

STATE TAX COMMISSION

Conrad Anderson  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
William Goldstein	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Years 1971 - 1976, 1978 & 1979.	:	

State of New York }  
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 5th day of October, 1984, he served the within notice of Decision by certified mail upon William Goldstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Goldstein  
1410 Blue Spruce Lane  
Wantagh, NY 11793

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
5th day of October, 1984.

David Parchuck

James A. Williams  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

October 5, 1984

William Goldstein  
1410 Blue Spruce Lane  
Wantagh, NY 11793

Dear Mr. Goldstein:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Sidney N. Solomon  
Eisenberg & Solomon  
3000 Marcus Avenue  
Lake Success, NY 11042  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
WILLIAM GOLDSTEIN	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1971,	:	
1972, 1973, 1974, 1975, 1976, 1978 and 1979.	:	

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Petitioner, William Goldstein, 1410 Blue Spruce Lane, Wantagh, New York 11793, 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 1971, 1972, 1973, 1974, 1975, 1976, 1978 and 1979 (File Nos. 40889 and 41741).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 15, 1984 at 10:45 A.M., with all briefs to be submitted by April 15, 1984. Petitioner appeared with Sidney N. Solomon, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irving Atkins, Esq., of counsel).

ISSUE

Whether petitioner's activities engaged in as a "traffic consultant" constituted the carrying on of an unincorporated business or were those of an employee and thus exempt from unincorporated business tax.

FINDINGS OF FACT

1. William Goldstein (hereinafter petitioner) filed New York State income tax resident returns for the years 1971, 1972, 1973, 1974, 1975, 1976, 1978 and 1979. (Taxable year 1977 is not at issue herein and accordingly will not be referred to). On each of said returns petitioner reported salary income derived

from his employment with Chicago Shippers Association, Inc., 1106 West 35th Street, Chicago, Illinois. Additionally, on each of said returns petitioner reported business income derived from his activities engaged in as a "traffic consultant". Petitioner did not file unincorporated business tax returns for any of the years at issue herein.

2. On June 21, 1982 the Audit Division issued two statements of audit changes to petitioner. One statement held the income derived from petitioner's activities as a traffic consultant subject to the unincorporated business tax for the years 1971 through 1974. The other statement held the income derived from said activities subject to the unincorporated business tax for the years 1975, 1976, 1978 and 1979. Accordingly, two notices of deficiency were issued against petitioner on December 9, 1982. One notice asserted unincorporated business tax of \$7,024.10 for the years 1971 through 1974, plus penalty of \$446.96 and interest of \$5,238.91, for a total due of \$12,709.97. The other notice asserted unincorporated business tax of \$5,553.21 for the years 1975, 1976, 1978 and 1979, plus penalty of \$390.53 and interest of \$2,738.64 for a total due of \$8,682.38. Said penalties were asserted pursuant to section 685(c) of Article 22 of the Tax Law, as incorporated into Article 23 by section 722, for failure to file a declaration of estimated unincorporated business tax for each of the years at issue.

3. During the years at issue herein petitioner was employed full time as the senior executive of Chicago Shippers Association, Inc., a freight consolidation company. His services as an employee were rendered at the company's Jersey City, New Jersey office. Unincorporated business tax was not asserted on the income which petitioner derived from such employment.

4. Petitioner contended that the income derived from his activities engaged in during each of the years at issue as a traffic consultant is exempt from the imposition of unincorporated business tax on the basis that such activities constituted services rendered as an employee.

5. Petitioner's traffic consultant activities consisted of reviewing freight bills for tariff and other overcharges by the various carrier railroads. When such overcharges were discovered, petitioner brought them to the attention of his principal. The principal then decided whether a claim for refund should be filed with the carrier. If such claim was to be filed, petitioner prepared the necessary documents.

6. From January, 1971 to May, 1972, petitioner was engaged in the aforestated traffic consultant activities for two principals: Universal Carloading & Distributing Co., and Terminal Freight Cooperative Association. From June, 1972 through December, 1979, petitioner rendered said services solely for Terminal Freight Cooperative Association ("Terminal"). A breakdown of the income derived from petitioner's two principals in 1971 and 1972 was not provided.

7. The hearing record is devoid of information concerning petitioner's relationship with Universal Carloading & Distributing Co. His claim of employee status was made during the hearing.

8. Petitioner's traffic consultant activities were carried on at his personal residence during evenings and weekends. Terminal, which was located in Chicago, Illinois, did not require petitioner to work stated hours or report on a regular basis.

9. Petitioner's compensation from Terminal consisted of a percentage of the amounts recovered by Terminal from the railroads, resulting from the overcharges discovered and claims filed by him. Income taxes were not withheld from such compensation.

10. Petitioner received no fringe benefits from Terminal. Business expenses incurred by petitioner with respect to his activities for Terminal were not reimbursed.

11. The hearing record includes federal schedules C filed by petitioner for the years 1976, 1978 and 1979. On each Schedule C petitioner reported the income and deductions attributable to his activities engaged in on behalf of Terminal. His business name, as reported on each Schedule C, was "Gold Medal Audits" and his employer identification number was 11-6207190.

12. On each Schedule C petitioner reported substantial deductions for automobile and travel and entertainment expenses. He contended that the automobile expenses were incurred during trips made to New York City to pick up the freight bills that Terminal sent him. The travel and entertainment expenses he contended were incurred during four to six trips made to Terminal in Chicago each year for business meetings.

#### CONCLUSIONS OF LAW

A. That it is the degree of control and direction exercised by the employer which determines whether the taxpayer is an employee or an independent contractor subject to the unincorporated business tax. Lieberman v. Gallman, 41 N.Y.2d 774. Furthermore, "[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case". 20 NYCRR 203.10(c).

B. That the degree of control and direction exercised by Terminal over petitioner's day-to-day activities engaged in on its behalf was insufficient for the existence of a relationship of employer-employee. Furthermore, since the record is devoid of information with respect to his relationship with Universal Carloading and Distributing Co. during 1971 and 1972, it must be held that his traffic consultant activities for the entire period at issue did not constitute services rendered as an employee within the meaning and intent of section 703(b) of the Tax Law.

C. That petitioner's traffic consultant 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.

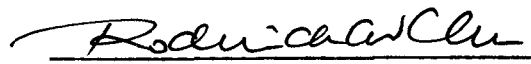
D. That the penalty asserted for tax year 1971, pursuant to section 685(c) of the Tax Law, for failure to file a declaration of estimated tax, is cancelled since said penalty was applicable for taxable years beginning after December 31, 1971.

E. That the petition of William Goldstein is granted to the extent shown in Conclusion of Law "D" supra; and that, except as so granted, his petition is in all other respects denied.

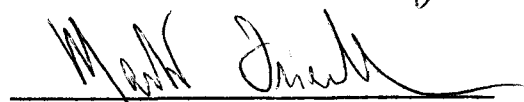
DATED: Albany, New York

OCT 05 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER