

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert Dickinson :
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. :
_____ :

AFFIDAVIT OF MAILING

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 15th day of July, 1983, she served the within notice of Decision by certified mail upon Robert Dickinson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Dickinson
127 Sandpiper Key
Secaucus, NJ 07094

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
15th day of July, 1983.

Connie A. Hagelund

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert Dickinson :

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. :

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 15th day of July, 1983, she served the within notice of Decision by certified mail upon John C. Hart the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John C. Hart
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Ave.
New York, NY 10154

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
15th day of July, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

July 15, 1983

Robert Dickinson
127 Sandpiper Key
Secaucus, NJ 07094

Dear Mr. Dickinson:

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
John C. Hart
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Ave.
New York, NY 10154
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT DICKINSON	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1976	:	
and 1977.	:	

Petitioner, Robert Dickinson, 127 Sandpiper Key, Secaucus, New Jersey 07094, filed a petition for redeterminaion of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1976 and 1977 (File No. 33784).

On January 11, 1983, petitioner filed a waiver of formal hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing file with all briefs to be submitted by April 1, 1983. After due consideration, the State Tax Commission renders the following decision.

ISSUES

I. Whether petitioner carried on an unincorporated business in New York State during the years 1976 and 1977 within the meaning and intent of section 703(a) of the Tax Law.

II. Whether petitioner's unincorporated business income, if any, was allocable to sources within and without New York State.

FINDINGS OF FACT

1. In 1976 and 1977, petitioner, Robert Dickinson, and his wife, Dorothy, filed joint New York State income tax resident returns. In both of said years, petitioner listed business income. On a Federal Schedule C, Profit or (Loss)

From Business or Profession, attached to each of the returns, petitioner listed his business activity as sales promotion and marketing consultant under the business name of The Rockwood Company with a business address the same as petitioner's home address which during those years was in Plandome, New York. Petitioner filed no unincorporated business tax returns for either 1976 or 1977.

2. On January 9, 1981, the Audit Division issued a Notice of Deficiency against petitioner in the amount of \$7,129.87 plus interest of \$1,929.71 for a total due of \$9,059.58 for the years 1976 and 1977. A Statement of Audit Changes issued November 5, 1980 explained that the business activities indicated on petitioner's returns constituted the carrying on of an unincorporated business and all income derived therefrom was subject to unincorporated business tax. Additionally, petitioner's 1976 business income as reported was increased by \$15,962.00 to reflect changes resulting from a Federal audit of the 1976 return.

3. During the years in issue petitioner was a sales representative for the Lehigh Press, Inc. ("Lehigh"), a company located in Pennsauken, New Jersey. Petitioner represented Lehigh in sales of printed material, such as direct mail and newspaper inserts, coupons, leaflets and folders produced by Lehigh for use by Lehigh's customers primarily in marketing goods and services. Petitioner also represented other firms. Petitioner worked out of an office in his home as well as an office at Lehigh. While travelling, petitioner worked in offices provided by businesses he was working for or by businesses whose accounts he was working on.

4. By the terms of petitioner's agreement with Lehigh, petitioner was to work on certain accounts for Lehigh. Said accounts could be added to or dropped by agreement of both petitioner and Lehigh. On Lehigh accounts petitioner

could represent only Lehigh on products produced by Lehigh. For other accounts and other products, petitioner could represent other companies. Lehigh paid petitioner a commission for his work on the Lehigh accounts. Lehigh did not reimburse petitioner for any expenses incurred for work on Lehigh accounts. Lehigh did not withhold any Federal or State taxes for petitioner nor is there any indication that petitioner was included in any pension or insurance plan or received other fringe benefits provided by Lehigh.

5. No evidence was submitted, to indicate that Lehigh placed any restrictions or controls on petitioner's sales techniques, hours of work, amounts of travel or dates of travel. There is no indication that Lehigh required petitioner to be at Lehigh's offices during periods when petitioner was not travelling. No evidence was offered indicating whether petitioner used stationery with the Lehigh letterhead, however, it does indicate that petitioner used substantial amounts of his own stationery since he took a deduction of \$3,901.00 in 1976 and \$709.00 in 1977 for printing, stationery and postage.

6. Petitioner alternatively argued that, if he was found to be carrying on an unincorporated business in New York State, he should be allowed to allocate the income from such business to other states. Petitioner alleged that he spent some 60 percent of his working days at Lehigh's offices in New Jersey or Illinois during the years in issue. The figures petitioner submitted, however, were completely unsubstantiated by any business records either of Lehigh or petitioner. Petitioner did not indicate from what source he was able to compile said figures. Moreover, petitioner did not indicate whether he paid taxes to either of the aforementioned states on the income allegedly earned there.

7. Petitioner claimed that, in its answer to the petition, the Audit Division failed to deny an allegation made by petitioner that he was an employee of Lehigh and that under 20 NYCRR 601.6(a)(3) such allegation, since not expressly denied, must be deemed to be admitted. The Audit Division responded with a request for leave to amend the answer to include a denial of said allegation since the original failure to deny was the result of an obvious clerical oversight. However, in requesting leave to amend, the Audit Division referred by number to the wrong allegation, referring instead to a numbered allegation which it had previously denied. Petitioner responded by claiming that, since the Audit Division had still failed to deny the allegation of petitioner's employment by Lehigh, it must be deemed to be admitted.

CONCLUSIONS OF LAW

A. That unless a mistake or defect in a pleading prejudices a substantial right of a party, such mistake may be corrected upon such terms as may be just or such mistake may be disregarded (see CPLR 2001). While the Audit Division did fail to deny petitioner's allegation of employment by Lehigh, it is clear both from the intent of the answer, taken as a whole, and from the Audit Division's request for leave to amend its answer to deny said allegation that it was the Audit Division's intent to deny said allegation and that it was only through a clerical error that the correctly numbered allegation was omitted from the denial. Petitioner was completely aware of the thrust of the Audit Division's arguments and could show no prejudice by the aforesaid error being corrected. Therefore the allegation by petitioner that he was an employee of Lehigh is deemed to have been denied by the Audit Division's answer.

B. That section 701(a) of the Tax Law imposes a tax on the unincorporated business income of every unincorporated business wholly or partly carried on within New York State. However, section 703(b) provides that

"[t]he performance of services by an individual as an employee ... of a corporation ... shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual."

C. That "[i]t is the degree of control and direction exercised by the employer that is determinative of whether or not the taxpayer is an employee" (Greene v. Gallman, 39 A.D.2d 270, aff'd, 33 N.Y.2d 778). "In the absence of supervision and control of the sales routine, salesmen do not become employees" (Liberman v. Gallman, 41 N.Y.2d 774).

D. That, inasmuch as petitioner did not show that Lehigh regulated his sales techniques, hours of work, or amounts of travel and did not reimburse petitioner for his business and travel expenses, it cannot be said that Lehigh exercised the degree of direction and control over petitioner which would determine that petitioner was an employee of Lehigh. Moreover, Lehigh did not withhold taxes or provide petitioner with a pension plan, health insurance or any other indicia of employment and petitioner was free to represent other companies as he saw fit. Petitioner, therefore, carried on an unincorporated business within the meaning and intent of section 703(a) of the Tax Law and was subject to tax on the income therefrom.

E. That section 707(a) of the Tax Law provides:

"If an unincorporated business is carried on both within and without this state, as determined under regulations of the tax commission, there shall be allocated to this state a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions. If the unincorporated business has no regular place of business outside this state, all of such excess shall be allocated to this state."

F. That 20 NYCRR 207.2(a) provides:

"In general, an unincorporated business is carried on at any place either within or without New York State where the unincorporated business entity has a regular place of business. The occasional consummation of an isolated transaction in or at a place where no regular place of business is maintained does not constitute the carrying on of business at such place. A regular place of business is any bona fide office, factory, warehouse or other place which is systematically and regularly used by the unincorporated business entity in carrying on its business."


G. That even though petitioner may have travelled and performed duties in connection with his business outside of New York State and even though services were performed for or on behalf of principals located outside New York, those services were performed in offices provided and maintained by the individual principals and not petitioner. "Such being the case, it cannot rightly be said that petitioner had a regular place of business without the State..." (Giordano v. State Tax Commission, 52 A.D.2d 691, mot. for lv. to app. den., 40 N.Y.2d 803; Matter of Burgmeier, State Tax Commission, September 19, 1980). Therefore, no allocation is allowed under section 707(a) of the Tax Law.


H. That the petition of Robert Dickinson is denied and the Notice of Deficiency issued January 9, 1981 is sustained.

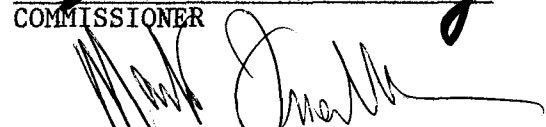
DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983


PRESIDENT


COMMISSIONER


COMMISSIONER