

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

PAUL BIKOFF

:

DECISION

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

Petitioner, Paul Bikoff, 26 Oakland Street, Huntington, New York 11743, 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. 61739).

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 October **31**, 1986 at 9:15 A.M. Petitioner appeared by Gerald M. Goodman, P.A. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, **Esq.**, of counsel).

ISSUE

Whether petitioner's activities as an insurance agent for National Life Insurance Company for the year 1980 constituted the carrying on of an unincorporated business thereby rendering his commissions derived therefrom, as well as his commissions derived from other insurance companies, subject to unincorporated business tax.

FINDINGS OF FACT

1. Paul Bikoff (hereinafter "petitioner") and his wife, Louise Bikoff, timely filed a New York State Income Tax Resident Return for the year 1980

activities as an insurance agent. Annexed thereto was a copy of petitioner's 1980 Federal Schedule C, Profit or (Loss) From Business or Profession, whereon he reported total income from said activities of \$113,689.00 and total deductions of \$48,419.00, which yielded a reported net profit of \$65,270.00. Petitioner did not file a New York State unincorporated business tax return for said year.

2. Attached to petitioner's return were four wage and tax statements as follows:

<u>Payor</u>	<u>Wages and Other Compensation</u>
National Life Insurance Co. National Life Drive Montpelier, Vermont 05602	\$82,147.88
National Life Insurance Co. National Life Drive Montpelier, Vermont 05602	\$ 9,000.00
Albert G. Ruben & Co. (New York) c/o Alexander & Alexander, Inc. 300 East Joppa Road Baltimore, Maryland 21204	\$23,230.40
Universal Economic Services, Inc. 29 Park Avenue Manhasset, New York 11030	\$12,000.00

3. The Wage and Tax Statement from National Life Insurance Co. ("National") for \$82,147.88 bore the notation "NON-EMPLOYEE". The compensation reported thereon was reported on petitioner's Federal Schedule C. FICA tax was withheld from said compensation; however, Federal and State personal income taxes were not withheld from said compensation. The compensation reported on the other three wage and tax statements was reported as wages on petitioner's return. Federal and State personal income taxes were withheld from such compensation.

4. On May 7, 1984, the Audit Division issued a Statement of Audit Changes wherein petitioner's reported net profit of \$65,270.00

unincorporated business tax. Accordingly, a Notice of Deficiency was issued against petitioner on May 24, 1985 asserting unincorporated business tax of \$2,210.80, plus interest of \$1,151.84, for a total due of \$3,362.64 for the year 1980.

5. Petitioner contended that his classification as a full-time career life underwriter for National, his prime company, gave him status as an employee and exempted his income derived from said company from the unincorporated business tax. During the hearing, he conceded that his relationship with other insurance companies was that of an independent contractor.

6. Petitioner's total income reported on his Federal Schedule C of \$113,689.00 was computed by reducing his gross income of \$246,377.00 by commissions he paid to other agents of \$132,688.00.

7. Petitioner entered into an "Income Builder Contract" with National effective November 1, 1974. On June 1, 1980, petitioner executed an amendment to the contract. Subsection I, paragraph 2 of section A of the amendment provides that:

"Nothing in this contract shall be construed to create the relation of employer and employee between National and Agent."

Subsection I, paragraph 1 of section A provides that:

"Persons to be solicited, time of solicitation, method and mode of transportation and other details concerning such solicitation will be at the discretion of Agent."

8. National permitted petitioner to sell insurance policies of other insurance companies.

9. Of petitioner's gross commission income of \$246,377.00, the amount he derived from National was \$82,147.88, while the amount he derived from other insurance companies was \$164,229.12.

10. During 1980, petitioner wrote 67 life insurance policies through National and 33 through other insurance companies.

11. Petitioner was associated with the Arthur H. Bikoff general agency of National which was located at 29 Park Avenue, Manhasset, New York. Said agency was operated by petitioner's father.

12. Some of petitioner's office furniture was owned by him personally. The balance was owned by the general agency.

13. All of petitioner's services (other than field work) from which he derived wage income were rendered at petitioner's office at the Arthur H. Bikoff agency (see Findings of Fact "2" and "3", supra).

14. Petitioner spent between 25 and 40 percent of his time on business related to his wage income. Of his remaining business time, approximately 60 percent was related to his insurance sales for National and approximately 40 percent was related to his insurance sales for other insurance companies.

15. Petitioner did not maintain an office at home; however, he reported his home address as his business address on his 1980 Federal Schedule C.

16. The deductions claimed by petitioner for rent of \$1,650.00, telephone of \$2,756.00 and office supplies of \$3,574.00 were expenditures petitioner incurred to help contribute to the general agent's costs of doing business.

17. Petitioner personally paid advertising expenses of \$610.00. Such expenses were incurred for placing advertisements in trade journals respecting National's products.

18. Petitioner's general agent provided him with secretarial services.

19. Petitioner participated in National's Agent Group Insurance Plan and Pension Plan.

20. Petitioner was not required to work stated days or hours for National. He reported to his general agent at least once a week.

21. Petitioner was required to obtain prior approval from the general agent for vacations.

22. Petitioner attended various sales meetings of National.

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. Callman, 41 NY2d 774.)

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 is subject to the unincorporated business tax." ¹

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 National, but rather was an independent contractor. Therefore, petitioner's activities for National, as well as those for the various other insurance companies during the year 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 year at issue was thus subject to the imposition of the unincorporated business tax.

E. That the petition of Paul Bikoff is denied and the Notice of Deficiency issued May 24, 1985 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE **TAX** COMMISSION


APR 06 1987

Roderick A. Allen
PRESIDENT

PRESIDENT

Francis Q. Koenig
COMMISSIONER

COMMISSIONER


COMMISSIONER

COMMISSIONER

1 The essence of this ruling is encompassed by the definition of "employee"
as provided in current regulations. Said definition is as follows: