

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JEFF SHOR

DECISION

for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law and New York City
Nonresident Earnings Tax under Chapter 46,
Title U of the Administrative Code of the
City of New York for the Years 1979 and 1980. :

Petitioner, Jeff Shor, 2 Hillcrest Drive, Great Neck, New York 11021,
filed a petition for redetermination of a deficiency or for refund of unincor-
porated business tax under Article 23 of the Tax Law and New York City nonresiden
earnings tax under Chapter 46, Title U of the Administrative Code of the City
of New York for the years 1979 and 1980 (File No. 46457).

A hearing was held before Allen Caplowaith, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on September 11, 1985 at 10:45 A.M. Petitioner appeared by Stephen J.
Schwartz, CPA. The Audit Division appeared by John P. Dugan, Esq. (Herbert
Kamrass, Esq., of counsel).

ISSUE

Whether petitioner's activities as an insurance agent for The Equitable
Life Assurance Society of the United States for the years 1979 and 1980 consti-
tuted the carrying on of an unincorporated business thereby subjecting the
commissions petitioner derived therefrom to unincorporated business tax.

FINDINGS OF FACT

1. Jeff Shor (hereinafter "petitioner") and **his** wife, Belle Shor, filed a New York State Income Tax Resident Return for 1979 under filing status "married filing separately on one return". For 1980, they filed a joint New York State Income Tax Resident Return. On each of said returns, petitioner reported net profit of \$72,313.00 (1979) and \$72,368.00 (1980) derived from his insurance sales activities. Petitioner also filed a Nonresident Earnings Tax Return for the City of New York for each of said years.

2. Petitioner filed a New York State Unincorporated Business Tax Return for each year at issue whereon he reported net profit from his aforesated activities subject to unincorporated business tax of only \$28,752.00 (1979) and \$31,697.00 (1980).

3. During the years at issue, petitioner earned life insurance commission income from The Equitable Life Assurance Society of the United States ("Equitable and other commission income from various other insurance companies in connection with his "general insurance" sales activities. For unincorporated business tax purposes, he reported only that portion of his income purportedly derived from his sale of "general insurance". Such amount was calculated in each year at issue by multiplying petitioner's net profit, as reported on his Federal Schedule C, by a percentage computed by dividing his general insurance commission income by his total commission income. In 1979, petitioner earned life insurance commission income from Equitable of \$143,568.00 and general insurance commission income of \$94,771.00. In 1980, he earned life insurance commission income from Equitable of \$119,865.00 and general insurance commission income of \$93,400.00.

4. On October 12, 1982, the Audit Division issued a Statement of Audit Changes in netitinner wherein his entire net profit from insurance sales was

held subject to unincorporated business tax for 1979 on the basis that his Federal Schedule C indicated that he was operating "as an independent broker". Additionally, wages of \$2,500.00 and "other" income of \$4,128.00 were held subject to said tax. Said statement also increased petitioner's reported New York City nonresident earnings tax liability for 1979 by holding his "other" income of \$4,128.00 subject to such tax. Accordingly, on July 21, 1983, a Notice of Deficiency was issued against petitioner for the year 1979 asserting additional unincorporated business tax of \$2,258.64, additional New York City nonresident earnings tax of \$32.12, plus interest of \$820.84, for a total due for 1979 of \$3,111.60.

5. On January 12, 1983, the Audit Division issued a Statement of Audit Changes to petitioner wherein his entire net profit from insurance sales was held subject to unincorporated business tax for 1980. The basis for such adjustment was essentially the same as that stated for taxable year 1979. Accordingly, on May 18, 1983, a Notice of Deficiency was issued against petitioner for the year 1980 asserting additional unincorporated business tax of \$1,677.84, plus interest of \$431.83, for a total due of \$2,109.67.

6. By its Answer of May 31, 1985, the Audit Division asserted a greater deficiency for the year 1980 based on Federal audit changes to certain deductions claimed on petitioner's Federal Schedule C. Accordingly, the unincorporated business tax deficiency now being asserted by the Audit Division for 1980 has been increased to \$1,963.40.

7. Petitioner contended that the life insurance commission income he derived from Equitable during 1979 and 1980 is exempt from the imposition of unincorporated business tax based on the provisions of section 703(f) of the Tax Law.

8. Petitioner did not contest the 1979 New York State adjustments holding wages and "other" income subject to unincorporated business tax or the 1979 New York City adjustment holding "other" income subject to the New York City nonresident earnings tax.

9. During the years at issue, petitioner sold life insurance for Equitable under an agreement executed March 26, 1974. Said agreement provided, in part, as follows:

"XVI. Independent Contractor. Nothing contained herein shall be construed to create the relationship of employer and employee between The Equitable and the Agent. The Agent shall be free to exercise independent judgment as to the persons from whom applications for policies and annuity contracts will be solicited and the time and place of solicitation. The Agent shall abide by the rules and regulations of The Equitable...but such rules and regulations shall not be construed so as to interfere with the freedom of action of the Agent as described in this Paragraph.

* * *

XVIII. Equitable's Prior Right. The Agent agrees not to submit to any other company proposals for any forms of policies or annuity contracts, of a class of business issued by The Equitable, unless authorized by The Equitable."

10. During the years at issue, petitioner conducted both his life insurance and general insurance business from his personal office located at One Penn Plaza, New York City. Said office, which was adjacent to Equitable's office, was provided to petitioner by Equitable at no cost to him. Equitable also provided petitioner with office furniture, clerical staff and telephone services. The door to petitioner's office bore his name.

11. During the years 1979 and 1980, petitioner claimed total deductions on his Federal schedules C of \$166,026.00 and \$140,897.00, respectively. Such deductions included, inter alia, the following:

<u>Deduction</u>	<u>Amount Claimed</u>	
	<u>1979</u>	<u>1980</u>
Advertising	\$ 4,614.00	\$ 733.00
Interest on business indebtedness	33,691.00	8,912.00
Office supplies	1,957.00	1,845.00
Postage	4,003.00	2,951.00
Wages	41,900.00	37,845.00
Payroll taxes	3,538.00	4,342.00
Telephone	5,377.00	4,345.00
Stationery	3,394.00	-0-
Selling expenses	38,037.00	26,612.00
Gifts	7,983.00	9,795.00
Temporary help	1,878.00	-0-
Supplies	-0-	8,168.00
Loss payments	2,141.00	15,308.00
Legal and professional	4,299.00	7,150.00

12. The deductions claimed on petitioner's Federal schedules C were not separated between those applicable to his life insurance sales and those applicable to his general insurance sales.

13. Petitioner expended substantial amounts for employee wages and telephone services in addition to the clerical help and telephone provided by Equitable. Petitioner personally paid for all the clerical and other help used with respect to his general insurance sales activities. Although Equitable provided petitioner with clerical help for his life insurance sales activities, such help was additionally compensated by petitioner personally. Petitioner personally paid for the telephone service maintained with respect to his general insurance sales activities.

14. Equitable did not reimburse petitioner for any expenses incurred with respect to his insurance sales activities.

15. Equitable did not withhold income taxes from petitioner's commission income.

16. Equitable provided petitioner with medical insurance coverage and retirement benefits, which were predicated on his volume of production

17. Petitioner reported to Equitable's District Manager only with respect to production. He was not required to attend sales meetings. He testified that his time and work were his **own** and that he was free to come and go as he pleased.

CONCLUSIONS OF LAW

A. That petitioner's reliance on section 703(f) of the Tax Law is misplaced. Section 703(f) provides, in pertinent part, that "**An individual...shall not be deemed engaged in an unincorporated business solely by reason of selling goods, wares, merchandise or insurance for more than one enterprise.**" As the Court stated in Frishman v. State Tax Commission, 33 A.D.2d 1071, 1072, "[t]he petitioner has apparently been under the misconception that subdivision (f) of section 703 is an exemption from the unincorporated business tax...when in fact this portion of article 23 merely limits the factors which may be relied upon to conclude that the individual is self-employed as opposed to being a mere employee of his principals."

B. That "[i]t is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee." Liberman v. Gallman, 41 N.Y.2d 774, 778.

C. That regulations promulgated by the State Tax Commission during the period at issue herein provide:

"[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case," 20 NYCRR 203.10(c).

Regulation section 203.10(b), stating the factors to be considered in determining whether or not an insurance agent is subject to unincorporated business tax, provides in part:

"Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished, but also as to the details and means by which that result is to be accomplished... [An employee] will usually be required to work during stated days and hours and be subject to company established production standards... Other factors characteristic of employment, but not necessarily required or present in every case, are the providing of equipment and the furnishing of a place to work to the individual who performs the services..."

D. That in view of all of the relevant facts and circumstances herein, petitioner was not subject to sufficient direction and control to be considered an employee of Equitable, but rather was an independent contractor. Therefore, petitioner's activities for Equitable during the years 1979 and 1980 constituted the carrying on of an unincorporated business in accordance with the meaning and intent of section 703(a) of the Tax Law. Petitioner's income received from Equitable during the years at issue was thus subject to the imposition of the unincorporated business tax.

E. That section 689(d)(1) of the Tax Law provides that:

"-- If a taxpayer files with the tax commission a petition for redetermination of a deficiency, the tax commission shall have power to determine a greater deficiency than asserted in the notice of deficiency and to determine if there should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefore is asserted at or before the hearing under rules of the tax commission."

F. That the claim asserting a greater deficiency as the result of changes made on a Federal audit for the year 1980 was made before the hearing by the Audit Division's Answer of May 31, 1985 (see Finding of Fact "6", supra). Since such increase in the deficiency was the result of a change or correction of Federal taxable income and the Tax Commission had no notice of such change at the time it mailed the Notice of Deficiency, the burden of proof is upon the petitioner to show that such increase in the deficiency was erroneous or

G. That section 689 of the Tax Law is incorporated into Article 23 by section 722(a).

H. That petitioner has failed to sustain his burden of proof to show that the greater deficiency asserted is improper or erroneous.

I. That the petition of Jeff Shor is denied and the Notice of Deficiency issued July 21, 1983 with respect to the year 1979 is sustained.

J. That the deficiency asserted in the Notice of Deficiency issued May 18, 1983 with respect to the year 1980 is increased to \$1,963.40 (see Finding of Fact "6", supra), together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

APR 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER