

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Joseph Ingerson	: : : : : :	: : : : : :
		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 Year 1973.		

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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Joseph Ingerson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Ingerson
299 Rock Beach Rd.
Rochester, NY 14617

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
20th day of May, 1983.

David Parchuck

James A. Haggan
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph Ingerson :
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 Year 1973. :

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 20th day of May, 1983, he served the within notice of Decision by certified mail upon John L. Bulger 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 L. Bulger
Van Voorhis & Van Voorhis
One Graves St.
Rochester, NY 14614

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
20th day of May, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 20, 1983

Joseph Ingerson
299 Rock Beach Rd.
Rochester, NY 14617

Dear Mr. Ingerson:

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 L. Bulger
Van Voorhis & Van Voorhis
One Graves St.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOSEPH INGERSON	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1973.	:	

Petitioner, Joseph Ingerson, 299 Rock Beach Road, Rochester, New York 14617, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1973 (File No. 26712).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on August 17, 1982 at 2:45 P.M. Petitioner appeared by Van Voorhis & Van Voorhis (John L. Bulger, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether petitioner's activities as a manufacturer's representative constituted the carrying on of an unincorporated business or whether he was an employee and thus exempt from unincorporated business tax.

II. Whether petitioner's failure to file an unincorporated business tax return on time and pay the tax when due was based on reasonable cause and not willful neglect, thereby permitting the penalties asserted pursuant to sections 685(a)(1) and (a)(2) of the Tax Law to be waived.

FINDINGS OF FACT

1. Petitioner herein, Joseph Ingerson, timely filed a 1973 New York State income tax return wherein he reported business income of \$25,632.17 derived from his activities as a manufacturer's representative. Petitioner did not file an unincorporated business tax return nor did he pay any unincorporated business tax for the year 1973.

2. On January 15, 1979, the Audit Division issued a Notice of Deficiency to petitioner for the year 1973, assessing additional tax due of \$1,284.63, plus penalty and interest of \$803.60, for a total due of \$2,088.23. Of the \$1,284.63 tax asserted due in the aforementioned notice, \$315.93 represented personal income tax and the balance, \$968.70, represented unincorporated business tax.

3. The above mentioned Notice of Deficiency was based on an explanatory Statement of Audit Changes dated June 4, 1976. Said statement held that the income earned from petitioner's activities as a manufacturer's representative was subject to unincorporated business tax and that penalties were imposed for failure to file an unincorporated business tax return and pay the tax when due. Petitioner concedes the accuracy of all adjustments pertaining to the assessment of additional personal income tax and, in fact, has paid the \$315.93 of personal income tax due. At the hearing held herein, both parties agreed that the \$315.93 of personal income tax asserted due in the Notice of Deficiency was not at issue. Accordingly, same will not be addressed hereinafter.

4. During the year in question and for some 27 years prior thereto, petitioner was a sales representative for Kaddis Manufacturing Corp. (hereinafter "Kaddis"). Petitioner worked solely for Kaddis on a full time basis; however, he was free to represent other organizations or businesses as long as he obtained

prior approval from Kaddis. Petitioner did not have a written contract with Kaddis.

5. Petitioner was paid by Kaddis on a straight commission basis and, for the year 1973, no federal, state or social security taxes were withheld from his commissions. For the 27 years prior to 1973, Kaddis did withhold federal, state and social security taxes from petitioner's commissions. The change in Kaddis' policy in 1973 concerning the withholding of taxes was not accompanied by any other change in the terms or conditions of petitioner's association with Kaddis.

6. Kaddis assigned a specific sales territory to petitioner and the boundaries of said territory were subject to change by Kaddis without petitioner's consent. Petitioner had no authority to set or alter the selling prices established by Kaddis or to extend credit. The orders which he submitted were subject to Kaddis' approval.

7. Petitioner was primarily "out on the road" selling Kaddis' products. He visited potential customers at Kaddis' direction and he also called upon customers on his own. Kaddis did on occasion prohibit petitioner from calling on and selling to certain accounts. The major portion of petitioner's sales leads were furnished by Kaddis.

8. During the year 1973 Kaddis was involved in the manufacture and sale of screw machine products for the automotive and electronic industries. For the most part Kaddis would manufacture its products to each customer's specifications. Kaddis would generally make a price quotation to its customers via a written form. Part of petitioner's duties for Kaddis involved following up on the price quotations. Petitioner would bring price quotations back to Kaddis for further work if the quotation was out of line with competition. Also,

petitioner would frequently call Kaddis when on the road seeking help and guidance from the sales people in the factory concerning pricing and delivery dates. When on the road, petitioner was required to report to Kaddis as to his whereabouts, either by phone or in writing, two to three times a week.

9. Kaddis furnished petitioner with sales brochures, all sales aids and business cards. The address and telephone number shown on the business card were that of Kaddis.

10. Petitioner was required to get permission from Kaddis for his vacation schedule. He received no compensation from Kaddis while on vacation. Petitioner was not entitled to any retirement benefits from Kaddis nor was he involved in any profit-sharing plan or health and medical benefit plan.

11. During the year 1973 petitioner worked out of an office he maintained in his personal residence. Petitioner did not have an office at Kaddis, nor did he receive reimbursement from Kaddis for the expenses incurred in maintaining his own office.

12. Petitioner reported commission income received from Kaddis on Federal Schedule C, Profit or (Loss) From Business or Profession. Net profit reported on Federal Schedule C was \$25,632.17. The record does not disclose the gross commissions received by petitioner from Kaddis or the nature and amount of expenses claimed against commission income. Petitioner was responsible for payment of all expenses he incurred in his sales activities without reimbursement from Kaddis.

13. In 1980 petitioner formed a corporation and conducted his sales activities with Kaddis through said corporate entity. The terms and conditions of petitioner's association with Kaddis were identical for both the period

prior to the creation of the corporation and the period after the corporation was formed.

14. Petitioner's personal income tax returns for the year at issue and for prior years were filed in a timely fashion. Petitioner relied on his accountant to prepare all necessary tax returns. Petitioner's accountant testified that it was his opinion that petitioner was an employee of Kaddis during the year 1973 and, as such, was not required to file an unincorporated business tax return for said year.

CONCLUSIONS OF LAW

A. That petitioner's activities as a manufacturer's representative during the year 1973 constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law. Accordingly, the income derived from said activities is deemed subject to the unincorporated business tax imposed pursuant to section 701 of the Tax Law. That although the record in this matter supports that some direction and control was exhibited by Kaddis over petitioner's activities, the degree of direction and control exercised was insufficient to classify petitioner as an employee within the meaning and intent of section 703(b) of the Tax Law.

B. That petitioner's failure to file an unincorporated business tax return for 1973 and pay the unincorporated business tax when due was based on reasonable cause and not willful neglect. Accordingly, the penalties assessed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are waived.

C. That the petition of Joseph Ingerson is granted to the extent indicated in Conclusion of Law "B", supra, and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 20 1983


PRESIDENT


COMMISSIONER


COMMISSIONER