

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gustave & Nadine Linell :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1974 - 1976. :
:

AFFIDAVIT OF MAILING

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 Bruce Van Genderen, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bruce Van Genderen
7 W. Main St.
Broadalbin, NY 12025

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 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
5th day of October, 1984.

David Parchuck

James A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

Conrad P. Schaefer
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Gustave & Nadine Linell
RD #1
Broadalbin, NY 12025

Dear Mr. & Mrs. Linell:

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
Bruce Van Genderen
7 W. Main St.
Broadalbin, NY 12025
AND
John T. Wilkinson
27 N. Main St.
Broadalbin, NY 12025
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
GUSTAVE AND NADINE LINELL	:	DECISION
	:	
for Redetermination of Deficiencies or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1974,	:	
1975 and 1976.	:	

Petitioners, Gustave and Nadine Linell, RD #1, Broadalbin, New York 12025, filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1974, 1975 and 1976 (File Nos. 33308 and 35096).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on March 16, 1984 at 9:15 A.M., with all briefs to be submitted by April 16, 1984. Petitioners appeared by Joseph T. Wilkinson, Esq. and Bruce Van Genderen, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether income petitioner Gustave Linell received from Carver Boat Corporation was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Gustave and Nadine Linell, filed resident personal income tax returns for 1974, 1975 and 1976. Each of these returns identified Gustave Linell's occupation as "Mfr. Rep. and Salesman". Attached to each of the

aforementioned returns was an unincorporated business tax return which reported all of Gustave Linell's income for unincorporated business tax purposes.

2. For each of the years in issue, petitioners filed a claim for refund of the unincorporated business tax. The claims indicated that Mr. Linell was engaged as a sales representative exclusively for the Carver Boat Corporation ("Carver") and that he was exempt from the unincorporated business tax. The Audit Division denied the claim for 1974 on April 30, 1979 and the claims for 1975 and 1976 on June 29, 1981. Petitioners timely filed petitions for refund of the tax paid.

3. Petitioner Gustave Linell has been associated with Carver from 1970 to the present time. During the years at issue, he did not have a written contract, but rather followed verbal instructions. His compensation was based on a percentage of sales and this percentage was adjusted periodically.

4. Mr. Linell's activities consisted principally of selling boats to boat dealers. His territory was limited to the northeastern United States. In addition to making sales to dealers, he was required to attend approximately 15 boat shows per year in his territory, as well as trade shows in Chicago and dealer meetings at Carver offices in Pulaski, Wisconsin.

5. During the period at issue, Mr. Linell was in contact with Carver's sales manager by telephone two or three times per week and filed monthly sales reports. He received no direction as to sales techniques, had no fixed hours and generally was not directed how to arrange his schedule.

6. Carver did not withhold any taxes from Mr. Linell's commissions. However, Mr. Linell was covered under a group medical and dental insurance program maintained by Carver. Mr. Linell was not reimbursed for the majority of expenses he incurred.

7. For each of the years at issue, petitioner Gustave Linell paid a self-employment tax on his net profit from business as shown on Federal schedule C.

8. During the period in question, Mr. Linell worked exclusively for Carver. While there is nothing in the record which indicates that Mr. Linell could not represent other manufacturers, he testified that Carver would have changed his commission rate had he tried to do so.

CONCLUSIONS OF LAW

A. That the degree of direction and control which Carver Boat Corporation exercised over the activities of petitioner Gustave Linell was insufficient to demonstrate that an employer-employee relationship existed within the meaning and intent of section 703(b) of the Tax Law.

B. That Gustave Linell's activities during the years at issue constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law and the income derived from his activities is subject to the unincorporated business tax.

C. That the petitions of Gustave and Nadine Linell are denied and the refund denials dated April 30, 1979 and June 29, 1981 are sustained.

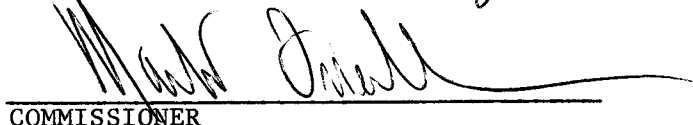
DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


PRESIDENT


COMMISSIONER


COMMISSIONER