

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Reuben & Pearl Linchitz

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax
Law for the Years 1973 and 1974 and Unincorporated :
Business Tax under Article 23 of the Tax Law for
the Years 1970 - 1974.

State of New York
County of Albany

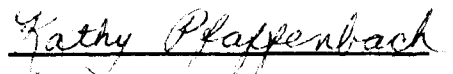
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of June, 1983, she served the within notice of Decision by certified mail upon Reuben & Pearl Linchitz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Reuben & Pearl Linchitz
c/o Herman L. Freid
5 Dakota Dr., Suite 208
Lake Success, NY 11040

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
29th day of June, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Reuben & Pearl Linchitz :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency for Refund of :
Personal Income Tax under Article 22 of the Tax
Law for the Years 1973 and 1974 and Unincorporated:
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1970 - 1974. :

State of New York
County of Albany

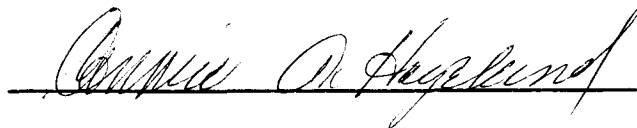
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of June, 1983, she served the within notice of Decision by certified mail upon Herman L. Freid the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

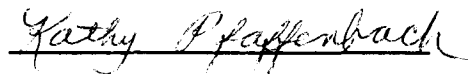
Herman L. Freid
H. L. Freid & Co.
5 Dakota Dr., Suite 208
Lake Success, NY 11040

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
29th day of June, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

June 29, 1983

Reuben & Pearl Linchitz
c/o Herman L. Freid
5 Dakota Dr., Suite 208
Lake Success, NY 11040

Dear Mr. & Mrs. Linchitz:

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Herman L. Freid
H. L. Freid & Co.
5 Dakota Dr., Suite 208
Lake Success, NY 11040
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
REUBEN LINCHITZ and PEARL LINCHITZ	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1973 and 1974 and Unincorporated Business:	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1970 through 1974.	:	

Petitioners, Reuben Linchitz and Pearl Linchitz, c/o Herman L. Freid, 5 Dakota Dr., Suite 208, Lake Success, New York 11042, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973 and 1974 and unincorporated business tax under Article 23 of the Tax Law for the years 1970 through 1974 (File No. 18600).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 20, 1981 at 2:30 P.M. Petitioners appeared by Herman L. Freid, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether petitioner Reuben Linchitz derived income as an employee of his principals or whether he was an independent agent and thus subject to unincorporated business tax for the years 1970 through 1974.

II. Whether petitioners' income in 1973 and 1974 was subject to the imposition of State income tax.

FINDINGS OF FACT

1. Petitioners, Reuben Linchitz and Pearl Linchitz, filed New York State income tax resident returns for the years 1970, 1971, 1972 and 1973, on which petitioner Reuben Linchitz indicated his occupation was that of an insurance broker. Reuben Linchitz did not file unincorporated business tax returns for said years. A New York State income tax nonresident return for 1974 was filed in March of 1977.

2. On February 28, 1977, the Audit Division issued a Statement of Audit Changes against Reuben Linchitz and Pearl Linchitz imposing additional personal income tax for the years 1973 and 1974 on the following grounds: that proration of exemption was required where a return was filed for less than twelve months because of a change of resident status in 1973; a portion of itemized deductions applicable to the period of nonresidence was disallowed as not properly deductible in computing taxable income for the period of residence; the itemized deductions allowed for the resident period was 10/12ths of \$8,603.00 or \$7,169.17; that since petitioners failed to submit all information requested, a deficiency was computed based on information available which deficiency included estimated business income and pensions for 1974; a long-term capital gain on sale of petitioners' New York home was held taxable to New York State at 60 percent rather than 50 percent; penalties are imposed under sections 685(a)(1) and (a)(2) of the Tax Law for failure to file a tax return and pay tax for 1974 and 685(c) of the Tax Law for underestimation of tax for 1974. Accordingly, a Notice of Deficiency was issued asserting tax, penalties and interest in the amount of \$5,142.17. A corrected Statement of Audit Changes was also issued on February 28, 1977 which reduced the 1974 taxes reflected in the Notice of Deficiency from \$3,145.88 to \$1,948.03.

3. On February 28, 1977, the Audit Division issued a Statement of Audit Changes against Reuben Linchitz asserting unincorporated business tax on the grounds that income from his activities as an insurance broker was subject to said tax for the years 1970 through 1974. Accordingly, a Notice of Deficiency was issued asserting tax, penalties and interest in the amount of \$5,593.96. A corrected Notice of deficiency was issued on the same date which increased the unincorporated business tax for 1974 from \$825.00 to \$1,349.70.

4. In the years 1970 through 1974, Reuben Linchitz earned commission income from the Equitable Life Assurance Society of the United States, Eastern Life Insurance, and LMG Agency. In the written agreement between Equitable and Mr. Linchitz, he was referred to as an agent. Said agreement contained a schedule which set forth the rate of premiums charged on insurance policies. It also set forth his authority, territory, vesting provisions, discontinuance and termination of the agreement, assignments, limitations and retirement plan. Paragraph XVI stated that "nothing contained herein shall be construed to create the relationship of employer and employee between the Society and the agent. The agent shall be free to exercise independent judgment as to the persons from whom applications for insurance policies and annuity contracts will be solicited and the time and place of solicitation. The agent shall abide by the rules and regulations... but such rules and regulations shall not... interfere with the freedom of action of the agent...". Paragraph IX provided that "the agent agrees not to submit to any other company proposals for any forms of insurance policies or annuity contracts unless authorized by the Society."

5. Petitioner Reuben Linchitz claimed that Equitable exercised direction and control over his activities since he was required to offer his insurance

proposals to said company, who had right of first refusal. Neither Equitable nor Eastern Life withheld federal, state or social security taxes from the Commissions paid to petitioner.

6. Petitioners' 1970, 1971, 1972 and 1973 State income tax returns listed wages received from the LMG Agency, Ltd. of Rockville Centre, New York. In 1972 and 1973, wages were received from LMG Excess, Ltd., Rockville Centre, New York. Said wages were not included in the computation of unincorporated business tax due. A copy of Federal Schedule C for 1971 and 1972 indicates gross receipts or sales in the amount of \$19,223.34 and \$25,059.00 respectively with deductions for rent, repairs, insurance, advertising, stationery, printing and postage, travel and entertainment, telephone and telegraph, utilities and other business expenses. Taxpayer's business activity was listed as "insurance commissions".

7. At the hearing, petitioners' representative indicated that Mr. Linchitz had no letterhead because he had only maintained working space in his home and that a portion of the income petitioner received represented reimbursement for some expenses incurred.

8. The 1974 nonresident return with a copy of the Federal return attached was received from petitioners in March of 1977. On their New York State tax return for said year they reported sale or exchange of capital assets in the amount of \$4,616.00, said amount representing fifty percent of the gain derived from the sale of their personal residence located in this state on April 14, 1974. This was the only item of income reported in the New York State column on their nonresident return. A federal Schedule C, Profit from Business or Profession, indicated that petitioner Reuben Linchitz was a consultant and that various business expenses were deducted from his gross

receipts. Petitioner Reuben Linchitz paid Social Security self-employment tax and made payments to a self-employed retirement plan for 1974. Petitioners did not report any business income to New York State on their 1974 nonresident return. Their representative stated at the hearing that "I don't have to address myself to '74 because he was not in the state at that time for earning any income at that time from any New York business and he was not in business in New York". A pension of \$1,641.00 was listed in the Federal column but not in the New York column on page two.

9. Petitioners moved to Florida in November 1973. They filed their 1973 New York State return as residents for the entire year and reported their entire income for said year from all sources. Petitioner did not maintain a permanent place of abode in New York State during 1974 and spent less than thirty days in this State during said year.

CONCLUSIONS OF LAW

A. That the determination whether services were performed by an individual as an "employee" or as an "independent agent" turns upon the unique facts and circumstances of each case.

"The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used." (Matter of Morton, 284 N.Y. 167, 172.) It is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee. (E.g., Matter of Greene v. Gallman, 39 A.D.2d 270, 272, affd. 33 N.Y.2d 778; Matter of Frishman v. New York State Tax Comm., 33 A.D.2d 1071, mot. for lv. to app. den. 27 N.Y.2d 483; Matter of Hardy v. Murphy, 29 A.D.2d 1038; see 20 NYCRR 203.10; cf. Matter of Sullivan Co., 289 N.Y. 110, 112.)" Matter of Liberman v. Gallman, 41 N.Y.2d 774, 778.

B. That although petitioner Reuben Linchitz was subject to general supervision by his principals he was free to exercise independent judgement as to the persons from whom he solicited insurance policies and annuity contracts and he was able to determine the time, place and manner in soliciting insurance business (see Matter of Cohen v. Gallman, 368 N.Y.S.2d 336). Petitioner was not provided with office space by either principal but incurred expenses for which he received some reimbursement. Neither Equitable Life nor Eastern Life Insurance Company withheld state and federal income taxes or social security taxes from his earnings.

C. That petitioners have failed to sustain their burden of proof to show that a change of domicile occurred in 1973. Accordingly, petitioners are residents of New York State for 1973 within the meaning and intent of section 605(a) of the Tax Law. Petitioners are nonresidents of New York State for 1974 since they did not have a permanent place of abode in this State, did have one elsewhere and spent less than 30 days in New York during said year. Therefore, petitioners are required to report on their 1974 New York nonresident return fifty percent of the long term gain attributable to the sale of their personal residence located in this State, plus twenty percent of said gain pursuant to section 612(b)(11) of the Tax Law.


D. That petitioner Reuben Linchitz has failed to sustain the burden of proof under section 689(e) of the Tax Law to show that he acted as an employee rather than an independent agent. Accordingly, petitioner's activities during the years 1970 through 1973 constituted the carrying on of an unincorporated business and the income derived therefrom is subject to the unincorporated business tax. However, petitioner's activities during 1974 are not subject to unincorporated business tax since he had no place of business in this State.


E. That the petition of Reuben Linchitz and Pearl Linchitz is granted to the extent shown in Conclusions of Law "C" and "D" supra; and that, except as so granted, the Notice of Deficiency issued on February 28, 1977 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 20 1983


PRESIDENT


COMMISSIONER


COMMISSIONER