

STATE OF NEW YORK

STATE TAX COMMISSION

|   |   |                      |
|---|---|----------------------|
| In the Matter of the Petition                     | : |                      |
| of  | : |                      |
| John S. Ruffino                                   | : |                      |
|   | : | 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 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 4th day of February, 1983, he served the within notice of Decision by certified mail upon John S. Ruffino, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John S. Ruffino  
45 Lisa Ct.  
Syosset, NY 11791

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  
4th day of February, 1983.

David Parchuck

Annie O. Highland

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
John S. Ruffino :  
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 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 4th day of February, 1983, he served the within notice of Decision by certified mail upon Lawrence L. Shapiro the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence L. Shapiro  
33 Roxton Rd.  
Plainview, NY 11803

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  
4th day of February, 1983.

David Parchuck

Annunzio G. Hagelland

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

February 4, 1983

John S. Ruffino  
45 Lisa Ct.  
Syosset, NY 11791

Dear Mr. Ruffino:

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) 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 Laws 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  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Lawrence L. Shapiro  
33 Roxton Rd.  
Plainview, NY 11803  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
JOHN S. RUFFINO  
for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Year 1976.

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DECISION

Petitioner, John S. Ruffino, 45 Lisa Court, Syosset, New York 11791, 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 1976 (File No. 31049).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 3, 1982 at 10:45 A.M. Petitioner John S. Ruffino appeared with Lawrence L. Shapiro, P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether services performed by petitioner as an employee were so interrelated and interconnected with his independent business activities as to cause the wage income earned as an employee to be subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, John S. Ruffino, timely filed a New York State Income Tax Resident Return for 1976 wherein he reported wage income of \$20,034.71 and business income of \$44,315.00. Petitioner also filed a 1976 New York State Unincorporated Business Tax Return reporting total unincorporated business income of \$44,315.00.

2. On June 13, 1980, the Audit Division issued a Notice of Deficiency to petitioner asserting that additional unincorporated business tax of \$1,101.90 was due together with interest. Said Notice of Deficiency was premised on a field audit where it was determined that reported wage income of \$20,034.71 was subject to unincorporated business tax since petitioner's activities as an employee were interrelated and interconnected with his independent business activities.

3. During the year 1976, petitioner was an employee of Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter Merrill Lynch) performing services for it as an assistant floor broker on the New York Commodities Exchange. At the hearing held herein, counsel for the Audit Division conceded that petitioner was a bona fide employee of Merrill Lynch. As a floor broker for Merrill Lynch, petitioner was primarily responsible for executing orders received by Merrill Lynch from its customers for the purchase or sale of cotton commodities or citrus commodities. Petitioner received a salary of \$20,034.71 from Merrill Lynch as compensation for personal services rendered. He did not receive a commission or any other form of remuneration from Merrill Lynch for executing its orders.

4. In 1976, petitioner also received net commission income of \$44,315.00 from numerous other brokerage houses for executing their orders on the commodities exchange. Petitioner did not actively solicit orders from outside brokerage houses and would execute outside orders only if he was not busy with Merrill Lynch business. If petitioner was too busy with Merrill Lynch business, he would turn down the order. Merrill Lynch was fully cognizant that petitioner was executing orders for other brokerage houses in his spare time.

5. The seat on the New York Commodities Exchange utilized by petitioner in executing orders for Merrill Lynch and for executing independent orders was paid for by Merrill Lynch. Merrill Lynch also paid for petitioner's membership dues to the Exchange. The services rendered by petitioner as an employee were done so on a full-time basis for one employer (Merrill Lynch) and said employment constituted his primary or chief occupational activity.

#### CONCLUSIONS OF LAW

A. That subdivision (b) of section 703 of the Tax Law provides in part, that:

"The 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."

In Matter of Naroff v. Tully, 55 A.D.2d 775, the court said:

"The clear purpose of the proviso in subdivision (b) is to prevent an individual entrepreneur from sheltering from the unincorporated business tax income which derives from the conduct of his unincorporated business in the form of salaries for services as an employee or officer of the corporate entities, in a situation where the corporate entities exist primarily to advance the business purposes of the unincorporated entity and do not have an independent and unrelated business purpose."

B. That 20 NYCRR 203.10(d) provides, in pertinent part, that:

"Personal services rendered by an individual as an employee... will ordinarily be deemed part of a business regularly carried on by such individual if such services are performed in furtherance of or for the direct benefit of other business activities or occupational activities the conduct of which constitutes an unincorporated business..."

C. That the services rendered by petitioner John S. Ruffino during the year 1976, as an employee of Merrill Lynch, were not so interrelated and interconnected with his unincorporated business activities as to constitute part of a business regularly carried on by him and, therefore, the salary received from said corporation is exempt from unincorporated business tax in

accordance with the meaning and intent of section 703(b) of the Tax Law and 20 NYCRR 203.10(d)(1).

D. That the petition of John S. Ruffino is granted and the Notice of Deficiency issued June 13, 1980 is hereby cancelled.

DATED: Albany, New York

FEB 04 1983

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER