

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ralph & Florence Theroux :
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 1961 & 1962, 1968-1974. :
:

AFFIDAVIT OF MAILING

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 17th day of June, 1983, he served the within notice of Decision by certified mail upon Ralph & Florence Theroux, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ralph & Florence Theroux
671 Bauer Ct.
Elmont, NY 11003

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
17th day of June, 1983.

David Parchuck

Kathy Pfaffenbach

Ann O'Hagerty

RECEIVED BY DEPARTMENT OF TAXATION AND FINANCE
JUN 20 1983
STATE OF NEW YORK

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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 17th day of June, 1983, he served the within notice of Decision by certified mail upon J. Michael Brandt the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. Michael Brandt
501 Fifth Ave.
New York, NY 10017

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
17th day of June, 1983.

David Parchuck

Conita O. Haglund

Kathy Pfaffenbach

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

June 17, 1983

Ralph & Florence Theroux
671 Bauer Ct.
Elmont, NY 11003

Dear Mr. & Mrs. Theroux:

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
J. Michael Brandt
501 Fifth Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
RALPH THEROUX AND FLORENCE THEROUX	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1961,	:	
1962 and 1968 through 1974.	:	

Petitioners, Ralph Theroux and Florence Theroux, 671 Bauer Court, Elmont, New York 11003, 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 1961, 1962 and 1968 through 1974 (File No. 29327).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 27, 1981 at 9:15 A.M. and continued to a conclusion before Allen Caplowaith, Hearing Officer, at the same location on September 24, 1982 at 9:00 A.M. Petitioners appeared by J. Michael Brandt, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. and Paul B. Coburn, Esq. (Anna D. Colello, Esq., of counsel).

ISSUES

I. Whether all deficiencies herein asserted against petitioner Ralph Theroux are in violation of a certain stipulation entered into on October 18, 1978.

II. Whether petitioner Ralph Theroux's activities as a jockey agent constituted the carrying on of an unincorporated business.

III. Whether the notices of deficiency should be dismissed on the ground of laches.

IV. Whether the notices of deficiency are barred by the period of limitations on assessment.

FINDINGS OF FACT

1. Ralph Theroux (hereinafter petitioner) and his wife, Florence Theroux, filed New York State income tax resident returns for the years 1961, 1962 and 1968 through 1974. On each return petitioner reported "business income" derived from his activities as a "jockey agent". Petitioner did not file unincorporated business tax returns for any of said years at issue.

2. On January 26, 1965, the Audit Division issued a Statement of Audit Changes for the years 1961 and 1962 wherein an adjustment was made for personal income tax purposes for 1962 "to conform with the audit of your Federal income tax return". Additionally, said statement held that petitioner's "activities as a jockey's agent constitute the carrying on of an unincorporated business".

3. On February 8, 1965, petitioner requested that the Statement of Audit Changes be held in abeyance pending the final decision, in the Matter of the Applications of Alfred L. Stevens, State Tax Commission decision, August 24, 1959, which was before the Supreme Court of the State of New York for review pursuant to Article 78 of the Civil Practice Act.

4. On October 18, 1978, a stipulation was entered into in the New York Supreme Court, Appellate Division, Third Department in the Matter of the Applications of Alfred L. Stevens, for the years 1952 and 1953. Such stipulation, which was executed by petitioner's representative, Mr. J. Michael Brandt, and Assistant Attorney General, Mr. Joseph F. Gibbons, provided that:

"It is hereby stipulated, consented to and agreed by and between the respective parties that this proceeding in the nature of an application for certiorari be and the same hereby is discontinued, without prejudice, and an order to that effect may be entered by either party without notice to or consent of the other."

5. On January 16, 1979, the Audit Division issued a letter to petitioner's representative wherein it stated that:

"The Statement of Audit Changes which asserted personal income tax due for 1962 based on Federal audit adjustments and unincorporated business tax due for 1961 and 1962 on the income derived from the business activities of a jockey agent was being held in abeyance until a final decision was reached in connection with the case Alfred L. Stevens per your request in your letter of February 8, 1965.

The Alfred L. Stevens Article 78 case has been concluded and I would like to close your clients' case on the basis of the 1952 and 1953 determination of the State Tax Commission for Alfred L. Stevens.

Therefore, please let me know the amount of fees and commissions earned in New York State and the amount of fees and commissions earned outside of New York State for 1961 and 1962."

6. On July 18, 1979, the Audit Division issued a Notice of Deficiency against petitioners¹ for the years 1961 and 1962 based on the Statement of Audit Changes issued January 26, 1965. Such notice asserted personal income tax of \$67.05, unincorporated business tax of \$242.67, plus interest of \$302.06, for a total due of \$611.78.

7. Petitioners did not contest the deficiency asserted for personal income tax purposes. Accordingly, same is hereby deemed conceded by petitioners.

8. On July 24, 1979, the Audit Division issued two statements of audit changes to petitioner for the years 1968 through 1974 wherein it held that;

"The income from your activities as Jockey Agent is subject to the unincorporated business tax based on the State Tax Commission Decision and stipulation of discontinuance dated October 18, 1978.

Also, penalties are being imposed for failure to file and pay unincorporated business tax when due and for underestimation of tax."

¹ The Notice of Deficiency inadvertently listed petitioners as "Theroux & Florence". Failure to state petitioner's first name appears to be a typographic error and is herein regarded as such.

Accordingly, two notices of deficiency were issued against petitioner on December 31, 1979. One notice asserted unincorporated business tax of \$2,689.17 for the years 1968, 1969, 1970 and 1971, plus penalties and interest of \$2,816.43, for a total due of \$5,505.60. The other notice asserted unincorporated business tax of \$1,323.27 for the years 1972, 1973 and 1974, plus penalties and interest of \$1,313.43, for a total due of \$2,636.70.

9. Petitioner believes, and accordingly argued that the stipulation constituted an agreement between the parties that the jockey agent income of Alfred L. Stevens, in particular, and all jockey agents, in general, would be treated as exempt from the unincorporated business tax for 1952 and 1953, as well as all future years. The Audit Division's position is that the stipulation constituted a mutually agreeable decision not to go forward with the pending Article 78 proceeding based on a settlement made for the years 1952 and 1953 and that said stipulation is applicable only to 1952 and 1953 for Alfred L. Stevens exclusively.

10. Petitioner contended that the State Tax Commission is guilty of laches, has waived its rights and is estopped from proceeding against petitioner.

11. Petitioner contended that the deficiencies for all years are barred by the "Statute of Limitations".

12. Petitioner contended that his activities as a jockey agent were so engaged in as an employee of a jockey. Accordingly, he argued that the income derived from such activities is exempt from the imposition of unincorporated business tax.

13. Petitioner's services as a jockey agent consisted of obtaining mounts for jockeys.

14. Pursuant to the policy of the New York Racing Association, Inc., petitioner, as a jockey agent, was permitted to represent only one journeyman jockey and one apprentice jockey at any given time.

15. Petitioner's compensation represented a percentage of the earnings of the jockey.

16. Either the jockey or the jockey agent could terminate their relationship at any time.

17. Petitioner's services were rendered exclusively at the race track.

18. Petitioner contended that approximately one third of his income was derived from services rendered at out of town tracks; however no evidence was submitted to support such contention.

CONCLUSIONS OF LAW

A. That the stipulation entered into on October 18, 1978 dealt only with the affairs of Alfred L. Stevens for the years 1952 and 1953 and cannot be used in defense of petitioner Ralph Theroux.

B. That the determination whether services were performed by an individual as an "employee" or as an "independent agent" turns upon the unique facts and circumstances of each case.

"The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used.' (Matter of Morton, 284 N.Y. 167, 172). It is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee (e.g., Matter of Greene v. Gallman, 39 A.D.2d 270, 272, aff'd 33 N.Y.2d 778; Matter of Frishman v. New York State Tax Comm., 33 A.D.2d 1071, mot. for lv. to app. den. 27 N.Y.2d 483; Matter of Hardy v. Murphy, 29 A.D.2d 1038; see 20 NYCRR 203.10; cf. Matter of Sullivan Co., 289 N.Y. 110, 112)" Matter of Liberman v. Gallman, 41 N.Y.2d 774, 778.

C. That petitioner has failed to sustain his burden of proof, required pursuant to section 689(e), as incorporated into section 722 of the Tax Law, to show that the degree of direction and control exercised by the jockeys he represented over his activities was sufficient for the existence of a bona fide employer-employee relationship. Accordingly, petitioner's jockey agent activities did not constitute services rendered as an employee within the meaning and intent of section 703(b) of the Tax Law.

D. That petitioner's jockey agent activities constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701(a) of the Tax Law.

E. That laches, waiver or estoppel may not be imputed to the State in the absence of statutory authority. This rule is generally applied in connection with tax matters. (Matter of Jamestown Lodge 1681 Loyal Order of Moose, 31 A.D.2d 981). The record herein clearly shows that the delay was caused by petitioner. Accordingly, the remedy of laches claimed by petitioner is unfounded.

F. That section 683(a) of the Tax Law, which is incorporated into section 722 of the Tax Law, provides that:

"Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed."

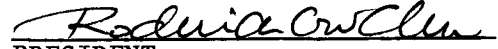
Accordingly, since no unincorporated business tax returns were filed by petitioner for the years at issue, the deficiencies herein asserted are not time barred.

G. That the petition of Ralph Theroux and Florence Theroux is denied and the notices of deficiency dated July 18, 1979 and December 31, 1979 are sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1983


PRESIDENT


COMMISSIONER


COMMISSIONER