

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Donald W. Eberle :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for the :
Year 1976. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Donald W. Eberle, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald W. Eberle
13 Carstead Dr.
Slingerlands, NY 12159

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
18th day of March, 1983.

David Parchuck

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Donald W. Eberle :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for :
the Year 1976. :

State of New York
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Charles E. Miller the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles E. Miller
Arthur Place & Co.
15 Loudon Parkway
Loudonville, NY 12211

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
18th day of March, 1983.

David Parchuck

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

March 18, 1983

Donald W. Eberle
13 Carstead Dr.
Slingerlands, NY 12159

Dear Mr. Eberle:

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) 690 & 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Charles E. Miller
Arthur Place & Co.
15 Loudon Parkway
Loudonville, NY 12211
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DONALD W. EBERLE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1976.	:	

Petitioner, Donald W. Eberle, 13 Carstead Drive, Slingerlands, New York 12159, 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 1976 (File No. 33047).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Building 9, Room 107, State Campus, Albany, New York, on January 11, 1982 at 9:15 A.M. Petitioner, Donald W. Eberle, appeared with Arthur Place & Company, P.C. (Charles E. Miller, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether the income generated from petitioner's activities as a financial services representative was done so in the capacity of an independent contractor subject to unincorporated business tax or that of an employee exempt from said tax.

II. Whether petitioner's failure to file an unincorporated business tax return and pay the tax when due was based on reasonable cause, and not willful neglect, thereby permitting the penalties assessed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law to be waived.

FINDINGS OF FACT

1. Petitioner, Donald W. Eberle, filed a 1976 New York State Income Tax Resident Return wherein he reported wage income of \$30,377.00 and other income of \$13,038.00. He did not file an unincorporated business tax return for said year.

2. On November 29, 1978 the Audit Division issued a Statement of Audit Changes to petitioner for the year 1976, setting forth an unincorporated business tax liability of \$1,347.17, less a personal income tax refund of \$19.05, for a net tax due of \$1,328.12. Penalties were also asserted due under sections 685(a)(1); (a)(2) and (c) of the Tax Law for failure to file a return, failure to pay the tax when due and failure to file a declaration of estimated tax, respectively. The unincorporated business tax was assessed based on the Audit Division's determination that the income from petitioner's activities as a financial services representative, to wit the wages of \$30,377.00 and the other income of \$13,038.00, was subject to said tax. Petitioner does not contest the overpayment of personal income tax due him and accordingly, same will not be addressed hereafter. Based on the aforementioned Statement of Audit Changes the Audit Division issued a Notice of Deficiency to petitioner on January 22, 1981. Said notice assessed a tax due of \$1,328.12, plus penalty and interest of \$1,094.93, for a total due of \$2,423.05.

3. During the year 1976 petitioner was associated with Waddell & Reed, Inc., an investment management company involved in the underwriting and distribution of mutual funds and, also, the sale of life insurance and accident and health insurance written through a subsidiary known as United Investors Life Insurance Company. Petitioner was a district manager for Waddell & Reed in Albany, New York, responsible for the training, motivation and supervision of

the three agents working out of the Albany, New York office. Petitioner was also personally involved in the sale of the products offered by Waddell & Reed through the performance of personal financial planning for prospective clients. Personal financial planning involved putting to a more efficient use the dollars set aside by a client for investment purposes and insurance purposes.

4. During the year at issue petitioner was a licensed life and accident and health insurance agent and a licensed securities representative. Pursuant to securities industry regulation, petitioner was permitted to place his securities license with only one investment company, which in petitioner's case was Waddell & Reed. All of the securities sold by petitioner was done through Waddell & Reed. All investment sales submitted by petitioner to Waddell & Reed were accompanied by a suitability questionnaire which was reviewed by petitioner's division manager and Waddell & Reed's legal office. Should either of these parties reject the sale as being unsuitable, then petitioner would lose the sale.

5. United Investors Life Insurance Company, a Waddell & Reed subsidiary, was not licensed to do insurance business in New York State. Accordingly, Waddell & Reed set up a wholly owned general agency, known as the Unicon Agency, located in Huntington, New York. Waddell & Reed, through the Unicon Agency, had agreements with two insurance companies licensed to do business in New York State, the first being International Life Insurance Co. of Buffalo (for the sale of life product) and the second being Provident Life & Casualty (for the sale of accident and health product). Although not legally bound to place all insurance sales through the Unicon Agency, petitioner did in fact place all insurance sales with said agency, feeling that he was both morally and ethically obligated to do so.

6. For the sale of mutual funds, petitioner received from Waddell & Reed a commission, payable semi-monthly. He also received an override commission from Waddell & Reed on the securities sales made by the three agents working out of the Albany, New York office. Total commission income received by petitioner from Waddell & Reed in 1976 amounted to \$30,376.75. This amount was reported on a wage and tax statement and federal, state and social security taxes were withheld from said income.

7. Petitioner also received commission income directly from the International Life Insurance Co. of Buffalo and Provident Life & Casualty for the sale of insurance products written as an agent. He received an override commission from the Unicon Agency on the sale of insurance written by the three agents working out of the Albany, New York office. No amounts were withheld for taxes from the commission income received by petitioner on his insurance sales. Commissions earned as the result of insurance sales totaled \$13,038.00 and said commission income was reported on forms 1099, information returns.

8. Had United Investors Life Insurance Company been licensed to do business in New York State, then all of petitioner's commissions, both securities and insurance, would have been paid by Waddell & Reed and reported on a single wage and tax statement. Federal, state and social security taxes would have been deducted from the total commission due petitioner.

9. Waddell & Reed maintained an office in Albany, New York for petitioner's use, for which it paid the monthly rent, telephone expense and secretarial expense. Petitioner paid for his own postage and stationary, along with his expenses for entertainment and travel. In connection with his sales activities petitioner, in 1976, incurred unreimbursed expenses of \$8,921.00, said total broken down as follows:

<u>ITEM</u>	<u>AMOUNT</u>
Auto Expense	\$2,530.00
Advertising & Sales Aids	1,514.00
Meals & Entertainment	1,599.00
Seminar Expense	128.00
Dues & Subscription	118.00
Office Supplies	620.00
Postage	702.00
Telephone & Toll Calls	274.00
Outside Guest Entertainment	939.00
Home Office Use	497.00
TOTAL	<u>\$8,921.00</u>

10. Petitioner was required by Waddell & Reed to file a weekly sales report indicating the number of insurance sales and investment sales consumated during the previous week. As a district manager, petitioner was also responsible for holding weekly sales meetings with the three agents under his supervision. Petitioner was a member of and participated in Waddell & Reed's profit sharing plan. Other than the products offered for sale by Waddell & Reed, petitioner was prohibited from selling any other product of any nature, unless such product was first "cleared" through Waddell & Reed.

11. Waddell & Reed did not place any restrictions on petitioner's sales territory nor did it subject petitioner to any sales quota. Petitioner was not required by Waddell & Reed to adhere to a daily work schedule and vacations (without pay) were scheduled at his own discretion. Waddell & Reed was primarily concerned with the results of petitioner's sales endeavors, however, they did furnish petitioner with a sales book which he utilized in his presentation of the products offered for sale by Wadell & Reed.

12. The standard "Career Opportunity Agreement" utilized by Waddell & Reed, Inc. (W & R) and United Investors Life Insurance Co. (UILIC) required petitioner to "...offer securities and insurance policies exclusively through W & R and UILIC, unless you obtain prior permission from your Division Manager

to offer a particular product". Said agreement also provided that petitioner "...must follow the directions of your Managers and comply with W & R's and UILIC's rules and policies". The career opportunity agreement could be terminated by either party upon written notice and the agreement would also terminate "...as to your status as an employee when you attain age 65. However, at your election, you may continue as a representative of Waddell & Reed and an agent of UILIC as an independent contractor...".

CONCLUSIONS OF LAW

A. That petitioner's association with Waddell & Reed and its wholly owned general agency, the Unicon Agency, was in the nature of an employee-employer relationship within the meaning and intent of section 703(b) of the Tax Law and 20 NYCRR 203.10 (Greene v. Gallman, 39 A.D. 2d 270, aff'd 33 N.Y. 2d 778; Gutmann v. Tully, 53 A.D. 2d 751; Kent v. State Tax Commission, 55 A.D.2d 727). Accordingly, the income earned from petitioner's activities as a financial services representative during 1976 is exempt from unincorporated business tax.

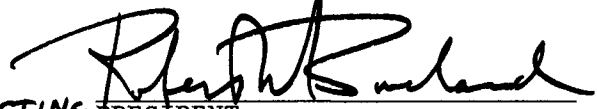
B. That the issue of penalties is rendered moot in light of Conclusion of Law "A", supra.

C. That the petition of Donald W. Eberle is granted and the Notice of Deficiency dated January 22, 1981 is cancelled in full. Additionally, the Audit Division is directed to authorize a refund to petitioner the personal income tax overpayment of \$19.05, plus any interest legally due thereon.

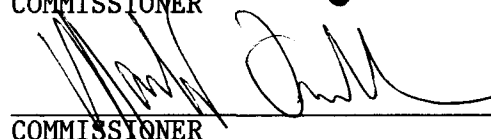
DATED: Albany, New York

MAR 18 1983

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER