

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Paul Castellano	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Years 1977 - 1978.	:	

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon Paul Castellano, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul Castellano
177 Benedict Rd.
Staten Island, NY 10304

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
20th day of December, 1983.

David Parchuck

James A. O'Keefe
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Paul Castellano :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1977 - 1978. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon Norge Bertolli, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Norge Bertolli
Frederick, Goglio & Bertolli
167 Willis Ave.
Mineola, NY 11501

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
20th day of December, 1983.

David Parchuck

Annunzio A. DeGasperis
pursuant to Tax Law section 174

Authorized to administer oaths

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

December 20, 1983

Paul Castellano
177 Benedict Rd.
Staten Island, NY 10304

Dear Mr. Castellano:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Norge Bertolli
Frederick, Goglio & Bertolli
167 Willis Ave.
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
PAUL CASTELLANO	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1977	:	
and 1978.	:	

Petitioner, Paul Castellano, 177 Benedict Road, Staten Island, New York 10304, 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 1977 and 1978 (File No. 33523).

A small claims hearing was held before Anthony J. Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 11, 1983 at 1:15 P.M. Petitioner appeared by Norge Bertolli, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner's salary was income attributable to his unincorporated business and thereby subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Paul Castellano, with his wife, jointly filed 1977 and 1978 New York State income tax returns. Attached to said returns were New York State unincorporated business tax returns. Petitioner also reported wages of \$26,000.00 in 1977 from "Meat Palace-5th Avenue" located at 5804 5th Avenue,

Brooklyn, New York and wages of \$26,000.00 in 1978 from "Meat Palace Stores" located at 225 60th Street, Brooklyn, New York.

2. On December 9, 1980, the Audit Division issued to petitioner a Statement of Audit Changes which stated:

"Your income from Meat Palace Stores, derived for advisory and consulting services, is income attributable to your unincorporated business activities subject to unincorporated business tax under Article 23, section 703."

On January 22, 1981, the Audit Division issued a Notice of Deficiency to petitioner for 1977 and 1978 imposing additional unincorporated business tax of \$2,730.00, interest of \$622.22, for a balance due of \$3,352.22.

3. Petitioner, Paul Castellano, owned and operated a self-service retail meat store called the "Meat Palace" at 1811 Church Avenue, Brooklyn, New York. He employed a manager to help run the store. The income from the business was reported on the unincorporated business tax returns noted in Finding of Fact "1", supra.

4. Mr. Castellano's sons, Joseph, Paul and Philip, formed a partnership (hereinafter "the partnership") which also operated a self-service retail meat store called the "Meat Palace" located at 5804 5th Avenue, Brooklyn, New York. The partnership hired Mr. Castellano to perform directorial and executive-type duties for the partnership because of his enormous knowledge of the retail meat market business. Mr. Castellano, in effect, performed similar type services for the partnership that he performed for his own store.

5. Petitioner installed a system of meat cutting tests for the partnership which determined the best way to cut the meat for retail sale. He inspected the store, evaluated the employees, made sure the cutting tests were done, checked counters for the proper display of the meats and, in coordination with the manager of the store, purchased the meat. The purchasing of the meat was a

major factor in making a retail meat market successful. While the partnership owned two other stores, it was alleged that petitioner performed services only for the store at 5804 5th Avenue.

6. Mr. Castellano was paid a weekly salary. Federal, New York State and City income taxes and social security taxes were withheld from his wages. He was covered by Workers' Compensation, Unemployment Insurance and Disability Insurance. Petitioner purportedly had an oral contract with the partnership. He was subject to dismissal by the partnership. Petitioner's representative alleged that Mr. Castellano was subject to the direction and control of the partnership and that Joseph Castellano was his supervisor. However, Mr. Castellano had no set days or hours of work; he spent at least 5 or 6 hours per week at the store. He also spent time at the wholesale meat markets purchasing meat for the partnership, which was done generally at the same time he was purchasing meat for his own business.

7. Petitioner, Paul Castellano, had no office, telephone listing or stationery listing him as a meat advisor or consultant. He did not perform services for others. He had no assistants.

8. The partnership and Mr. Castellano's business were separate and distinct entities. A complete and separate set of double entry books were kept for the partnership and Mr. Castellano's business. The partnership was completely financed by Mr. Castellano's sons. He neither loaned money to his sons nor contributed capital to the partnership to run the store.

CONCLUSIONS OF LAW

A. That the performance of services by an individual as an employee shall not be deemed an unincorporated business unless such services constitute part

of a business regularly carried on by such individual (section 703(b) of the Tax Law).

B. That the term "employee" means an individual performing services for an employer under an employer-employee relationship. Generally, the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished, but also as to the details and means by which that result is to be accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but as to how it shall be done. He will usually be required to work during stated days and hours. It is not necessary that the employer actually direct or control the manner in which the services are performed, it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. If an individual is subject to the control or direction of another merely as to the results to be accomplished by the services and not as to the means and methods for accomplishing the result, he usually is an independent contractor or an independent agent rather than an employee. An individual who performs services for only one person or entity may, nevertheless, be an independent contractor or independent agent. Where he, however, performs services for two or more persons or entities without a clear division of time, such an individual would ordinarily not be an employee but rather an independent contractor or agent with respect to both such persons or entities, since neither person or entity could be said to actually direct or control such individual to the extent necessary in an employer-employee relationship. [20 NYCRR 203.10(b)]

C. That in light of all the relevant facts and circumstances herein, petitioner, Paul Castellano, has not established that he was subject to sufficient direction and control to be considered an employee of the partnership. He was hired primarily for his knowledge in the retail meat market business which may be construed as for advisory or consulting duties. He had no set days or hours to work and spent a minimal number of hours at the store. There is no testimony as to what the purported oral contract consisted of.

D. That the partnership did issue a wage statement to Mr. Castellano and did withhold all the appropriate taxes and paid the appropriate insurances required by an employer. However, this alone would not show Mr. Castellano to be an employee since the manner of his payment was in the discretion of the partnership. Further, the fact that Mr. Castellano had no office, stationery or telephone listing, employed no assistants, and did not hold himself out to the public has little value in this instance since his activities for the partnership were not Mr. Castellano's primary or chief occupational activity.

E. That where an individual rendering personal services as an employee is also actively engaged in his own business, without a clear division of time, such services will be deemed to constitute part of an unincorporated business regularly carried on by the individual [20 NYCRR 203.10(d)].

F. That even if petitioner, Paul Castellano, was an employee of the partnership, his services would be deemed to constitute part of his unincorporated business within the meaning and intent of 20 NYCRR 203.10(d). There is no evidence showing a clear division of his time. There is evidence that Mr. Castellano generally purchased meat for the partnership at the same time he purchased meat for his business. Considering that the purchase of meat is a major factor in

the success of a retail meat market, and the record indicates that Mr. Castellano spent a significant amount of time on these decisions, the purchase of the meat would certainly be done for the partnership and his own business at the same time.

G. That petitioner, Paul Castellano's, salary was income attributable to his unincorporated business and subject to unincorporated business tax imposed by section 701 of the Tax Law.

H. That the petition of Paul Castellano is denied and the Notice of Deficiency dated January 22, 1981 is sustained.

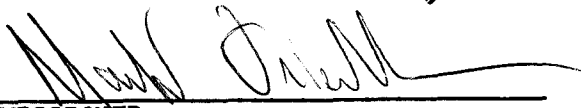
DATED: Albany, New York

STATE TAX COMMISSION

DEC 20 1983


PRESIDENT


COMMISSIONER


COMMISSIONER