

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Dudley H. & Christine Dommerich :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or for Refund :  
of New York State Personal Income and Unincorporated :  
Business Taxes under Articles 22 and 23 of the Tax :  
Law and New York City Nonresident Earnings Tax under :  
Chapter 46, Title U of the Administrative Code of :  
the City of New York for the Years 1978, 1979 and :  
1980. :

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State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of August, 1985, he served the within notice of Decision by certified mail upon Dudley H. & Christine Dommerich, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dudley H. & Christine Dommerich  
7 Indian Pass Lane  
Greenwich, CT 06830

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
21st day of August, 1985.

David Parchuck

James A. Hagelius  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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Dudley H. & Christine Dommerich :  
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AFFIDAVIT OF MAILING

State of New York :  
ss.:  
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of August, 1985, he served the within notice of Decision by certified mail upon Howard G. Acker, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Howard G. Acker  
Wilfred Wyler & Co.  
122 E. 42nd St., Suite 616  
New York, NY 10168

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
21st day of August, 1985.

David Parchuck

Ann A. Hegland  
Authorized to administer oaths

pursuant to Tax Law section 174

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

August 21, 1985

Dudley H. & Christine Dommerich  
7 Indian Pass Lane  
Greenwich, CT 06830

Dear Mr. Dommerich:

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 & 1312 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Howard G. Acker  
Wilfred Wyler & Co.  
122 E. 42nd St., Suite 616  
New York, NY 10168  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
DUDLEY H. DOMMERICH and CHRISTINE DOMMERICH	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income and	:	
Unincorporated Business Taxes under Articles	:	
22 and 23 of the Tax Law and New York City	:	
Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Years 1978, 1979 and 1980.	:	

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Petitioners, Dudley H. Dommerich and Christine Dommerich, 7 Indian Pass Lane, Greenwich, Connecticut, 06830, filed a petition for redetermination of a deficiency or for refund of New York State personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1978, 1979 and 1980 (File No. 38767).

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 March 14, 1984 at 1:15 P.M., with final briefs to be submitted on May 14, 1984. Petitioners appeared by Howard G. Acker, CPA. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner Dudley H. Dommerich's activities as a life insurance agent constituted the carrying on of an unincorporated business, thereby subjecting his commission income derived therefrom to unincorporated business tax.

II. Whether petitioner is properly entitled to allocate the income derived from his activities as a life insurance agent to sources without New York State and City and if so, to what extent.

FINDINGS OF FACT

1. Petitioners, Dudley H. Dommerich and Christine Dommerich, timely filed a joint New York State Income Tax Nonresident Return (with City of New York Nonresident Earnings Tax) for each of the years 1978, 1979 and 1980. On each of said returns, Dudley H. Dommerich (hereinafter "petitioner") reported business income derived from his activities engaged in as a life insurance agent. Petitioner allocated 50 percent of his net profit from such activities to New York State and 10 percent of his net profit to New York City for each year at issue. Said allocation percentages were estimated by petitioner. Petitioner did not file an unincorporated business tax return for any of the years at issue.

2. On April 6, 1982, the Audit Division issued a Statement of Audit Changes to petitioner and his wife wherein, based on petitioner's failure to submit the information requested in the Audit Division's inquiry letter of September 14, 1981, the entire net profit from petitioner's activities as a life insurance agent was held subject to unincorporated business tax for 1978. Additionally, for New York State personal income tax purposes and New York City nonresident earnings tax purposes, such income was held allocable in its entirety to New York State and City. Accordingly, on April 14, 1982, two notices of deficiency were issued against petitioner and his wife for 1978. One such notice asserted unincorporated business tax of \$599.36, plus penalties of \$245.74 and interest of \$175.78, for a total due of \$1,020.88. Said penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of Article 22 of the

Tax Law, as incorporated into Article 23 of the Tax Law by section 722(a), for failure to file an unincorporated business tax return for 1978 and failure to pay the tax determined to be due respectively. The second Notice of Deficiency asserted New York State personal income tax of \$615.46, New York City nonresident earnings tax of \$131.52, plus interest of \$219.07, for a total due of \$966.05.

3. On April 6, 1982, the Audit Division issued statements of audit changes for the years 1979 and 1980 whereon petitioner's entire net profit derived from said activities during each of said years was held subject to unincorporated business tax. Additionally, as in taxable year 1978, such income was held fully allocable to New York State and New York City for personal income tax and nonresident earnings tax purposes. Accordingly, on July 9, 1982, two notices of deficiency were issued against petitioner and his wife for each of the years 1979 and 1980. The basis for the issuance of such notices was identical to that as stated for taxable year 1978. For 1979, one notice asserted unincorporated business tax of \$332.44, plus penalties of \$119.67 and interest of \$78.22, for a total due of \$530.33. The other notice issued for 1979 asserted New York State personal income tax of \$496.76, New York City nonresident earnings tax of \$102.00, plus interest of \$140.89, for a total due of \$739.65. For 1980, one notice asserted unincorporated business tax of \$42.86, plus penalties of \$12.84 and interest of \$6.45, for a total due of \$62.15. The other notice issued for 1980 asserted New York State personal income tax of \$198.53, New York City nonresident earnings tax of \$63.43, plus interest of \$39.38, for a total due of \$301.34. The penalties asserted for unincorporated business tax purposes for 1979 and 1980 were identical in nature to those issued for taxable year 1978.

4. Petitioner claimed that he is properly entitled to allocate a portion of the income derived from his activities as an insurance agent to sources without the State and City of New York based on his contention that he maintained a bona fide business office in his Connecticut residence.

5. During the years at issue petitioner was engaged in activities as a life insurance agent for the Northwestern Mutual Life Insurance Company (hereinafter "Northwestern"), 720 East Wisconsin Avenue, Milwaukee, Wisconsin. Said activities were conducted pursuant to a "Full Time Special or Soliciting Agent's Contract" effective June 1, 1969, between petitioner and Peter S. Hearst and Associates, Inc., general agent for Northwestern. Said contract provided, inter alia, that:

- a) "Relationship - Nothing contained herein shall be construed to make Agent an employee of the Company, General Agent of First Party. Agent shall be free to exercise his own judgement as to the persons from whom he will solicit applications and the time, place and manner of solicitation, but the company from time to time may adopt regulations respecting the conduct of the business covered hereby, not interfering with such freedom of action of Agent."
- b) "Exclusive Dealing - (a) Agent shall do no business for any other life insurance company, except in connection with applications which have been declined by the Company (or would necessarily be declined in their entirety by the company under its then published underwriting rules), or applicants who have been found by the Company to be insurable only at higher than standard premium rates which are unacceptable to the applicants."
- c) "Responsibility - Agent shall be responsible to first party (general agent) and to the Company for all business done by or entrusted to persons employed by him..."
- d) "Expenses - Agent shall pay all expenses incurred by him in the performance of this agreement."

6. Pursuant to said contract, petitioner's territory consisted of metropolitan New York and certain specific townships, counties, cities and boroughs in New Jersey. Said contract further provided that:

"In addition:

Agents appointed by said General Agent or his District Agent, who have their business office in Metropolitan New York (except those officed in New Jersey) and solicit primarily in Metropolitan New York may solicit in Fairfield County, Connecticut and place business through the agency office with which they are contracted."

7. Petitioner filed a Federal Schedule C, Profit or (Loss) from Business or Profession, for each year at issue whereon he reported gross income from his life insurance agent activities of \$43,681.00 (1978), \$39,813.00 (1979) and \$34,615.00 (1980). Petitioner contended that his gross income for each of said years was derived from sources as follows:

	<u>Northwestern</u>	<u>Other Companies</u>	<u>Gross Income</u>
1978	\$43,505.00	\$ 176.00	\$43,681.00
1979	38,798.00	1,015.00	39,813.00
1980	34,252.00	363.00	34,615.00

8. Petitioner submitted his commission statements from Northwestern for the years at issue herein. Said statements show that the total income paid to petitioner by Northwestern was \$38,289.05 in 1978, \$34,959.52 in 1979 and \$31,801.45 in 1980. In a letter submitted by petitioner's representative, Mr. Howard G. Acker, dated April 12, 1984, he classified the difference between petitioner's total income derived from Northwestern for each year at issue pursuant to the commission statements and that as scheduled in Finding of Fact "6", supra, as "general agent incentive payments". No documentation or other evidence was submitted to show that said characterization was accurate.

9. Petitioner's net profit derived from his activities as an insurance agent, as reported on his Federal schedules C, was \$21,234.00 (1978), \$16,693.00 (1979) and \$10,759.00 (1980).

10. On petitioner's Federal schedules C he claimed deductions for the following expenses incurred:



Deduction	A m o u n t   C l a i m e d		
	1978	1979	1980
Secretarial Services	\$ 116.00	\$5,971.00	\$5,598.00
Wages	4,657.00		
Office Supplies	822.00	2,272.00	1,828.00
Postage	1,294.00	1,211.00	1,315.00
Rent on Business Property	1,541.00	1,881.00	2,207.00
Office Expense	266.00		
Supplies	1,145.00		
Telephone	1,898.00	1,816.00	1,830.00
Travel and Entertainment	6,495.00		
Advertising		548.00	993.00
Office in Home		718.00	546.00
Business Promotion		4,784.00	5,915.00
Education Costs	189.00	310.00	209.00

The above list of deductions claimed is not all inclusive.

11. Petitioner did not appear at the hearing held herein. In a letter dated August 24, 1982, Mr. Acker stated that petitioner "is furnished with office space by his general agent, Peter S. Hearst and Associates, Inc." and that "Mr. Dommerich is furnished with secretarial assistance and telephone facilities by his general agent." In contrast to the above, in a letter dated April 12, 1984, Mr. Acker stated that "the company reimburses the taxpayer for office space, etc. through incentive payments."

12. A memorandum issued by the general agent on March 7, 1984 with respect to "the agency allowance program" provides, in pertinent part, that:

"The allowance is meant to partially reimburse associates for expenses incurred for office space, telephone and sales assistant. Unless the agent is housed in the agency and currently employs a sales assistant for fifteen or more hours per week, vouchers for expenses are required, and the allowance paid will either be that which is earned or that which can be vouchered, whichever is less."

13. Mr. Acker claimed that said allowance was in force during the years at issue and constituted part of the incentive program of the general agent. As such, he claimed that it qualifies as a reimbursement pursuant to a policy

memorandum of the State Tax Commission entitled "Attachment to Memorandum No. 251", which provides in pertinent part that:

"...many general agents have incentive programs wherein the soliciting agent receives additional commissions for new policies written. If the incentive agreement provides that the amount of the additional commissions shall not exceed the amount of the "office expenses" of the soliciting agent, the funds received are considered to be reimbursements..."

14. Petitioner's office was located in the same business office as that of his general agent. Initially the general agent's business office was maintained at 277 Park Avenue, New York City. From mid 1979 through the balance of the period at issue, said office was located at 405 Lexington Ave., New York City. Mr. Acker contended that petitioner was provided with office space in the general agent's offices; however, no details or substantiation of such office space arrangement was provided.

15. Petitioner submitted a letter from The Hearst Agency, Inc., General Agent (formerly Peter S. Hearst & Associates, Inc.) wherein it was stated that "We maintain a close relationship with our Special Agents such as Dudley H. Dommerich, Jr." According to said letter, various meetings were held by Northwestern and the general agent as follows:

- a) Client Builder Meetings - These are monthly meetings of peer group agents with the general agent. Their purpose is to exchange ideas and to direct sales efforts of special agents (which petitioner has been designated) in directions that will improve their effectiveness.
- b) Individual meetings with special agents - These meetings with the general agent are held at least twice a month to review the progress of the special agent, resolve problem areas and suggest methods for more effective solicitation.
- c) General agency meetings - These are mainly training meetings and are held five or six times a year.
- d) Regional annual meeting - This meeting is held by Northwestern's Eastern Region and lasts for two days.

e) National Annual Meeting - This is a three day meeting held each year in Milwaukee, Wisconsin.

No information was provided with respect to which of the aforestated meetings petitioner was actually required to attend.

16. Said letter from The Hearst Agency, Inc. further stated that:

- a) "Day-to-day relationships - The preceding paragraphs (with respect to various meetings) furnish information regarding the formal aspects of our relationships with Agents. Informally, we are in touch with Agents on a day-to-day basis to help with problems, suggest courses of action, inform ourselves as to their progress or lack of progress, etc. Obviously, we usually develop a personal relationship that maximizes the amount of assistance that can be given to our Agents."
- b) "Minimum Earnings Standards Report - The Home Office furnishes our Agency with elaborate monthly statistical reports that detail the quotas, present production, production history, etc., of our Agents. This data enables us to monitor performance, historical trends, etc., of the Agents and thereby assist them in their work for the Company."
- c) "One of the functions of our office is the recruitment of new Agents. We also terminate the contracts of Agents who we feel are not performing satisfactorily, who are not or who we feel will not be able to meet our minimum quotas or whose conduct is below our standards."

17. Northwestern withheld F.I.C.A. tax from commissions earned by petitioner. Petitioner participated in the group life and health insurance plan of Northwestern. He also participated in the Agents Retirement Investment Fund through deductions from his gross commissions. No income taxes were withheld by Northwestern from petitioner's commission income.

18. Petitioner submitted all of his semi-monthly commission statements from Northwestern covering the years at issue herein. For each transaction petitioner indicated the location where such transaction was consummated. Pursuant to said statements, most transactions were consummated in either New York or Connecticut. However, petitioner listed several transactions with a

point of consummation in New Jersey or, on an occasional basis, a point of consummation outside the aforestated three states comprising his assigned territory. (see Finding of Fact "6", supra).

19. Petitioner's business letterhead lists his Connecticut address and telephone number under the designation "residence". His business card shows only his New York business address and lists his Connecticut telephone number under the designation "residence".

20. Petitioner submitted statements from eleven (11) clients, each of whom has met with petitioner at his Connecticut office for business purposes.

21. In a letter dated April 10, 1984, petitioner's general agent stated that:

"Many potential and present clients live or work closer to our Agent's home than to our Manhattan office. In addition, many potential and present clients must be contacted at home in the evening and over weekends to generate sales and provide necessary service. For these reasons, we encourage our Agents to establish offices in their homes to provide the resources necessary to conduct this important aspect of their business.

Dudley Dommerich is one of our successful Agents. We attribute a good measure of his success to the use of his Connecticut office on a regular basis."

22. Petitioner's representative, Howard G. Acker, CPA, testified that petitioner did not file unincorporated business tax returns for the years at issue based on his professional opinion and advise that petitioner's income was not subject to said tax. Accordingly, he argued that the penalties asserted should be abated.

#### CONCLUSIONS OF LAW

A. That the State Tax Commission ruling reported at 20 NYCRR 281.3 provides that:

"A full-time life 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, regardless of the provisions of the agreement existing between him and the insurance company, but commissions received from other companies will be subject to such tax. Such an agent shall generally be considered an independent contractor subject to the tax with respect to all his commissions where, for example, he operates from his own office, paying rent not specifically reimbursed to him by his principal company, or where, for example, he, himself, employs one or more permanent employees (rather than temporary help employed from day to day when needed), paying their salaries which are not specifically reimbursed to him. 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."

B. That petitioner urges that Matter of Greene v. Gallman (39 AD2d 270, affd. 33 NY2d 778) controls. However, petitioner failed to prove that he satisfied the requirement in the Greene decision (or the aforementioned ruling) that he use "office space provided by the company or its general agent" and that he be "furnished stenographic assistance and telephone facilities without cost."

C. That it is the degree of control and direction exercised by the employer that is determinative of whether or not the taxpayer is an employee. (Matter of Frishman v. New York State Tax Comm., 33 AD2d 1071, mot. for lv. to app. den. 27 NY2d 483; Matter of Hardy v. Murphy, 29 AD2d 1038).

D. That petitioner has failed to sustain his burden of proof to show that he was subject to general and particular supervision by his company over sales.

There is evidence he was subject to general supervision but such was insufficient for the existence of a bona fide relationship of employer-employee.

E. That petitioner's activities as a life insurance agent for Northwestern as well as for other companies during the years 1978, 1979 and 1980 constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law. Accordingly, the income derived from said activities is subject to the imposition of unincorporated business tax pursuant to section 701(a) of the Tax Law.

F. That section 707(a) of the Tax Law provides that:

"If an unincorporated business is carried on both within and without this state, as determined under regulations of the tax commission, there shall be allocated to this state a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions. If the unincorporated business has no regular place of business outside this state, all of such excess shall be allocated to this state."

G. That 20 NYCRR 207.2 provides in pertinent part that:

"In general, an unincorporated business is carried on at any place either within or without New York State where the unincorporated business entity has a regular place of business. The occasional consummation of an isolated transaction in or at a place where no regular place of business is maintained does not constitute the carrying on of business at such place. A regular place of business is any bona fide office, factory warehouse or other place which is systematically and regularly used by the unincorporated business entity in carrying on its business."

H. That 20 NYCRR 207.2(c) provides:

"The foregoing provisions of this section are not exclusive in determining whether an unincorporated business has a regular place of business outside New York State or in determining whether the business is carried on both within and without New York. Where any question on these points exists, consideration should be given to all of the facts pertaining to the conduct and operation of the business including:

- (1) the nature of the business,
- (2) the type and location of each place of business used in the activity,
- (3) the nature of the activity engaged in at each place of business and
- (4) the regularity, continuity and permanency of the activity at each location."

I. That the petitioner has the burden of proving that the office in Connecticut is systematically and regularly used in carrying on the business. Petitioner's business letterhead lists his Connecticut address and telephone number under the designation "residence" and his business card shows only his New York business address but lists his Connecticut telephone number under the designation "residence". The fact that the petitioner has met with clients in his home on occasion does not constitute maintaining an office in his home. The petitioner offered no documentary or other substantial evidence to give a specific indication of the nature of the business activity or a description of the business locale at his Connecticut home. Where one desires to allocate income to sources without the State, sufficient relevant evidence must be offered to demonstrate the regularity, continuity and permanency of the business activity at an actual office. Therefore all of the petitioner's unincorporated business income is allocated to New York State.


J. That the penalties asserted for all three years at issue with respect to unincorporated business tax are hereby abated since petitioner has established that his failure to file the unincorporated business tax returns and his failure to pay the taxes determined to be due was due to reasonable cause and not due to willful neglect. (See Finding of Fact "22", supra).


K. That the petition of Dudley H. Dommerich and Christine Dommerich is granted to the extent provided in Conclusions of Law "J", and that except as so granted, the petition is, in all other respects, denied.

DATED: Albany, New York

STATE TAX COMMISSION

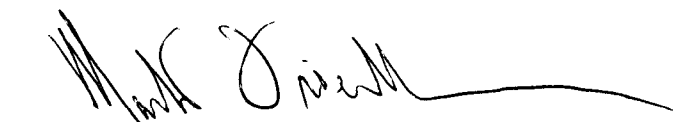
AUG 21 1985

  
PRESIDENT

  
COMMISSIONER

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COMMISSIONER

I dissent. The record substantiates petitioner's claim that he maintains a business office at his Connecticut residence. While more evidence could always be requested, petitioner here has met his burden of proof. I would find for petitioner.

  
COMMISSIONER