

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

MICHAEL and MARIE ASSELTA

DECISION

for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1976
through 1980.

Petitioners, Michael and Marie Asselta, 91-12 217th Street, Queens Village,
New York 11428, 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 1976 through 1980 (File **No.** 57823).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the
offices of the State Tax Commission, **Two** World Trade Center, New York, New York
on July 17, 1986 at 11:00 A.M. Petitioners appeared by Stephen L. Popp, C.P.A.
The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito,
Esq., of counsel).

ISSUES

I. Whether the petition was timely filed.

II. If **so**, whether the income from petitioner Michael Asselta's activities
as an agent for Mutual **of** Omaha are subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Michael and Marie Asselta, timely filed joint New York
State resident income tax returns for the years 1976 through 1980. Petitioner
Michael Asselta did not file unincorporated business tax returns for said
years.

2. On December 2, 1977 the Audit Division issued a Statement of Audit Changes to petitioners for the year 1975, disallowing \$2,910.97 in deductions for business expenses, interest, and medical expenses and asserting \$255.65 in additional income tax, \$616.17 in unincorporated business tax, and \$200.26 in penalty, plus interest. On December 7, 1977, petitioners consented to pay the proposed deficiency.

3. On October 5, 1983 the Audit Division issued a Notice of Deficiency to petitioners for unincorporated business tax, claiming a deficiency of \$5,766.00 in tax and \$3,277.25 in penalty, plus interest, for the years 1976 through 1979. On the same date, the Audit Division issued a second Notice of Deficiency for unincorporated business tax against petitioners for the year 1980 in the amount of \$1,158.64 in tax, a penalty of \$534.83, plus interest.

4. The Audit Division had computed the deficiencies by holding petitioner Michael Asselta's income from his activities as an insurance sales agent subject to unincorporated business tax.

5. On November 14, 1984 the Tax Appeals Bureau received a letter dated November 7, 1984 from petitioners, protesting the October 5, 1983 notices of deficiency. Petitioners explained in their letter that they "were unaware that these assessments had been issued since this case was being held by Mr. Thomas Joyce CPA.... Mr. Joyce has since become ill and he did not reply to these assessments within the 90 day period."

6. Petitioner Michael Asselta (hereinafter referred to as "petitioner") has been a selling agent for Mutual of Omaha since 1970. When he was hired he was required to complete a training program and was subject to supervision by unit managers.

7. During the years at issue, petitioner worked (and in fact still works) out of the James J. Juergens Division Office of Mutual of Omaha. This office is located in Jericho, New York.

8. Petitioner arranges his **own** schedules for meetings with clients in their homes and offices. He **is** required however, to be in the Division Office three times per week. He must also call in each day that he is in the field.

9. Petitioner **is** provided with sales leads by the Division Office once a week. He must attempt to contact each lead within one week and report what was done with each lead. **He** receives no sales leads from any other insurance carrier.

10. Petitioner may solicit policies only for Mutual of Omaha. **All** policy applications must be submitted to Mutual **of** Omaha for approval of the underwriters at its home office.

11. The Division Office provides and pays for office space, telephone and secretarial assistance, stationery and other supplies.

12. Petitioner must pay his **own** travel expenses which are not reimbursed by Mutual of Omaha.

13. Petitioner is paid on **a** commission only basis. No taxes are withheld from his commissions and he receives a Federal form 1099. He pays his **own** social security taxes.

14. Petitioner does not receive **sick** pay or vacation pay. He **is**, however, covered by group insurance, disability insurance and health insurance by the Division Office.

15. Mutual of Omaha offers a deferred compensation plan in which it provides matching funds. Petitioner is a participant in such plan.

16. Petitioner is eligible for trips to conventions offered by Mutual of Omaha when he sells a certain amount of insurance.

17. Petitioner has a career contract with Mutual of Omaha, however, only the first page thereof is in the record. This page contains a provision that, if requested, petitioner is to supply an independent contractor's bond to guarantee his performance. No such bond was ever requested. Petitioner testified that his circumstances were similar to those of another Mutual of Omaha employee, Edgar J. Miller. In the Matter of the Petition of Edgar J. Miller, State Tax Commission, May 25, 1984, although the contract provided that it was not to be construed to create an employee/employer relationship, the petition was granted and the deficiency of unincorporated business tax was cancelled.

CONCLUSIONS OF LAW

A. That since the petition was not filed within ninety days after the mailing of the notices of deficiency, it was not timely (Tax Law § 681[b]). Accordingly, the State Tax Commission lacks the jurisdiction to consider Issue II herein. It appears, however, that petitioner may pay the deficiencies and file a petition for refund under section 689(c)(2) of the Tax Law.

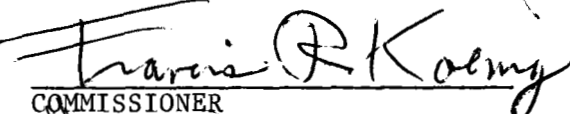
B. That the petition of Michael and Marie Asselta is denied and the notices of deficiency are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 09 1987

PRESIDENT


COMMISSIONER
