

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
WILLIAM R. VON SCHMID
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1972
and 1973.

DECISION

Petitioner, William R. Von Schmid, 40 March Lane, Westbury, New York 11590, 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 1972 and 1973 (File No. 29475).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 22, 1982 at 10:30 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (James F. Morris, Esq., of counsel).

ISSUE

Whether petitioner's activities as carpet technician constituted services rendered as an employee for unincorporated business tax purposes.

FINDINGS OF FACT

1. William R. Von Schmid (hereinafter petitioner) timely filed a New York State Combined Income Tax Return with his wife for each of the years 1972 and 1973 whereon he reported business income derived from his activities as a carpet technician. He did not file an unincorporated business tax return for either of said years.

2. On March 17, 1977 the Audit Division issued a Statement of Audit Changes to petitioner wherein it held that his "activities as a carpet technician constitute the carrying on of an unincorporated business." Accordingly, a Notice of Deficiency was issued against petitioner on December 31, 1979 asserting unincorporated business tax for 1972 and 1973 of \$518.38, plus penalties and interest of \$550.92, for a total due of \$1,069.30. Said penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to file unincorporated business tax returns and failure to pay the tax determined to be due respectively.

3. Petitioner's activities consisted of inspecting for defects and servicing carpets in residential and business locations. Such inspections were conducted pursuant to a contract executed May 23, 1972 between petitioner, d/b/a V & S Carpet Service and Mr. Al Myman, d/b/a A & M Carpet Service (hereinafter A & M). Said contract provided in pertinent part that:

- a) petitioner would inspect and service carpets exclusively and solely for A & M.
- b) petitioner would not enter the employment of or render any service to any individual or entity engaged in the carpet business without prior written approval of A & M.
- c) petitioner's compensation would be \$1,500.00 a month or 50 percent of his monthly billings, whichever is higher.
- d) petitioner is not an employee of A & M but is an independent contractor.
- e) A & M would not reimburse petitioner for his operating costs and expenses, and

f) A & M would not withhold income or social security taxes from petitioner's compensation.

4. Petitioner contended that he was an employee since he worked exclusively for A & M.

5. Petitioner reported his income and expenses attributable to his carpet technician activities on Federal Schedules C (Profit (or Loss) From Business or Profession).

6. Petitioner rendered services to A & M on a six-day work week basis. At least one day per week was usually spent in the office of A & M.

7. A & M scheduled petitioner's appointments and provided him with report forms under the letterhead of A & M.

8. A & M did not set standards or procedures for petitioner to follow in conducting inspections. Petitioner's completed inspection reports were always accepted as filed.

9. In a letter, submitted in response to an Audit Division inquiry, petitioner indicated that he was free to represent other principals and that "the only control (over his activities) is the forwarding of calls to be done on a particular day or week".

CONCLUSIONS OF LAW

A. That the determination whether services were performed by an individual as an "employee" or as an "independent agent" turns upon the unique facts and circumstances of each case.

"The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used.' (Matter of Morton, 284 N.Y. 167, 172.) It is the degree of control and direction exercised by the employer that determines whether the taxpayer is an

employee. (E.g., Matter of Greene v. Gallman, 39 A.D.2d 270, 272, aff'd. 33 N.Y.2d 778; Matter of Frishman v. New York State Tax Comm., 33 A.D.2d 1071, mot. for lv. to app. den. 27 N.Y.2d 483; Matter of Hardy v. Murphy, 29 A.D.2d 1038; see 20 NYCRR 203.10; cf. Matter of Sullivan Co., 289 N.Y. 110, 112.)" Matter of Liberman v. Gallman, 41 N.Y.2d 774, 778.

B. That sufficient direction and control was not exercised by A & M over petitioner's day-to-day activities so as to form a relationship of employer-employee. Accordingly, petitioner's activities did not constitute services rendered as an employee of A & M within the meaning and intent of section 703(b) of the Tax Law.

C. That petitioner's carpet technician activities constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701(a) of the Tax Law.

D. That the petition of William R. Von Schmid is denied and the Notice of Deficiency dated December 31, 1979 is hereby sustained, together with such additional penalties and interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 14 1982

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

2BT

Walker, Kenneth

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Kenneth Walker

:
:
: 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 1972 & 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 Kenneth Walker, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kenneth Walker
37 East Dr.
Woodbury, NY 11797

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.

Annie A. Hagedorn

J. Vredenburg

P 230 842 358

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO		<i>Kenneth Walker</i>	
STREET AND NO.		<i>34 East Dr.</i>	
P.O. STATE AND ZIP CODE		<i>Woodbury NY 11797</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	\$
		SPECIAL DELIVERY	\$
		RESTRICTED DELIVERY	\$
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	\$
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	\$
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	\$
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	\$
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

TA 26 (9-79)

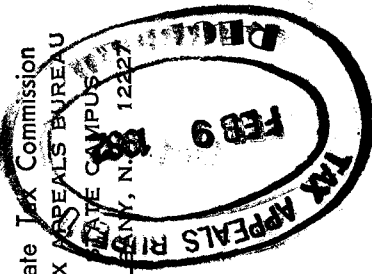
STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N.Y. 12227

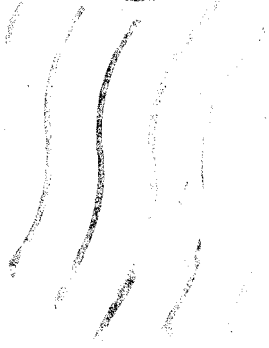
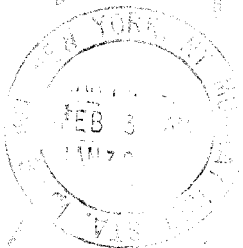
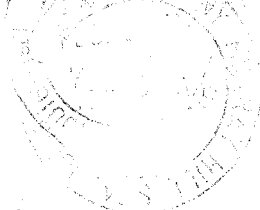


Kenneth Walker
115 E. 34th St.
New York, NY 10016

Handwritten: RECEIVED
FEB 9 1980

Printed: RECEIVED
Address: _____
Telephone: _____
Business Address: _____
Home Address: _____
Rooming Address: _____
Number: _____

11791
M. L. Z. A.
67 East 22
New York, N.Y.
10011




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NEW YORK STATE
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[Handwritten signature]

REQUEST FOR BETTER ADDRESS

Requested by 	Unit	Date of Request
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition
Name <i>WALKER, KENNETH</i>	
Address	

Results of search by Files

<input checked="" type="checkbox"/> New address:	<i>37 East Dr. Woodbury, N.Y. 11797</i>
<input type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other:	

Searched by	Section	Date of Search
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PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER