

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Vincent Carollo	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Years 1974 - 1976.	:	

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Vincent Carollo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Vincent Carollo
5 Wintergreen Drive West
Melville, NY 11746

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
27th day of May, 1983.

David Parchuck

William A. Haggard

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
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AFFIDAVIT OF MAILING
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Business Tax under Article 23 of the Tax Law for :
the Years 1974 - 1976. :

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Louis Kanter the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis Kanter
Kanter & Levenberg, P.C.
52 Broadway
Greenlawn, NY 11740

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
27th day of May, 1983.

David Parchuck

Quinn P. Hyland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Vincent Carollo
5 Wintergreen Drive West
Melville, NY 11746

Dear Mr. Carollo:

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) 690 & 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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Louis Kanter
Kanter & Levenberg, P.C.
52 Broadway
Greenlawn, NY 11740
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
VINCENT CAROLLO
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1974,
1975 and 1976.

DECISION

Petitioner, Vincent Carollo, 5 Wintergreen Drive West, Melville, New York 11746, 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 1974, 1975 and 1976 (File No. 31535).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 21, 1982 at 1:30 P.M. Petitioner appeared by Kanter & Levenberg, CPA's (Louis Kanter, CPA). The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether income from petitioner's activities as a commodity broker for the tax years 1974, 1975 and 1976 is subject to unincorporated business tax.

II. If such income is subject to unincorporated business tax, whether penalties for failure to file returns and pay unincorporated business taxes due are applicable.

FINDINGS OF FACT

1. On October 2, 1979, the Audit Division issued a Statement of Audit Changes against Vincent Carollo, the petitioner herein.

2. The Statement of Audit changes contained the following explanation:

"As a result of field audit for the above-indicated year(s), your tax liability has been recomputed as follows:

	<u>1974</u>	<u>1975</u>	<u>1976</u>	
Unincorporated Business Tax Due	\$794.64	\$1,969.44	\$4,122.64	\$ 6,886.72
Penalties Sec. 722 ¹	377.45	856.70	1,545.99	2,780.14
			Interest	1,745.86
			Total Due	<u>\$11,412.52"</u>

On June 13, 1980, a Notice of Deficiency was issued for unincorporated business tax, penalty, and interest in the total amount of \$11,629.83.

3. Annexed to the Statement of Audit Changes was a Tax Computation

Schedule which read as follows:

"Tax Year or Period Ended	<u>1974</u>	<u>1975</u>	<u>1976</u>
UNINCORPORATED BUSINESS			
Net adjustment per audit	\$14,448.00	\$35,808.00	\$74,957.00
Taxable business income previously stated	-0-	-0-	-0-
Corrected taxable business income	<u>\$14,448.00</u>	<u>\$35,808.00</u>	<u>\$74,957.00</u>
Tax at 5½%	\$ 794.64	\$ 1,969.44	\$ 4,122.64
Less business tax credit			
Corrected unincorporated business tax due	<u>\$ 794.64</u>	<u>\$ 1,969.44</u>	<u>\$ 4,122.64</u>
Unincorporated business tax previously computed	-0-	-0-	-0-
Deficiency	<u>\$ 794.64</u>	<u>\$ 1,969.44</u>	<u>\$ 4,122.64"</u>

4. Mr. Louis Kanter, petitioner's representative, testified on behalf of petitioner who was not present at the hearing.

5. Petitioner, through his representative, asserted that he was employed by Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), a brokerage house, to conduct and operate its commodity brokerage business in his name. The reason for this arrangement was that a brokerage house such as Merrill Lynch was not permitted to trade in its own name on the commodity exchange.

¹ Penalties under section 685(a)(1) and (2) are applicable by virtue of section 722 of the Tax Law.

6. Petitioner's membership on the commodity exchange was in his own name; however, Merrill Lynch paid for the membership.

7. Petitioner was paid a salary for his work from which Merrill Lynch deducted social security and withholding taxes; he was also a member of its pension plan.

8. Petitioner's representative stated that his client was under the direct control of and received his instructions from Merrill Lynch, did not have a business telephone listing, did not pay office rent, and did not have any other attributes of a self-employed person.

9. In addition to being paid a salary by Merrill Lynch, petitioner, with its approval and acceptance, was permitted to carry on trades for other brokerage firms.

10. Petitioner, on his 1974, 1975 and 1976 income tax returns, respectively reported that his income from "wages" was \$14,250.00, \$18,650.00 and \$22,808.00 and that respectively his "other income" was \$10,060.00, \$27,158.00 and \$62,149.00.

11. Petitioner's representative did not know the origin of petitioner's "other income".

12. Item number 12 of petitioner's Perfected Petition, herein, states in part as follows:

"Further substantiation from his former employer cannot be obtained since taxpayer is involved in legal actions that may have an adverse affect (sic) on his relations with his former employer and/or various staff members of that employer."

13. The Audit Division asserted that the "other income" received was attributable to services rendered for other brokers.

14. No evidence was offered to negate the penalties asserted herein.

CONCLUSIONS OF LAW

A. That the petitioner has the burden of proving wherein the Notice of Deficiency is erroneous and/or improper and that the penalties asserted herein should be negated. Section 689(e) of the Tax Law.

B. That the petitioner failed to sustain his burden of proof.

C. That the petition herein is denied and the Notice of Deficiency is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER