

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Charles G. Mascott
and Rebecca Mascott

:

:

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 1976, 1977 & 1978.

State of New York
County of Albany

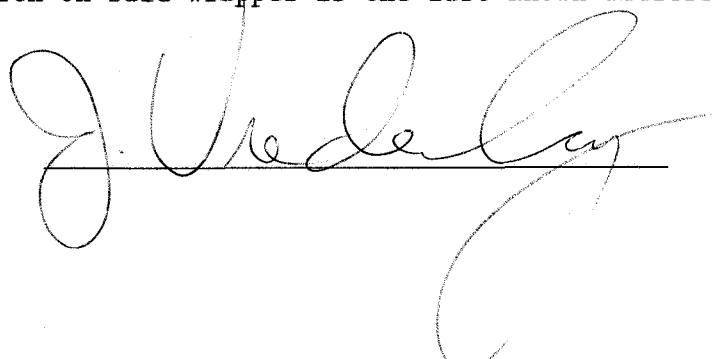
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of September, 1982, he served the within notice of Decision by certified mail upon Charles G. Mascott, and Rebecca Mascott the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

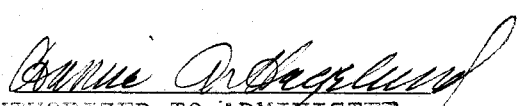
Charles G. Mascott
and Rebecca Mascott
196 Stone Root Ln.
Concord, MA 01742

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
24th day of September, 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 :
Charles G. Mascott :
and Rebecca Mascott :

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 :
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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 24th day of September, 1982, he served the within notice of Decision by certified mail upon Arnold J. Wallace the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

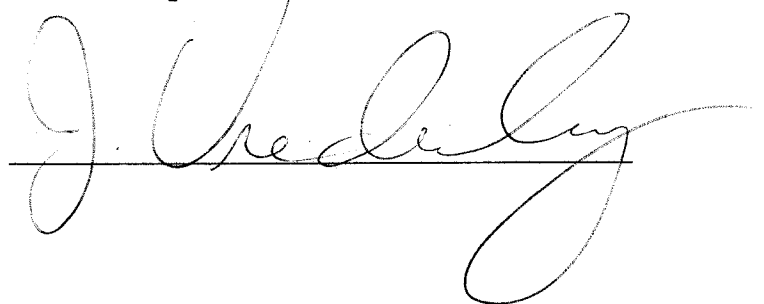
Arnold J. Wallace
Wallace & Ingerman
15 West End Ave.
Brooklyn, NY 11235

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
24th day of September, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174 -



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

September 24, 1982

Charles G. Mascott
and Rebecca Mascott
196 Stone Root Ln.
Concord, MA 01742

Dear Mr. Mascott:

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
Arnold J. Wallace
Wallace & Ingerman
15 West End Ave.
Brooklyn, NY 11235
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CHARLES G. MASCOTT and REBECCA MASCOTT
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1976,
1977 and 1978.

DECISION

Petitioners, Charles G. Mascott and Rebecca Mascott, 196 Stone Root Lane, Concord, Massachusetts 01742, 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 1976, 1977 and 1978 (File Nos. 29131 and 29132).

Petitioners waived their right to a hearing and requested that a decision be rendered based on the record contained in their file. Upon review of the file, the State Tax Commission hereby finds:

ISSUE

Whether the income earned by petitioner Charles G. Mascott from his activities as a general agent was done so in the capacity of an independent contractor subject to unincorporated business tax or that of an employee exempt from said tax.

FINDINGS OF FACT

1. Petitioners, Charles G. Mascott and Rebecca Mascott, timely filed New York State resident income tax returns for the years 1976, 1977 and 1978 wherein they reported business income of \$42,108.00, \$44,035.00 and \$526.00,

respectively. The 1978 return, a part-year resident return,¹ also reported a gain of \$11,635.00 from the sale or exchange of property other than capital assets and other income of \$1,000.00. No unincorporated business tax returns were filed for any of the years at issue.

2. On January 25, 1980, the Audit Division issued a Notice of Deficiency to Charles G. Mascott and Rebecca Mascott for the year 1976, asserting that \$1,734.26 of unincorporated business tax was due together with interest. A second Notice of Deficiency dated January 25, 1980 was issued to Charles G. Mascott for the years 1977 and 1978, asserting that \$2,219.98 of unincorporated business tax was due together with interest. Both of the aforementioned notices of deficiency were premised on an explanatory Statement of Audit Changes dated August 15, 1979, wherein the Audit Division held reported business income subject to unincorporated business tax. Also, for the year 1978, the Audit Division held the \$11,635.00 gain from the sale of property and the other income of \$1,000.00 as being subject to unincorporated business tax.

3. During the years at issue, petitioner² was a general agent for the Connecticut Mutual Life Insurance Company (hereinafter "The Company"), conducting business as a sole proprietor under the business name of Charles G. Mascott Agency. The agency was located at One Lincoln Center, Syracuse, New York.

4. Petitioner reported the income generated from his general agency on Federal Schedule C, Profit or (Loss) From Business or Profession. The following

¹ Petitioners incurred a change of residence from New York to Massachusetts effective May 15, 1978 and had no income from New York State sources after said change. Accordingly, any reference to the year 1978 and the income and deductions for 1978 shall pertain to the period January 1, 1978 to May 14, 1978.

² Petitioner Rebecca Mascott is involved in this proceeding due solely to the filing of a joint tax return for the year 1976. Accordingly, the use of the term petitioner hereinafter shall pertain only to Charles G. Mascott.

chart indicates the gross receipts, total deductions and net income reported on Federal Schedule C for the years at issue:

	<u>1976</u>	<u>1977</u>	<u>1978</u>
Gross Income	\$276,629.00	\$327,961.00	\$87,551.00
Total Deductions	<u>234,521.00</u>	<u>283,926.00</u>	<u>87,025.00</u>
Net Income	<u>\$ 42,108.00</u>	<u>\$ 44,035.00</u>	<u>\$ 526.00</u>

5. Pursuant to a memorandum agreement with The Company, petitioner received reimbursement at a rate of 85½ percent for such expenses as: rent, clerical help, postage, telephone, employment fees and social security and unemployment taxes. Most other expenses incurred in the operation of the agency were assumed by Mr. Mascott. The gross income figures shown in Finding of Fact "4", supra, include the reimbursements received by petitioner from The Company. Petitioner maintains that approximately two-thirds of reported gross income actually represents expense reimbursements received from The Company. Accordingly, petitioner's unreimbursed expenses totaled approximately \$50,102.00 for 1976, \$65,285.00 for 1977 and \$28,657.00 for 1978.

6. The Company was the lessee of the office located at One Lincoln Center and also, with the exception of Mr. Mascott's personal furniture, owned all the furniture located in said office. Petitioner's Federal Schedule "C" for the years 1976, 1977 and 1978 claimed expenses for equipment leasing of \$4,383.00, \$9,897.00 and \$3,385.00, respectively. Said schedules also claimed deductions for depreciation of furniture, fixtures, machinery and other equipment, said items having a cost basis of \$27,992.00 in 1976, \$33,078.00 in 1977 and \$23,346.00 in 1978.

7. The memorandum agreement between petitioner and The Company limited his sales territory to nine counties, provided him with a "blanket fidelity bond" and a "blanket errors and omissions policy".

8. During the years at issue, petitioner worked exclusively for The Company. His income from The Company was in the nature of a commission on sales, override commission on premiums collected and expense reimbursement. The tax returns do not reflect the withholding of any Federal or State income taxes. Petitioner paid self-employment taxes on the income earned from his general agency. He also claimed deductions for contributions to an individual retirement account.

9. Petitioner was required to file reports twice a month with The Company and he also attended a minimum of twelve sales meetings a year. With respect to vacations, no prior approval was necessary, just prior notification.

10. In 1978, petitioner relinquished the general agency in Syracuse and moved to Massachusetts, where he operated a general agency in the town of Wellesley. The entire moving expense incurred by petitioner was paid by The Company.

11. Petitioner Rebecca Mascott was not involved in the operation of her husband's general agency.

CONCLUSIONS OF LAW

A. That the degree of direction and control exercised by a principal is of paramount importance when determining whether a taxpayer is an employee or independent contractor (Matter of Greene v. Gallman, 39 A.D.2d 270, aff'd. 33 N.Y.2d 778). That an employee-employer relationship exists where the principal has the right to control and direct the individual performing services, not only as to the end result to be accomplished, but also as to the means and details to be employed (Matter of Liberman v. Gallman, 41 N.Y.2d 774).

B. That the record in this matter is basically void of any substantial evidence on the key element of direction and control. Accordingly, petitioner

has failed to sustain the burden of proof imposed by sections 722 and 689(e) of the Tax Law to show that his activities as a general agent for The Company were controlled to the degree necessary to be considered an employee within the purview of subdivision (b) of section 703 of the Tax Law and 20 NYCRR 203.10. Accordingly, petitioner's activities as a general agent during the years 1976, 1977 and 1978 constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law and the income derived from said activity is subject to unincorporated business tax imposed by section 701(a) of the Tax Law.

C. That petitioner Rebecca Mascott was not connected with the operation of her husband's unincorporated business and, therefore, her name is to be deleted from the Notice of Deficiency issued for the year 1976.

D. That the petition of Charles G. Mascott and Rebecca Mascott is granted to the extent indicated in Conclusion of Law "C", supra, and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 24 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER