

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Allen C. Miller, Sr. : AFFIDAVIT OF MAILING
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. :

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

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Allen C. Miller, Sr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Allen C. Miller, Sr.
Old Barrington Rd.
Hollowville, NY 12530

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
18th day of January, 1984.

David Parchuck

James A. Hagedorn
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

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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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Allen C. Miller, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Allen C. Miller
542 Warren St.
Hudson, NY 12534

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
18th day of January, 1984.

David Parchuck

William A. Haggard
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Allen C. Miller, Sr.
Old Barrington Rd.
Hollowville, NY 12530

Dear Mr. Miller:

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
Allen C. Miller
542 Warren St.
Hudson, NY 12534
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ALLEN C. MILLER, SR.	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1974	:	
through 1976.	:	

Petitioner, Allen C. Miller, Sr., Old Barrington Road, Hollowville, New York 12530, 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 1974 through 1976 (File No. 29516).

A small claims hearing was held before Charles Reynolds, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on July 27, 1983 at 1:15 P.M. Petitioner appeared by Allen C. Miller, Jr., Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner maintained a regular place of business outside New York State thus entitling him to allocate his business income.

FINDINGS OF FACT

1. On September 14, 1978, the Audit Division issued a Statement of Audit Changes to petitioner on the grounds that farm losses claimed by petitioner were not allowable since petitioner's wife was the owner of the farm and because income derived from his activities as a sales representative was held subject to unincorporated business tax. An allowance was made due to overpayment

of penalty under section 685(c) of the Tax Law. Said statement proposed personal income tax, minimum income tax and unincorporated business tax due of \$4,249.80, credit due to overpayment of penalty, pursuant to section 685(c) of the Tax Law, and interest for a net due of \$5,014.09. On December 1, 1978, a revised Statement of Audit Changes was issued to petitioner proposing unincorporated business tax due of \$2,742.03,¹ credit due to overpayment of penalty, and interest for a total due of \$3,294.15. The decrease in tax was due, in part, to the allowance of farm losses for each of the years 1974 through 1976. Accordingly, a Notice of Deficiency was issued on April 10, 1979, asserting tax due of \$2,662.92, credit due to overpayment of penalty, and interest for a balance due of \$3,374.15. The discrepancy between the tax shown due on the Notice of Deficiency and the tax shown due on the revised Statement of Audit Changes appears to be the credit due to overpayment of the 685(c) penalty for 1975 and 1976 of \$79.11.

2. For the years in issue, Allen C. Miller, Sr. (hereinafter "petitioner") was an outside salesman for Lee Lime Corporation ("Lee") which was located in Lee, Massachusetts. He also worked for other principals selling non-competing lines to the same customers he serviced for Lee who permitted him to do this because of expenses he incurred on their behalf which were not reimbursed. Petitioner sold lawn and garden products and other products on behalf of his principals.

3. Petitioner was paid on a commission basis by his principals. He asserted that he worked for Lee approximately eighty percent of the time and

¹ The record is void as to the omission of personal income tax and minimum income tax from the revised Statement of Audit Changes and the Notice of Deficiency.

that sixty percent of his income from said firm was derived from sales efforts conducted without New York State.

4. Petitioner submitted a schedule showing total gross sales income was derived from the following companies during the years in issue:

<u>Company</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>
Mason Mix	--	--	\$ 2,152.60
Jova Birch	\$ 5,613.59	\$ 3,319.60	3,271.51
Nassav Birch	755.00	858.75	368.50
Pfizer, Inc.	1,225.44	3,824.68	1,811.75
Scratch Pad	67.55	--	67.75
P & M Birch	3,647.14	2,288.99	4,868.21
Contech	3,889.53	4,245.63	--
Prosoco	--	846.49	1,507.87
Other	1,156.42	--	2,755.59
Lee Lime	33,633.29	33,436.05	32,717.60
Total	<u>\$49,987.96</u>	<u>\$48,820.19</u>	<u>\$53,798.33</u> ²
Lee's % of Total	67.3%	68.4%	60.1%

Petitioner applied the above percentages to total income (net income from business less farm losses as shown on the Statement of Audit Changes dated December 1, 1978) for each year to arrive at the net income from Lee:

Net Income	\$25,732.00	\$24,464.00	\$29,552.00
Lee's % of Total	67.3	68.4	60.1
Net Income from Lee	<u>\$17,317.63</u>	<u>\$16,733.37</u>	<u>\$17,760.75</u>

The net income from Lee was then multiplied by the following percentages in order to determine Lee sales attributable to Connecticut and New Jersey:

Net Income from Lee	\$17,317.63	\$16,733.37	\$17,760.75
Allocation Percentages for Connecticut & New Jersey	<u>41.8</u>	<u>44.4</u>	<u>44.0</u>
Sales attributable to Connecticut & New Jersey	\$ 7,238.51	\$ 7,429.61	\$ 7,814.73

The out-of-state percentages computed by petitioner were based on tonnage of materials for 1974 on a weighted average for the period January through September

² The amounts shown in the 1976 column add up to \$49,521.38. The difference of \$4,276.95 could not be found in the schedules submitted by petitioner and it can only be assumed that said amount was erroneously omitted.

of 1973 and October through December of 1974. The percentage for 1975 was also based on tonnage of materials and was for the nine month period January to September of 1975. For 1976, the percentage was computed by taking an average of the tonnage of material for the periods October, 1974 to September, 1975 and May, 1978 to April, 1979. Petitioner asserted that the amounts for 1976 were not available and that years 1978 and 1979 were substituted since his income and activities for said years were similar to 1976.

5. Petitioner was assigned specific territories covering Putnam, Rockland, Westchester, Long Island, New York City, Connecticut and certain counties in northern New Jersey. He sold the entire line of Lee products in each of these territories.

6. Petitioner's functions included soliciting accounts in his areas, performing developmental activities, calling on architects and contractors to develop uses for products, reviewing sales reports, credit and collection activities, sales promotion and preparing specifications.

7. Petitioner serviced approximately 300 to 400 accounts, most of which were located in major metropolitan areas.

8. Petitioner was at the Lee office in Massachusetts once a week. While there, he had meetings with the president and vice president. The discussions involved condition of accounts, sales strategy, construction applications, trade show preparation and collection of past-due accounts.

9. Petitioner would often pick up samples provided by Lee and travel to specific areas using his own car. He would either phone in orders from his client's place of business or he would fill them out at the Lee plant when he was there in person. This represented a very small percentage of the total orders obtained by petitioner. Petitioner's account was credited whenever a

customer in his territory would either phone in or write in an order to the Lee office. Approximately seventy-five percent of all written orders came directly from customers.

10. When petitioner was at the office of Lee he was provided with a desk, which was also used by other Lee salesmen, and a company secretary who was employed by Lee. Petitioner maintained a file in the office in which he kept some correspondence and sales orders.

11. Petitioner made phone calls at the Lee office setting up some of his appointments with customers. The vice president would call him at home to tell him where to go the next day, what accounts to call on and the territory to be visited. The vice president would frequently accompany him on such trips.

12. Several times a year, petitioner would meet with customers at the Lee plant. Petitioner's clients did not call him at his residence nor did they visit him there.

13. Petitioner asserted that he did not maintain an office in New Jersey or in Connecticut.

14. Petitioner concedes that he is liable for the unincorporated business tax but asserts that he is entitled to allocate his net business income to sources within and without New York since he maintained a regular place of business outside this state at the Lee plant in Massachusetts within the meaning of section 707 of the Tax Law.

CONCLUSIONS OF LAW

A. That 20 NYCRR 207.2(a) provides:

"In general, an unincorporated business is carried on at any place either within or without New York State where the unincorporated business entity has a regular place of business... A regular place of business is any bona fide office, factory warehouse or other place which is systematically and regularly used by the unincorporated business entity in carrying on its business...

(b)...An unincorporated business entity does not have a regular place of business outside this State merely because sales may be made to, or services performed for or on behalf of, persons or corporations located without the State...".

B. That petitioner did not maintain a regular place of business outside New York State where his business affairs were systematically and regularly carried on within the meaning and intent of section 707(a) of the Tax Law (Matter of Giordano v. State Tax Commission, 52 A.D.2d 691, Mot for lv to app den 40 N.Y.2d 803; Petition of Allen Bindler and Kathleen Bindler, State Tax Commission, January 17, 1973).


C. That the petition of Allen C. Miller, Sr. is denied and the Notice of Deficiency issued on April 10, 1979 is sustained, together with such additional interest which may be lawfully owing.



DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER

 
COMMISSIONER