

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Kurt & Alice Walter :

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 1974 - 1980.
:

State of New York :

ss.:

County of Albany :

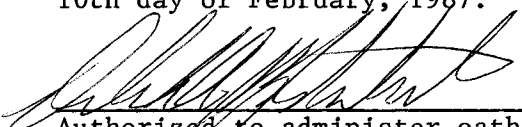
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 10th day of February, 1987, he/she served the within notice of Decision by certified mail upon Kurt & Alice Walter the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

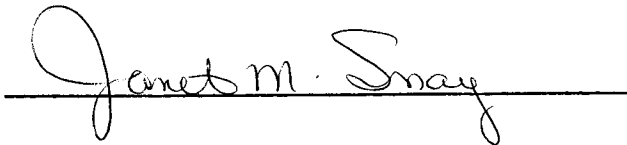
Kurt & Alice Walter
4702 Banyan Lane
Tamarac, FL 33319

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
10th day of February, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

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of
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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 10th day of February, 1987, he served the within notice of Decision by certified mail upon James H. Tully, Jr., the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

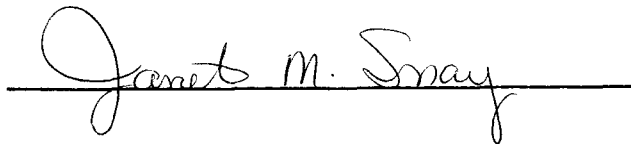
James H. Tully, Jr.
DeGraff, Foy, Conway, Holt-Harris & Mealey
90 State St.
Albany, NY 12207

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
10th day of February, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

February 10, 1987

Kurt & Alice Walter
4702 Banyan Lane
Tamarac, FL 33319

Dear Mr. & Mrs. Walter:

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:
James H. Tully, Jr.
DeGraff, Foy, Conway, Holt-Harris & Mealey
90 State St.
Albany, NY 12207

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
KURT WALTER AND ALICE WALTER	:	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 1980.	:	

Petitioners, Kurt Walter and Alice Walter, 4702 Banyan Lane, Tamarac, Florida 33319, 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 1980 (File No. 49769).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W.A. Harriman State Office Building Campus, Albany, New York on April 1, 1986 at 9:15 a.m. with all briefs to be submitted by June 10, 1986. Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris and Mealey (James H. Tully, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division properly considered certain items of income as subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Kurt Walter and Alice Walter, filed New York State personal income tax returns for the years 1974 through 1980. They did not file New York State unincorporated business tax returns during the years in issue.
2. On April 13, 1984 the Audit Division issued a Notice of Deficiency to petitioners, Kurt and Alice Walter, asserting a deficiency of unincorporated

business tax for the years 1974 through 1977 in the amount of \$87,524.64 plus penalty of \$49,918.25 and interest of \$64,406.62 for a total amount due of \$201,849.51. On the same date, the Audit Division issued a second Notice of Deficiency to petitioners asserting a deficiency of unincorporated business tax for the years 1978 through 1980 in the amount of \$11,708.93 plus penalty of \$5,736.26 and interest of \$5,186.45 for a total amount due of \$22,631.64. The notices of deficiency were premised upon the Audit Division's position that the income petitioners received from various sources was subject to unincorporated business tax. The specific items of income and the respective years involved are as follows:

	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>
St. Martin Construction Fee				\$ 2,500			
Gotham Seaview Fees	\$188,620	\$406,430	\$587,230	371,564		\$65,618	
Consulting Fees - Hirsch Electric				54,851	\$34,847	48,746	\$12,325
Telephone Installation & Maintenance - Alleged Salary							17,300
Progressive Electric Contracting Co.			20,162		13,310		
Progressive Equities - Alleged Salary						57,604	43,188
Additional U.B.T. Income Asserted	\$188,620	\$406,430	\$607,392	\$428,915	\$48,157	\$171,869	\$72,813

3. The penalties were asserted pursuant to Tax Law §685(a)(1) for failure to file a tax return, Tax Law §685(a)(2) for failure to pay the amounts shown as tax on a return required to be filed, Tax Law §685(b) for negligence and, except for 1980, Tax Law §685(c) for failure to file a declaration of estimated tax or failure to pay all or part of an installment of estimated tax.

