not subject to unincorporated business tax for the years 1965 through 1967, why was he subject to the tax in 1968 since his modus operandi had not changed.

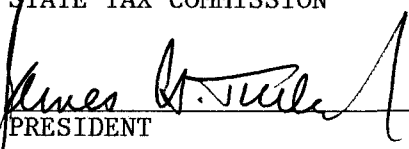
CONCLUSIONS OF LAW

A. That while the record does show that Loblaws Supermarkets gave some direction to petitioner, Albert G. Lomber, the petitioner failed to sustain the burden of proof imposed by section 689(e) of the Tax Law to show that enough control and supervision were present to establish that an employee-employer relationship existed in accordance with the meaning and intent of section 703(b) of the Tax Law. When one considers the fact that the petitioner billed Loblaws Supermarkets for parts and services, was paid on an hourly rate from the time he left home until he returned and was not treated in a manner similar to other Loblaws' employees, it must be held that the services rendered by petitioner Albert G. Lomber are those of an independent contractor rather than those of an employee pursuant to section 703(b) of the Tax Law.

B. That the petition of Albert G. Lomber is denied and the Notice of Deficiency issued on January 31, 1972 is sustained.

DATED: Albany, New York
APR 09 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER