

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Roger W. 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 Years 1965, 1966 & 1967.

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 Roger W. Lomber, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Roger W. Lomber
457 Main St.
Etna, NY 13062

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

Roger W. Lomber
457 Main St.
Etna, NY 13062

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	:	
ROGER W. LOMBER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1965,	:	
1966 and 1967.	:	

Petitioner, Roger W. Lomber, 457 Main Street, Etna, New York 13062, 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 1965, 1966 and 1967 (File No. 01531).

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 petitioner is entitled to an unincorporated business tax refund for the years 1965, 1966 and 1967 on the grounds that his activities as a refrigeration service repairman were that of an employee.

FINDINGS OF FACT

1. Petitioner, Roger W. Lomber, filed claims for credit or refund of unincorporated business tax (Form IT-113X) in the amounts of \$145.00 and \$219.10 for the years 1965 and 1966, respectively.

2. On July 7, 1969 and June 15, 1970, the Income Tax Bureau disallowed the petitioner's claim for credit or refund for the years 1965 and 1966 respectively, on the grounds that the income derived from his activities as a refrigeration service repairman was subject to unincorporated business tax.

3. When petitioner filed his petition for refund of unincorporated business tax, he enclosed a Claim for Credit or Refund of Unincorporated Business Tax for year 1967 in the amount of \$226.91 and requested that it be included with his other claims.

4. During the years 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. Petitioner used a billing receipt which contained the name R.W. Lomber Refrigeration, his address and his telephone number.

5. 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.

6. 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.

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

CONCLUSIONS OF LAW

A. That while the record does show that Loblaws Supermarkets gave some direction to petitioner, Roger W. 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 facts 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 Roger W. Lomber are those of an independent contractor rather than those of an employee pursuant to section 703(b) of the Tax Law.

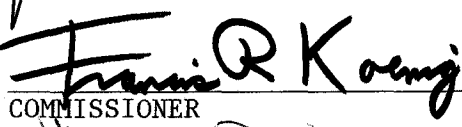
B. That the petition of Roger W. Lomber is denied and the notices of disallowance issued July 7, 1969 and June 15, 1970 are sustained.


DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER