

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Michael & Marie Asselta

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated
Business Tax under Article(s) 23 of the Tax Law :
for the Years 1976 - 1980.

:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 9th day of January, 1987, he/she served the within notice of Decision by certified mail upon Michael & Marie Asselta the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael & Marie Asselta
91-12 217 Street
Queens Village, New York 11428

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
9th day of January, 1987.

Janet M. Snay

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Michael & Marie Asselta :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
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Business Tax under Article(s) 23 of the Tax Law :
for the Years 1976 - 1980.
_____ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 9th day of January, 1987, he served the within notice of Decision by certified mail upon Stephen L. Popp, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen L. Popp
132 Nassau St.
New York, NY 10038

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
9th day of January, 1987.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

January 9, 1987

Michael & Marie Asselta
91-12 217 Street
Queens Village, New York 11428

Dear Mr. & Mrs. Asselta:

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, 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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Stephen L. Popp
132 Nassau St.
New York, NY 10038

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

MICHAEL and MARIE ASSELTA : DECISION

for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Years 1976 :
through 1980.

Petitioners, Michael and Marie Asselta, 91-12 217th Street, Queens Village, New York 11428, 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 1976 through 1980 (File No. 57823).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on July 17, 1986 at 11:00 A.M. Petitioners appeared by Stephen L. Popp, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the petition was timely filed.

II. If so, whether the income from petitioner Michael Asselta's activities as an agent for Mutual of Omaha are subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Michael and Marie Asselta, timely filed joint New York State resident income tax returns for the years 1976 through 1980. Petitioner Michael Asselta did not file unincorporated business tax returns for said years.

2. On December 2, 1977 the Audit Division issued a Statement of Audit Changes to petitioners for the year 1975, disallowing \$2,910.97 in deductions for business expenses, interest, and medical expenses and asserting \$255.65 in additional income tax, \$616.17 in unincorporated business tax, and \$200.26 in penalty, plus interest. On December 7, 1977, petitioners consented to pay the proposed deficiency.

3. On October 5, 1983 the Audit Division issued a Notice of Deficiency to petitioners for unincorporated business tax, claiming a deficiency of \$5,766.00 in tax and \$3,277.25 in penalty, plus interest, for the years 1976 through 1979. On the same date, the Audit Division issued a second Notice of Deficiency for unincorporated business tax against petitioners for the year 1980 in the amount of \$1,158.64 in tax, a penalty of \$534.83, plus interest.

4. The Audit Division had computed the deficiencies by holding petitioner Michael Asselta's income from his activities as an insurance sales agent subject to unincorporated business tax.

5. On November 14, 1984 the Tax Appeals Bureau received a letter dated November 7, 1984 from petitioners, protesting the October 5, 1983 notices of deficiency. Petitioners explained in their letter that they "were unaware that these assessments had been issued since this case was being held by Mr. Thomas Joyce CPA.... Mr. Joyce has since become ill and he did not reply to these assessments within the 90 day period."

6. Petitioner Michael Asselta (hereinafter referred to as "petitioner") has been a selling agent for Mutual of Omaha since 1970. When he was hired he was required to complete a training program and was subject to supervision by unit managers.

7. During the years at issue, petitioner worked (and in fact still works) out of the James J. Juergens Division Office of Mutual of Omaha. This office is located in Jericho, New York.

8. Petitioner arranges his own schedules for meetings with clients in their homes and offices. He is required however, to be in the Division Office three times per week. He must also call in each day that he is in the field.

9. Petitioner is provided with sales leads by the Division Office once a week. He must attempt to contact each lead within one week and report what was done with each lead. He receives no sales leads from any other insurance carrier.

10. Petitioner may solicit policies only for Mutual of Omaha. All policy applications must be submitted to Mutual of Omaha for approval of the underwriters at its home office.

11. The Division Office provides and pays for office space, telephone and secretarial assistance, stationery and other supplies.

12. Petitioner must pay his own travel expenses which are not reimbursed by Mutual of Omaha.

13. Petitioner is paid on a commission only basis. No taxes are withheld from his commissions and he receives a Federal form 1099. He pays his own social security taxes.

14. Petitioner does not receive sick pay or vacation pay. He is, however, covered by group insurance, disability insurance and health insurance by the Division Office.

15. Mutual of Omaha offers a deferred compensation plan in which it provides matching funds. Petitioner is a participant in such plan.

16. Petitioner is eligible for trips to conventions offered by Mutual of Omaha when he sells a certain amount of insurance.

17. Petitioner has a career contract with Mutual of Omaha, however, only the first page thereof is in the record. This page contains a provision that, if requested, petitioner is to supply an independent contractor's bond to guarantee his performance. No such bond was ever requested. Petitioner testified that his circumstances were similar to those of another Mutual of Omaha employee, Edgar J. Miller. In the Matter of the Petition of Edgar J. Miller, State Tax Commission, May 25, 1984, although the contract provided that it was not to be construed to create an employee/employer relationship, the petition was granted and the deficiency of unincorporated business tax was cancelled.

CONCLUSIONS OF LAW


A. That since the petition was not filed within ninety days after the mailing of the notices of deficiency, it was not timely (Tax Law § 681[b]). Accordingly, the State Tax Commission lacks the jurisdiction to consider Issue II herein. It appears, however, that petitioner may pay the deficiencies and file a petition for refund under section 689(c)(2) of the Tax Law.

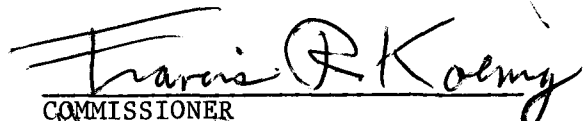
B. That the petition of Michael and Marie Asselta is denied and the notices of deficiency are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER