

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dan L. Stone : 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 1972 - 1975. :

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 22nd day of April, 1983, he served the within notice of Decision by certified mail upon Dan L. Stone, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dan L. Stone
156 Surrey Run, P.O. Box 414
Williamsville, NY 14221

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
22nd day of April, 1983.

David Parchuck

James A. Haggard

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dan L. Stone : 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 1972 - 1975.

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 22nd day of April, 1983, he served the within notice of Decision by certified mail upon Morris Kissin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morris Kissin
5555 Main Street
Williamsville, NY 14221

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
22nd day of April, 1983.

David Parchuck

James P. Hagedorn
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 22, 1983

Dan L. Stone
156 Surrey Run, P.O. Box 414
Williamsville, NY 14221

Dear Mr. Stone:

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
Morris Kissin
5555 Main Street
Williamsville, NY 14221
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DAN L. STONE	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1972	:	
through 1975.	:	

Petitioner, Dan L. Stone, 156 Surrey Run, P.O. Box 414, Williamsville, New York 14221, 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 1972 through 1975 (File No. 29187).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on April 23, 1982 at 9:00 A.M. Petitioner appeared by Morris B. Kissin, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether salary income received by petitioner from a corporation of which he was president and 50 percent stockholder was for services which were so integrated and interrelated to activities carried on by petitioner relating to operation of an unincorporated business as to constitute income derived from or connected with the carrying on of the unincorporated business, thereby subjecting said salary income to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Dan L. Stone, filed New York State income tax resident returns for the years 1972 through 1975. Petitioner filed unincorporated business tax returns for 1974 and 1975 with respect to his unincorporated business, Dan L. Stone Associates ("Associates"), but did not include income reported as salary from Associated Valve Services, Inc. ("the corporation").

2. On January 30, 1978, the Audit Division issued a Statement of Audit Changes to petitioner proposing additional unincorporated business tax for the years 1971 through 1975 of \$6,952.40 plus interest of \$1,513.16 for a total due of \$8,465.56. The basis of the adjustment was that activities of the corporation and Associates were similar in nature and integrated in a manner that each complemented the other. Thus wages from the corporation were included in computing the unincorporated business tax of Associates. Petitioner paid the tax on October 31, 1979 to the Buffalo District Office.

3. Petitioner filed a claim for refund of the unincorporated business tax for each of the years 1972 through 1975 as follows: 1972, \$457.65; 1973, \$867.92; 1974, \$2,231.27; 1975, \$3,004.40 for a total of \$6,561.24 plus penalty and interest. On February 25, 1980, the Audit Division disallowed petitioner's claim in full.

4. Petitioner timely filed petitions for refund of unincorporated business tax with respect to each of the years 1972 through 1975 on the ground that the aforesaid salary income was received as an employee of the corporation and did not constitute receipt of income from an unincorporated business within the meaning of section 705 of the Tax Law.

5. During the years in issue, the corporation, of which petitioner was president and 50 percent stockholder, engaged in a valve rebuilding business.

The corporation rebuilt and repaired customers' valves. The customers retained title to the valves during the process, and no sales of a product were involved. Petitioner devoted approximately 85 to 90 percent of his time to working for the corporation.

6. During this same period, petitioner operated his unincorporated business, Associates, on a part-time basis. Associates bought and resold new and used valves. It also sold pipe, fittings, tanks and other allied industrial products. Associates was involved primarily in a manufacturer's representative or distributorship operation. There were no repair or rebuilding activities.

7. For one or two years during the period at issue, the corporation rented out space in its plant to Moody Equipment Sales, ("Moody Equipment") a business owned by the son of the other 50 percent stockholder of the corporation, Robert Moody. Moody Equipment bought junk valves, rebuilt them on its own lathe located on rented space in the corporation's plant and then resold them. Associates occasionally acted as Moody Equipment's sales representative until Moody built up enough business to move out on its own.

8. The address of the corporation and Associates was listed in the telephone directory as 330 East Niagara Street, Buffalo, New York. However, most of petitioner's work for Associates was done in an office at his home. Two separate phone numbers were listed. The corporation's phone rang at the corporation's office, and Associates' rang at petitioner's office at home. A third number, common to both the corporation and Associates, also appeared in both listings. Petitioner testified that this third number was listed for emergency late night repair calls to his home. Due to the nature of the business involved, the corporation and Associates shared some but not all of their customers.

9. The corporation and Associates, at all times, maintained separate books and bank accounts. There was no commingling of funds. The corporation withheld Federal and state income taxes and social security taxes from petitioner's wages.

CONCLUSIONS OF LAW

A. That section 703(b) of the Tax Law provides, in part, that the "performance of services by an individual as an employee or as an officer or director of a corporation...shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual."

B. That the purpose of the foregoing provision 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" (Naroff v. Tully, 55 AD2d 755, 756).

C. That Associated Valve Service, Inc. did not exist primarily to advance the business purposes of Dan L. Stone Associates. The two entities were not interrelated in such manner that the corporation had no independent and unrelated business purpose. Therefore, petitioner's services as an officer of the corporation did not constitute part of the business regularly carried on by Dan L. Stone Associates within the meaning and intent of section 703(b) of the Tax Law.

D. That the salary income received from the corporation was improperly included in computing unincorporated business tax for the years in issue.

E. That the petition of Dan L. Stone is granted to the extent of reducing unincorporated business tax due for the years 1972 through 1975 by the amount attributable to inclusion of wages from Associated Valve Services, Inc.; that the Audit Division is hereby directed to refund the appropriate amount; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 22 1983

Rodwick as Clu
PRESIDENT

Frank R. Koenig
COMMISSIONER

M. H. J. N.
COMMISSIONER