

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

HYMAN ADELSBERG

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or  
a Revision of a Determination or a Refund  
of Personal Income and  
Unincorporated Business  
Taxes under Article(s) 22 & 23 of the  
Tax Law for the Year(s) ~~or Period(s)~~  
1970, 1971, 1972 and 1973.

State of New York  
County of Albany

John Huhn, being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 25th day of August, 1978, she served the within  
Notice of Decision by (certified) mail upon Hyman Adelsberg

(~~representative of~~) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Mr. Hyman Adelsberg  
173-21 Croydon Road  
Jamaica, New York 11432

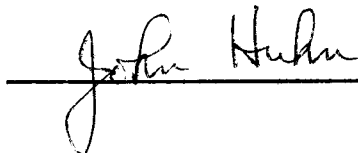
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

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

25th day of August, 1978.







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

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

**August 25, 1978**

**Mr. Hyman Adelsberg**  
**173-21 Croydon Road**  
**Jamaica, New York 11432**

**Dear Mr. Adelsberg:**

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 and 722** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

**Joseph Chyrywaty**  
**Hearing Examiner**

cc: ~~Petitioner's Representative~~

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|--|---|----------|
| In the Matter of the Petition                | : |          |
| of   | : |          |
| HYMAN ADELSBERG                              | : | DECISION |
| for Redetermination of a Deficiency or for   | : |          |
| Refund of Personal Income and Unincorporated | : |          |
| Business Taxes under Articles 22 and 23 of   | : |          |
| the Tax Law for the Years 1970, 1971, 1972   | : |          |
| and 1973.                                    | : |          |

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Petitioner, Hyman Adelsberg, 173-21 Croydon Road, Jamaica, New York 11432, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1970, 1971, 1972 and 1973 (File No. 13054).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on October 18, 1977 at 10:45 A.M. Petitioner appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUES

- I. Whether New York City unincorporated business tax paid by petitioner was deductible in computing New York State personal income tax.
- II. Whether the activities of petitioner during 1970, 1971, 1972 and 1973 constituted the carrying on of an unincorporated business.
- III. Whether penalties imposed against petitioner pursuant to sections 685(a)(1) and 685(a)(2) for failing to file unincorporated business tax returns and pay unincorporated business tax for 1970 through 1973 were proper.

IV. Whether that portion of the Notice of Deficiency issued on February 24, 1975 for 1970 was barred by the three-year statute of limitations.

V. Whether the method used by the Income Tax Bureau in arriving at its determination of petitioner's liability for unincorporated business tax rendered said determination arbitrary and capricious.

FINDINGS OF FACT

1. Petitioner, Hyman Adelsberg, timely filed New York State personal income tax returns for 1970, 1971, 1972 and 1973, in which he reported his occupation to be that of real estate appraiser. He reported his income to be comprised of wage income and also partnership income. Also, in arriving at his New York adjusted gross income petitioner did not increase his Federal adjusted gross income by his distributive share of New York City unincorporated business tax paid by a partnership, of which petitioner was a member, and which he had deducted for Federal income tax purposes. Petitioner did not file unincorporated business tax returns for said years.

2. The Income Tax Bureau contended that New York City unincorporated business tax paid was not a proper deduction for New York State personal income tax purposes and must be added back to income. Also, it contended that petitioner's activities from which his alleged wage income was derived constituted the carrying on of an unincorporated business. Accordingly, it issued a Statement of Audit Changes and a Notice of Deficiency on February 24, 1975, which combined personal income tax for 1971, 1972 and 1973 and unincorporated business tax for 1970, 1971, 1972 and 1973 in the amount of \$4,914.30, plus \$2,013.86 in penalty and \$764.16 in interest, for a total due of \$7,692.32.

3. Petitioner contended that in accordance with section 706(4) of the Tax Law, New York City unincorporated business tax was specifically exempted (as an income tax) from the requirement that it be added back to income and that it was, therefore, deductible. Petitioner also contended that the reported wage income was derived from services performed by him as an employee for two principals. He further contended that the Statement of Audit Changes, various letters from the Income Tax Bureau and arguments at a conference referred to professional exemption, and not to whether petitioner was an employee; therefore, petitioner contended that the Statement of Audit Changes was arbitrary and capricious. Finally, he contended that he apprised the Income Tax Bureau of all income earned in 1970; therefore, the Notice of Deficiency for 1970 was not properly issued within the three-year statute of limitations.

4. During the years at issue, petitioner had income from three sources, namely, the County of Nassau, New York, the Town of Huntington, New York, and a real estate appraisal partnership of which he was a partner (which partnership was subject to and paid New York State unincorporated business tax).

5. Petitioner performed services for the County of Nassau under a written agreement (which designated him to be a consultant) and was compensated on a per-diem basis. He worked in the County attorney's office two or three days each week. His duties were assigned to him by the senior deputy county attorney or one of the staff, which duties involved consultation on condemnations and certiorari matters. Petitioner submitted written memoranda summarizing findings or recommendations on certain matters and also conferred on these matters when needed. He cooperated with the board of assessors and other county departments in conferences or analysis. He also helped in the preparation of appeals' briefs.

6. Petitioner performed services for the Town of Huntington as a consultant to the town attorney and to the town assessor. His duties included analyzing problems relating to new construction or changed assessments and making recommendations regarding pending certiorari proceedings. He also assisted the town attorney (or his deputy) in connection with pending proceedings or settlements and in research for preparation of trials and appeals' briefs. Petitioner worked approximately one day per week for the Town of Huntington. The resolution of the town board meeting which retained petitioner designated his services as "real estate consultant." He was paid on a per-diem basis.

7. Petitioner was not issued a withholding tax statement by either principal, nor were income taxes or social security withheld from his compensation. He performed services for his principals when he could fit them into his schedule. There was no agreement between his principals or the partnership (for which petitioner performed services as a real estate appraiser) as to the division of petitioner's time. Petitioner did not submit documentary or other satisfactory evidence to show the degree of control and direction exercised by his principals over his activities (except for the assignment of duties) which would be present in an employer-employee relationship, as opposed to that of an independent contractor serving as a consultant.

8. The Income Tax Bureau contended that petitioner's failure to file unincorporated business tax returns for 1970 through 1973 was due to reasonable cause and not due to willful neglect.

9. The Income Tax Bureau followed acceptable, established procedures in arriving at its determination and in its issuance of the Statement of Audit Changes.

CONCLUSIONS OF LAW

A. New York City unincorporated business tax is identified as a deductible income tax in accordance with section 706(4) of Article 23 of the Tax Law, which refers to the computation of New York State unincorporated business income tax. For purposes of personal income tax, Article 22 applies, which article requires a modification increasing Federal income by adding back income taxes imposed by this or any other state or taxing jurisdiction; therefore, New York City unincorporated business tax was not deductible in computing New York State personal income tax in accordance with the meaning and intent of sections 612(b)(3) and 615(c)(1) of the Tax Law.

B. That the activities of petitioner, Hyman Adelsberg, during 1970, 1971, 1972 and 1973 constituted the carrying on of an unincorporated business in accordance with the meaning and intent of section 703(a) of the Tax Law, and did not constitute service as an employee in accordance with the meaning and intent of section 703(b) of the Tax Law. Neither did said activities constitute the practice of a profession in accordance with the meaning and intent of section 703(c) of the Tax Law. Therefore, the income derived from petitioner's activities was subject to unincorporated business tax in accordance with the meaning and intent of section 701 of the Tax Law.

C. That petitioner had reasonable cause for his failure to file New York State unincorporated business tax returns for 1970 through 1973. Therefore, all penalties are cancelled.

D. That the reporting of business income as wages by petitioner on his personal income tax return for 1970 did not constitute the filing of an unincorporated business tax return. Therefore, the Notice of Deficiency issued February 24, 1975 was issued timely for 1970 in accordance with the meaning and intent of section 683(c)(1) of the tax Law.

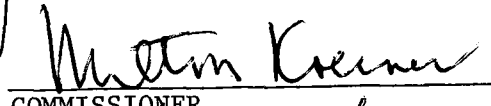
E. That the method used by the Income Tax Bureau in arriving at its determination of petitioner's liability in unincorporated business tax was in accordance with accepted procedures and was not arbitrary and capricious.

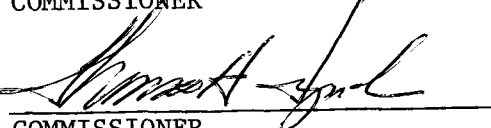
F. That the petition of Hyman Adelsberg is granted to the extent of cancelling all penalties. The Income Tax Bureau is hereby denied to so modify the Notice of Deficiency issued February 24, 1975 and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
August 25, 1978

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER