

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

WILLIAM KRONETHAL

DECISION

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

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Petitioner, William Kronethal, 5 McIntosh Lane, Monsey, New York 10952, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1980 (File No. 52503).

A hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 4, 1986 at 2:45 P.M. and was continued to conclusion before the same Hearing Officer at the same offices on February 5, 1986 at 11:30 A.M. Petitioner appeared by Berk & Michaels, CPAs (Sidney D. Berk and Michael S. Kokal, CPAs). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel),

#### ISSUE

Whether petitioner's activities as an insurance agent for New England Mutual Life Insurance Company during 1980 constituted the carrying on of an unincorporated business thereby subjecting the commissions received by petitioner from New England Mutual to unincorporated business tax.

#### FINDINGS OF FACT

1. Petitioner, William Kronethal, timely filed a New York State Income

"Insurance Agent." This return also was used by petitioner's wife, Ellen Kronethal, inasmuch as Mr. and Mrs. Kronethal filed separately but on one return (Filing Status "3") for 1980. Ellen Kronethal **is** not a party to this proceeding. Petitioner also timely filed a New York State Unincorporated Business Tax Return for 1980.

2. On August 12, 1983, the Audit Division issued to petitioner a Statement of Audit Changes finding additional unincorporated business tax due for the year 1980 in the amount of \$3,554.40, plus accrued interest. In turn, on October 5, 1983, the Audit Division issued a Notice of Deficiency to petitioner in the amount of \$3,554.40, plus interest.

3. The Statement of Audit Changes issued to petitioner on August 12, 1983, contained the following explanation as to the additional unincorporated business tax due:

"Available information shows that your \$107,870.07 of income from The Nadel Agency for tax year 1980 was an integral part of the business activities carried on and is held reportable for the New York State unincorporated business tax.

Your 1980 New York State unincorporated business tax liability **is** computed as **follows**:

Business income per return	\$99,289.00
Less: Contributions	<u>429.00</u>
Balance	\$98,860.00
Less: Allowance for services	<u>5,000.00</u>
Balance	\$93,860.00
Less: Exemption	<u>5,000.00</u>
Taxable business income	\$88,860.00

UNINCORPORATED BUSINESS TAX DUE @ 4%

\$3,554.40"

4. For 1980, petitioner had filed a Federal Schedule "C" (Profit or Loss From Business or Profession) indicating thereon his business activity as

"Insurance Agent" and reflecting gross receipts of \$211,888.00 with a net

profit of \$99,289.00 after deducting \$112,599.00 for expenses.

receipts figure was \$107,870.00 in commissions and persistency bonuses paid to petitioner from New England Mutual Life Insurance Company ("New England") through the Nadel Agency ("Nadel"). The balance of the gross receipts represent insurance commissions paid to petitioner by companies other than New England, and also consulting fees earned by petitioner.

5. On his 1980 unincorporated business tax return, petitioner reported the above-noted net profit amount from Schedule "C" (\$99,289.00), then subtracted therefrom the \$107,870.00 of New England/Nadel earnings included therein, as well as the other subtractions noted in the Statement of Audit Changes (contributions, allowance for services and allowable exemption), to arrive at a taxable business income (**loss**) of (\$11,522.00) with **no** unincorporated business tax due. A handwritten notation on the unincorporated business tax return regarding the \$107,870.00 provided: "W-2 wages - not subject-included in above". In sum, petitioner included the New England/Nadel receipts in calculating net business profit on Schedule "C", but "backed out" such receipts on his unincorporated business tax return on the assertion that such sums represented wages paid to him as an employee of the Nadel Agency.

6. Petitioner concedes that the income which he received from insurance companies other than his principal company, New England, and his consulting fees would be subject to unincorporated business tax. He maintains, however, that the income from New England/Nadel is exempt from unincorporated business tax and further, that no unincorporated business tax is due on the non-New England/Nadel amounts since allowable deductions reduce such amounts to less than zero. No explanation was offered as to why the New England/Nadel receipts, and the unreimbursed expenses paid by petitioner in connection therewith, were reported on Schedule "C" as opposed to being reported on Schedule "E" as wages.

unreimbursed expenses connected thereto claimed as employee business expenses on Federal Form 2106. The method of reporting used by petitioner does not reveal the amounts of unreimbursed expense attributable to New England/Nadel receipts as opposed or in proportion to the amount of petitioner's expenses attributable to his other earnings.

7. Petitioner has been working in the insurance industry for many years. He joined New England/Nadel during 1967. On March 10, 1976, petitioner entered into an Incentive Career Contract with New England's General Agent, Edwin Nadel. Petitioner operated under a continuation of this contract during the year at issue herein. Section 1(d) of the contract provisions states: "[n]othing in this Contract shall be construed to create the relationship of employer and employee."

8. Petitioner was provided with office space at the place of business of New England's general agent, The Nadel Agency, at 575 Lexington Avenue, New York, New York. Petitioner paid a monthly rental fee for office space in addition to that allowed by New England/Nadel. He could not recall the amount of rent he paid per month for such additional space. New England/Nadel also provided petitioner with secretarial help, office supplies, advertising and mailing services, and telephone service. Secretarial help, office supplies, advertising and mailing services, and telephone service in excess of certain dollar limits were not provided by New England/Nadel, and petitioner spent his own funds for the cost of such items in excess of the amounts allowed. The specific dollar amounts (allowances) provided to petitioner by New England/Nadel for the foregoing enumerated items **was not** specified.

9. New England paid petitioner on a commission basis. Social security taxes **were deducted from petitioner's commissions**, but neither Federal nor New

York State income taxes were withheld. Petitioner was provided with group life insurance and medical insurance and was included in New England's pension plan. Petitioner received no paid vacations or sick leave from New England.

10. Petitioner was required to offer to place all life insurance contract applications with New England first. If New England declined to accept an application (or did not offer the type of insurance needed), petitioner could place it with any other insurance company.

11. The general agent's primary control over petitioner's activities was limited to requiring that petitioner meet certain minimum production standards in terms of insurance sales quotas for New England. Petitioner has always exceeded these quotas. Day-to-day control over petitioner's work hours, sales methods or locations for soliciting business were not imposed, in view of petitioner's years of experience and success as an insurance agent, as well as in view of the nature of selling insurance.

#### 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 an independent contractor subject to the unincorporated business tax." Liberman 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 agent <sup>1</sup>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 New England/Nadel, but rather was an independent contractor. Nearly one-half of petitioner's earnings as an insurance agent were from placements other than with New England. Moreover, there is no indication that petitioner was subject to the exercise of any control by either New England or Nadel over the methods and means by which he worked. Therefore, petitioner's activities for New England during the year 1980 constituted the carrying on of an unincorporated business in accordance within the meaning and intent of section 703(a) of the Tax Law. Petitioner's income received from New England during the year at issue was thus subject to the imposition of the unincorporated business tax.

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1 The essence of this ruling is encompassed by the definition of "employee" as provided in current regulations of the State Tax Commission.

E. That the petition of William Kronethal is hereby denied and the Notice of Deficiency dated October 5, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 28 1986



PRESIDENT



COMMISSIONER



COMMISSIONER