

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Estate of Frederic F. Lawall :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Unincorporated Business Tax :  
under Article 23 of the Tax Law  
for the Year 1967- 1969. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of January, 1981, he served the within notice of Decision by certified mail upon Estate of Frederic F. Lawall, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Frederic F. Lawall  
c/o Janet L. Elliot, Executrix  
5 W. 86th St.  
New York, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
9th day of January, 1981.

*Cornice A. Haglund*

*[Signature]*

STATE OF NEW YORK  
STATE TAX COMMISSION

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of  
Estate of Frederic F. Lawall :  
for Redetermination of a Deficiency or a Revision :  
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Unincorporated Business Tax :  
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State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of January, 1981, he served the within notice of Decision by certified mail upon John A. Dowd the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. John A. Dowd  
Forman, Kingston, Kops & Dowd  
290 Old Country Road  
Mineola, NY 11501

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
9th day of January, 1981.

*Connie A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

January 9, 1981

Estate of Frederic F. Lawall  
c/o Janet L. Elliot, Executrix  
5 W. 86th St.  
New York, NY

Dear Ms. Elliot:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
John A. Dowd  
Forman, Kingston, Kops & Dowd  
290 Old Country Road  
Mineola, NY 11501  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
Of	:	
ESTATE OF FREDERIC F. LAWALL	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1967,	:	
1968, and 1969.	:	

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Petitioner, The Estate of Frederic F. Lawall, c/o Janet L. Elliot, Executrix, 5 West 86th Street, New York, New York 10024, 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 1967, 1968 and 1969 (File No. 15759).

A small claims 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 June 23, 1980 at 1:15 P.M. Petitioner appeared by John A. Dowd, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

Whether Frederic F. Lawall's activities as a life insurance agent constituted the carrying on of an unincorporated business of which the income derived therefrom is subject to the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Frederic F. Lawall (hereinafter decedent) timely filed a New York State Combined Income Tax Return with his wife, Elizabeth R. Lawall (deceased October 14, 1967), for the year 1967. For the years 1968 and 1969, he timely filed New York State income tax resident returns. On each of said returns, decedent listed his occupation as "insurance agent", and reported the income derived therefrom on a federal "Schedule C", which was attached to each of the aforementioned returns. Decedent did not file an unincorporated business tax return for any of said years at issue.

2. On January 28, 1974, the Audit Division issued a Statement of Audit Changes to decedent wherein it held that his "activities as insurance agent are considered subject to unincorporated business tax" for the years 1967, 1968 and 1969. Accordingly, a Notice of Deficiency was issued against decedent under the same date, asserting unincorporated business tax of \$2,098.34, plus interest of \$579.60, for a total due of \$2,677.94.

3. Petitioner contended that decedent's income derived from Massachusetts Mutual Life Insurance Company (Mass. Mutual) was exempt from the imposition of unincorporated business tax since Mass. Mutual was decedent's prime principal. With respect to the income derived from other life insurance companies, petitioner conceded that such income is subject to said tax.

4. During the years at issue, decedent was an insurance agent attached to the D.J. Lizotte Associates general agency (Lizotte) of Mass. Mutual. His compensation from Mass. Mutual, which was paid on a commission basis for the years 1967, 1968 and 1969, was \$10,938.45, \$12,180.87 and \$12,737.32, respectively. Said compensation represented less than fifty percent of decedent's total insurance sales compensation from all sources during each year at issue.

5. Lizotte provided decedent with office space, telephone and secretarial service at no cost to him. Additionally, decedent expended his own funds for secretarial help during 1967, 1968 and 1969 of \$2,448.04, \$532.59 and \$345.00 respectively.

6. Petitioner contended that decedent's secretarial expenses were incurred solely with respect to activities engaged in for insurance companies other than Mass. Mutual and that decedent's income derived from such other companies consisted primarily of renewal commissions.

7. Lizotte provided decedent with group life insurance and major medical coverage although part of the premiums were paid by decedent.

8. Decedent's services were rendered to Lizotte under a contract entitled, "Contract B For Full-Time Agents". Said contract, which was dated January 1, 1966, and subsequently renewed, provided that "Second Party (decedent) shall determine the time, place and manner in which Second Party shall solicit such applications and amendments. Nothing in this contract shall be construed as creating the relationship of employer and employee between First Party (Lizotte) and Second Party or between the Company and Second Party".

9. Lizotte did not withhold income taxes from decedent's compensation.

10. Decedent was free to place policies with companies other than Mass. Mutual.

11. In decedent's letter dated March 20, 1971, he stated that his principal exercised very little supervision and control over his sales activities.

#### CONCLUSIONS OF LAW

A. That petitioner has failed to sustain its burden of proof required pursuant to section 689(e) of the Tax Law to show that decedent was a full-time life insurance soliciting agent whose principal activity was the solicitation of insurance for one insurance company.

B. That petitioner has failed to sustain its burden of proof required pursuant to section 689(e) of the Tax Law to show that Mass. Mutual or Lizotte exercised a sufficient degree of direction and control over decedent's activities so as to constitute a relationship of employer-employee. Therefore the decedent was not an employee in accordance with the meaning and intent of section 703(b) of the Tax Law.

C. That decedent's insurance sales activities for Mass. Mutual constituted the carrying on of an unincorporated business. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

D. That the income derived from decedent's insurance sales activities for insurance companies other than Mass. Mutual is subject to the imposition of unincorporated business tax as conceded by petitioner.

E. That the petition of the Estate of Frederic F. Lawall is denied and the Notice of Deficiency dated January 28, 1974 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JAN 09 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER