

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

**SAMUEL B. COHEN AND SARAH G. COHEN**

DECISION

for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Years 1979  
and 1980.

---

Petitioners, Samuel B. Cohen and Sarah G. Cohen, 71-28 Yellowstone Boulevard, Forest Hills, New York 11375, 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 1979 and 1980 (File Nos. 48233 and 48983).

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 10, 1985 at 9:15 A.M., and continued to conclusion on September 26, 1985 at 9:15 A.M., with all briefs to be submitted by November 15, 1985. Petitioners appeared by Melvin Jay Huber, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

#### ISSUE

Whether petitioner Samuel B. Cohen's activities as an insurance agent for the Provident Mutual Life Insurance Company of Philadelphia during the years 1979 and 1980 constituted the carrying on of an unincorporated business, thereby rendering his commissions derived therefrom subject to unincorporated business tax.

#### FINDINGS OF FACT

1. Petitioners, Samuel B. Cohen and Sarah G. Cohen, timely filed New York

status "Married filing separately on one return." On such returns, Samuel B. Cohen (hereinafter "petitioner") reported business income derived from the sale of insurance of \$48,824.00 and \$59,936.00, respectively. Annexed to each return was a Federal Schedule C, Profit or (Loss) From Business or Profession, whereon petitioner reported the income and deductions attributable to his insurance sales activities. Petitioner did not file an unincorporated business tax return for either year at issue.

2. On May 16, 1983, the Audit Division issued a Statement of Audit Changes to petitioner wherein his reported business income was held subject to unincorporated business tax based on the explanation that "The activities in which you are engaged constitute the carrying on of an unincorporated business..." Accordingly, on August 19, 1983, the Audit Division issued a Notice of Deficiency against petitioner and his wife<sup>1</sup> asserting unincorporated business tax for the years 1979 and 1980 of \$3,744.52, plus interest of \$1,199.05, for a total due of \$4,943.57.

3. Petitioner argued that he maintained an employer-employee relationship with the Provident Mutual Life Insurance Company of Philadelphia ("Provident") during the years at issue and, accordingly, his income derived therefrom is exempt from the imposition of unincorporated business tax. However, he did not contest the imposition of said tax on his insurance sales income derived from companies other than Provident.

4. During 1979, petitioner derived gross receipts from his insurance sales activities of \$59,739.00. Of said amount, \$41,689.84 was derived from

---

1 Sarah G. Cohen's income is not at issue herein. Accordingly, the Notice of Deficiency was erroneous with respect to the inclusion of her name thereon.

Provident. During 1980, petitioner derived gross receipts from his insurance sales activities of \$74,382.00. *of* said amount, \$48,035.65 was derived from Provident. The balance of such gross receipts was derived each year from approximately ten to twelve insurance companies other than Provident.

5. During the years at issue, petitioner, who was attached to Provident's New York City branch office located at 60 East 42nd Street, sold insurance for Provident under a Special Agent's Career Agreement which provided, in part, that:

"Nothing contained herein shall be construed to create the relation of employer and employee between the Company and the Special Agent, except as otherwise provided by law. The Special Agent shall be free to exercise his own judgement as to the persons from whom he will solicit applications and as to the time, place and manner of solicitation, but the applicable statutes and governmental regulations pertaining to the conduct of the business covered hereby, as well as the regulations from time to time adopted by the Company respecting its methods *of* doing business shall be observed and conformed to by the Special Agent."

6. Petitioner has sold insurance for Provident since 1956. When he commenced his relationship with Provident, said company provided petitioner with a program of basic training which covered areas of contractual provisions, prospecting techniques, marketing concepts, establishing administrative systems and servicing *of* existing policyholders. During this period of basic training, petitioner received direct supervision on a daily basis. Subsequent to the completion of basic training, which lasted approximately two months, the direct supervision of petitioner, both in the field and the office, gradually diminished to a point several months later where such direct supervision became unnecessary. Subsequent to the basic training, petitioner received periodic training with respect to new developments on both the company and agency levels.

7. Provident furnished petitioner with office space, clerical and secre-

8. Provident provided coverage for petitioner under its group health, accident and term life insurance policies. It also provided petitioner with disability benefits and covered him under its pension plan.

9. Provident's home office withheld social security taxes from petitioner's compensation. It also paid the employer's portion of social security taxes on petitioner's compensation.

10. Provident paid for petitioner's advertising expenses. The advertising expenses deducted on petitioner's Federal schedules C were with respect to greeting cards petitioner mailed to his clients for occasions such as birthdays and holidays.

11. Petitioner was not required to meet a production quota in order to be entitled to the aforesated benefits provided to him by Provident.

12. Petitioner was **not** forbidden from placing insurance with companies other than Provident. Provident not only permitted such action, but actually encouraged it in order to maintain the goodwill of its clients and enhance the image **of** the agent. Provident even permitted brokerage representatives **of** other companies to physically visit its agents at the Provident office to discuss the placement of business with other companies. Petitioner's supervisor had no control over petitioner's **sales** of the products of other insurance companies.

13. Petitioner sold predominantly life and disability insurance for Provident. For the other insurance companies, he **sold** life and disability insurance as well as major medical and group insurance policies.

14. Petitioner completed his paperwork with respect to sales made for companies other than Provident at both his Provident office and his office maintained at home.

15. Petitioner was issued a Wage and Tax Statement from Provident during each year at issue. However, such statements designated his status as non-employee. No state or local income taxes were withheld from his compensation from Provident.

16. Provident did not direct petitioner as to whom he may solicit new business from. Petitioner was not required to submit a schedule detailing his movements in the field.

#### CONCLUSIONS OF LAW

A. That "[i]t is the degree of control and direction exercised by the employer which determines whether the taxpayer is an employee or independent contractor subject to the unincorporated business tax." Lieberman v. Gallman (1977), 41 N.Y.2d 774, 396 N.Y.S.2d 159.

B. 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) .

C. That a June 9, 1959 ruling by the State Tax Commission, reported originally at 20 NYCRR 281.3, stating the factors to be considered in determining whether or not an insurance agent is subject to unincorporated business tax provides:

"A full-time insurance soliciting agent whose principal activity is the solicitation of insurance for one life insurance company and who is forbidden by contract or practice from placing insurance with any other company without the consent of his principal company; who uses office space provided by the company or its general agent, is furnished stenographic assistance and telephone facilities without cost, is subject to general and particular supervision by his company over sales, is subject to company established production standards, will generally not be subject to the unincorporated business tax on commissions received from his prime company... In every case all the relevant facts and circumstances will be considered before a decision is

made whether or not the <sup>2</sup>agent is subject to the unincorporated business tax." (emphasis added) .

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 Provident, but rather was an independent contractor. Therefore, petitioner's activities for Provident, as well **as** those **for** the various other insurance companies 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. Accordingly, petitioner's income derived from the sale of insurance during the years at issue was thus subject to the imposition of unincorporated business tax.


E. That the Notice **of** Deficiency issued August 19, 1983 **is** cancelled insofar as it applies to Sarah G. Cohen (see Finding of Fact "2", supra).

F. That the petition of Samuel B. Cohen is denied and the Notice of Deficiency issued August 19, 1983 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 27 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

---

2 The essence of this ruling **is** encompassed by the definition of "employee" as provided in current regulations of the State Tax Commission found at 20 NYCRR 200.1-2.1.