

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

James & Mary McGee :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income & UBT :
under Article 22 & 23 of the Tax Law
for the Year 1970. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 13th day of February, 1980, he served the within notice of Decision by certified mail upon James & Mary McGee, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

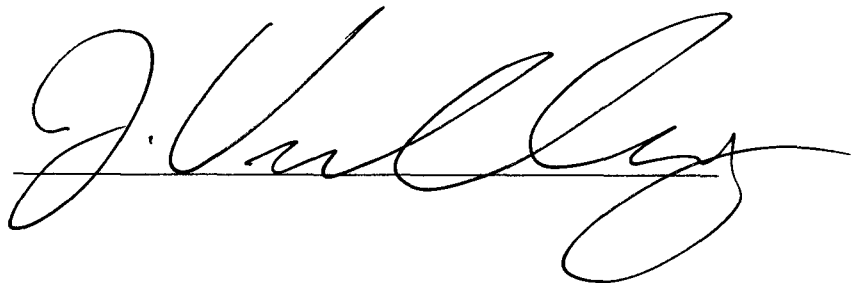
James & Mary McGee
40 Vine Rd.
Larchmont, NY 10538

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
13th day of February, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

James & Mary McGee :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income & UBT :
under Article 22 & 23 of the Tax Law
for the Year 1970. :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 13th day of February, 1980, he served the within notice of Decision by certified mail upon Charles J. Parlatore the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Charles J. Parlatore
474 Westchester Ave.
Port Chester, NY

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
13th day of February, 1980.

Joanne Knapp

J. Vredenburg

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

February 13, 1980

James & Mary McGee
40 Vine Rd.
Larchmont, NY 10538

Dear Mr. & Mrs. McGee:

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, 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Charles J. Parlatore
474 Westchester Ave.
Port Chester, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JAMES McGEE and MARY McGEE : 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 Year 1970. :

Petitioners, James McGee and Mary McGee, 40 Vine Road, Larchmont, New York 10538, 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 year 1970 (File No. 14080).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 18, 1978 at 9:15 A.M. Petitioners appeared by C. J. Parlatore, Accountant. The Income Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether petitioner James McGee's activities as an insurance salesman constituted the carrying on of an unincorporated business.

II. Whether petitioners properly deducted business expenses, contributions, and interest expenses.

FINDINGS OF FACT

1. Petitioners, James McGee and Mary McGee, timely filed a joint New York State Income Tax Resident Return for 1970 on which they claimed employee

business expenses incurred by James McGee of \$13,843.00, contributions of \$350.00 and interest expenses of \$4,090.00. An unincorporated business tax return was not filed for 1970.

2. On July 30, 1973, the Income Tax Bureau issued a Notice of Deficiency against petitioners, James and Mary McGee, on which the Bureau disallowed, in full, employee business expenses, contributions, and interest expenses claimed as a result of petitioners' failure to respond to the Bureau's correspondence which requested supporting evidence. A second Notice of Deficiency was issued on July 30, 1973 against petitioner James McGee, on which unincorporated business tax was asserted on his income from his activities as an insurance salesman. Penalty in accordance with section 685(a)(1) and section 685(a)(2) of the Tax Law was also imposed.

3. Petitioner James McGee was an insurance salesman who represented the New York Life Insurance Company ("N.Y. Life") during 1970. He was compensated on a commission basis and received no reimbursement for his selling expenses. His commission income was subject to withholding under the Federal Insurance Contributions Act (FICA), with an equal amount being contributed by N.Y. Life.

4. N.Y. Life provided petitioner James McGee with group life insurance, a disability plan and a pension plan. In addition, he was covered under the Workman's Compensation Law of New York State.

5. Petitioner James McGee worked at a branch office of N.Y. Life in New Rochelle, New York and was provided with office facilities, including secretarial and telephone services. However, he paid for outside secretarial services during 1970 when the regular secretarial services were too busy or unavailable to him.

6. Petitioner James McGee was required to report his sales progress to the sales manager at the branch office and was required to attend sales meetings, training classes and seminars held by N.Y. Life.

7. Petitioner James McGee usually determined his own daily itinerary, but was frequently provided with "leads" by N.Y. Life which he was obligated to pursue.

8. Petitioner James McGee contended that he incurred \$13,843.00 in expenses during 1970 while pursuing his activities as a salesman. Commission income from his sole principal, N.Y. Life, during 1970 was \$24,230.00.

9. Petitioner James McGee did not maintain a diary or any other record of his daily business activities or of his expenditures. Numerous photocopies of cancelled checks were submitted, but said checks did not indicate the nature and/or purpose of each expenditure.

10. Petitioners were able to substantiate contributions of \$53.00 and interest expenses of \$2,076.00 as a result of the checks and statements which they submitted.

CONCLUSIONS OF LAW

A. That sufficient direction and control was exercised by the New York Life Insurance Company over petitioner James McGee's activities so as to create an employer-employee relationship; therefore, the commission income he derived from his activities as an employee was not subject to unincorporated business tax in accordance with the meaning and intent of section 703(b) of the Tax Law.

B. That petitioner James McGee has failed to satisfy the record keeping requirements of Treasury Regulation 1.274-5 and also has failed to sustain the burden of proof imposed by section 689(e) of the Tax Law in establishing that he incurred employee business expenses of \$13,843.00.

C. That the petition of James McGee is granted to the extent that no unincorporated business tax is due for 1970. Therefore, the Notice of Deficiency for unincorporated business tax issued on July 30, 1973 is cancelled.

D. That the petition of James McGee and Mary McGee, with respect to personal income tax, is granted to the extent that the burden of proof was sustained in establishing contributions of \$53.00 and interest expenses of \$2,076.00. The Audit Division is hereby directed to modify accordingly the Notice of Deficiency for personal income tax issued July 30, 1973; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 13 1980


PRESIDENT


COMMISSIONER

COMMISSIONER