4. Prior to the years in issue, Mr. Walter possessed an option to purchase a parcel of land in Rockaway, New York. Mr. Walter conceived the idea of providing the land to the City of New York for a housing project pursuant to the Mitchell Lama Law (New York Public Housing Law §44 et seq.). He then took action to secure the necessary approvals for the housing project.

5. On June 1, 1973, a limited partnership known as Seaview Towers Associates was formed by parties unrelated to this proceeding for, among other purposes, constructing and managing a rental housing project.

6. On June 19, 1973, Mr. Walter, Gotham Construction No. II, Inc. and others sold the land and rights to construct the housing project to Seaview Towers Associates. Mr. Walter was designated as a general contractor in this agreement. It was also agreed on June 19, 1973, that Mr. Walter would, under certain circumstances, have the option to receive a percentage interest in Seaview Towers Associates. On or about December 17, 1973, Mr. Walter exercised the option and became a limited partner of Seaview Tower Associates.

7. Although the agreement of June 19, 1973 described Mr. Walter as a general contractor, Mr. Walter did not, in fact, serve as a general contractor or perform any function other than transferring his property. Rather, he was listed as a contractor in order to be paid a fee for the creation of the deal to construct the housing project. The contracts were structured in this manner because of Mr. Walter's belief that the Mitchell Lama Law precluded him from making a profit on the transfer of an interest in real estate. On the basis of the foregoing, Mr. Walter asserts that the Gotham Seaview construction fees were not subject to unincorporated business tax since it involved the transfer of property for his own account.

8. Mr. Walter never received any money from Seaview Towers Associates.

9. Since the 1940's, Mr. Walter was engaged in an enterprise known as Progressive Electric Construction Company ("Old Progressive"). In 1976, Mr. Walter sold his business.

10. On January 17, 1976, Hirsch Electric Inc. ("Hirsch Electric"), Old Progressive and Mr. Kurt Walter entered into an agreement. Pursuant to this agreement, Hirsch Electric formed a corporation known as "Progressive Electric Contracting Corp. ("New Progressive") and Old Progressive changed its name to Progressive Equities Corp. ("Progressive Equities").

11. On February 3, 1976, Old Progressive, New Progressive and Hirsch Electric entered into a contract whereby New Progressive would complete the contracts which had been entered into by Old Progressive. For a period of a few months, Mr. Walter assisted in the completion of contracts for customers of Old Progressive.

12. At or about the same time the foregoing contract was executed, Mr. Walter entered into a contract with New Progressive and Hirsch Electric to become a consultant with respect to work performed for customers who had previously been customers of Old Progressive. As compensation, Mr. Walter was to receive a certain percentage of annual gross receipts arising from the work which it was expected New Progressive would perform for Old Progressive's former clients. This agreement further provided that Mr. Walter would continue to be paid if he became disabled, and, if he died, his estate would be paid. In addition, Mr. Walter agreed not to engage in any business of the type offered by New Progressive.

13. Mr. Walter never performed any consulting activities for New Progressive. Nevertheless, Hirsch Electric and New Progressive paid the agreed consulting fees.

14. The balance of the assets directly related to the business activities of Old Progressive were sold at an auction.

15. Progressive Equities became an investment company which owned stocks, bonds, an apartment building and investments in partnership with other enterprises. Mr. Walter managed the apartment building.

16. In 1979 and 1980, Progressive Equities paid Mr. Walter, respectively, \$57,603.77 and \$43,187.67. Mr. Walter received wage and tax statements from Progressive Equity for the years 1979 and 1980 which disclosed that Social Security, New York State and Federal taxes were withheld from the payments which Walter received from Progressive Equity. Mr. Walter, in turn, reported the payments from Progressive Equity as salary on his New York State Income Tax Return for the years 1979 and 1980.

17. In the mid 1970's, Mr. Walter and another individual formed a company known as Telephone Installation and Maintenance to perform telephone installation and maintenance work. Thereafter, Mr. Walter sold his stock in the company to his remaining associates. Mr. Walter asserted that, at this time, he was due a salary. In 1980, when the owners of the company sold their stock to another party, petitioner received the alleged salary which was due him.

18. Mr. Walter's New York State Personal Income Tax Return for the year 1980 did not report any wages from Telephone Installation and Maintenance. Moreover, the return for the year 1980 did not disclose a wage and tax statement from Telephone Installation and Maintenance which would have shown whether social security, New York State or Federal taxes were withheld.

19. Petitioners asserted that the \$2,500.00 received in 1977 represented payment for an old debt based on services rendered years before. However, petitioner did not present any evidence with respect to this assertion.

CONCLUSIONS OF LAW

A. That Tax Law §703(a) defines an unincorporated business, in part, as "any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity".

B. That Tax Law §703(d) provides that:

"(d) Purchase and sale for own account. - An individual or other unincorporated entity, except a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall not be deemed engaged in an unincorporated business solely by reason of the purchase and sale of property for his own account, but this subsection shall not apply if the unincorporated entity is taxable as a corporation for federal income tax purposes."

C. That 20 NYCRR 203.12(a) provides, in part, that "an individual or unincorporated entity, other than a dealer holding property primarily for sale to customers in the ordinary course of his or its trade or business, shall not be deemed engaged in an unincorporated business solely by reason of the purchase and sale of property (real or personal) for his or its own account."

D. That in view of the fact that the transaction on which the Gotham Seaview fees were paid was a transaction in real property for Mr. Walter's own account and further that it was not part of a regular course of business of dealing in property for sale to others, the Gotham Seaview fees were not subject to unincorporated business tax (20 NYCRR 203.12[a]).

E. That in view of Mr. Walter's acknowledgement that for a period of several months during 1976 he assisted in the completion of contracts for the customers of Old Progressive, the income received by Mr. Walter during 1976 from Progressive Electric Contracting Co. was derived from the unincorporated business of being an electrical contractor. Therefore, this income was properly held subject to unincorporated business tax (Tax Law §703[a]).

F. That since Mr. Walter's unincorporated business was liquidated in 1976, the income received during 1977 and thereafter from Hirsch Electric and Progressive Electric Contracting Co. was unrelated to the conduct of a business. Therefore, this income was not subject to unincorporated business tax (see Matter of Fischel v. State Tax Commission, 48 AD2d 381, affd 39 NY 816; cf. Matter of Leyendecker v. State Tax Commission, 11 AD2d 747, affd 9 NY2d 717).

G. That since the income received from Progressive Equities was in the form of wages for payment of services as an employee, the income received by Mr. Walter from Progressive Equities was not subject to unincorporated business tax (Tax Law §703[b]).

H. That in view of the fact that there has been no showing that either Telephone Installation and Maintenance or Mr. Walter considered the payment to Mr. Walter in 1980 as salary, petitioners have failed to sustain their burden of proof of establishing that the income received from Telephone Installation and Maintenance was not subject to unincorporated business tax (Tax Law §§689[e]; 722).

I. That petitioners have not sustained their burden of proof of establishing that the payment of \$2,500.00 in 1977 was not subject to unincorporated business tax (Tax Law §§689[e]; 722).


J. That the petition of Kurt Walter and Alice Walter is granted to the extent of Conclusion of Law "D", "F" and "G"; the Audit Division is directed to modify the notices of deficiency accordingly; and, as modified, the notices are sustained.


DATED: Albany, New York

FEB 10 1987

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER