

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

David F. & Carol M. West : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refunds :
of NYS Personal Income and Unincorporated Business
Taxes under Articles 22 and 23 of the Tax Law and :
NYC Nonresident Earnings Tax under Chapter 46,
Title U of the Administrative Code of the City of :
New York for the Years 1975, 1976 and 1978.

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon David F. & Carol M. West, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David F. & Carol M. West
75 Norma Road
Harrington, NJ 07640

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
6th day of February, 1985.

David Parchuck

Ernie R. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of

David F. & Carol M. West : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refunds :
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Taxes under Articles 22 and 23 of the Tax Law and :
NYC Nonresident Earnings Tax under Chapter 46,
Title U of the Administrative Code of the City of :
New York for the Years 1975, 1976 and 1978.

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Hirsch Kaplan, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hirsch Kaplan
405 Lexington Ave.
New York, NY 10174

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
6th day of February, 1985.

David Parchuck

Annie A. Hegelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

David F. & Carol M. West
75 Norma Road
Harrington, NJ 07640

Dear Mr. & Mrs. West:

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, 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
Hirsch Kaplan
405 Lexington Ave.
New York, NY 10174
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
DAVID F. WEST AND CAROL M. WEST	:	DECISION
	:	
for Redetermination of Deficiencies or for	:	
Refunds 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 1975, 1976 and 1978.	:	

Petitioners, David F. West and Carol M. West, 75 Norma Road, Harrington, New Jersey 07640, filed petitions for redetermination of deficiencies or for refunds 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 1975, 1976 and 1978 (File Nos. 35325, 35326 and 40749).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 11, 1984 at 9:00 A.M., with all briefs to be submitted by August 16, 1984. Petitioners appeared by Hirsch Kaplan, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether commission income received by petitioner David F. West as a soliciting life insurance agent should be included with income earned by Mr. West as a general agent and held subject to unincorporated business tax.

II. Whether petitioner David F. West, for personal income tax purposes, properly allocated to New York State and City sources the commission income

received as a soliciting life insurance agent based on the volume of business transacted within and without the State and City.

FINDINGS OF FACT

1. Petitioners herein, David F. West and Carol M. West,¹ filed New York State income tax nonresident returns for the years 1975, 1976 and 1978, New York City nonresident earnings tax returns for 1976 and 1978, and New York State unincorporated business tax returns for 1975, 1976 and 1978. During each of the years at issue, petitioner earned income as both a general agent and a soliciting life insurance agent (hereinafter "soliciting agent"). The following chart represents a synopsis of the amounts reported on petitioner's returns from each activity and the amounts allocated to New York State and City sources:

<u>Year & Type of Income</u>	<u>Amount Reported for Federal Purposes</u>	<u>N.Y.S. Personal Income Tax Portion</u>	<u>N.Y.S. Unincorporated Business Tax Portion</u>	<u>N.Y.C. Portion</u>
<u>1975</u> - general agent income	\$ 37,784.00	\$ 37,784.00	\$ 37,784.00	N/A
soliciting agent income	16,388.00	8,194.00	-0-	N/A
<u>1976</u> - general agent income	\$ 58,728.00	\$ 58,728.00	\$ 58,728.00	\$ 58,728.00 ²
soliciting agent income	19,560.00	7,824.00	-0-	7,284.00 ²
<u>1978</u> - general agent income	\$130,665.00	\$130,665.00	\$130,665.00	\$130,665.00 ³
soliciting agent income	24,404.00	6,623.00	-0-	6,629.00 ³

¹ Carol M. West is a party to this proceeding solely as the result of filing joint income tax returns with her spouse. Accordingly, the term petitioner shall hereinafter refer solely to David F. West.

² It would appear that to be consistent with the amount reported on his New York State personal income tax return petitioner should have reported \$7,824.00 for New York City purposes and not \$7,284.00. This is apparently a transposition error.

³ It would appear that to be consistent with the amount reported on his New York State personal income tax return petitioner should have reported \$6,623.00 for New York City purposes and not \$6,629.00. This is apparently an arithmetic error.

2. On January 22, 1979, petitioner executed Form IT-75, Consent Fixing Period of Limitations Upon Assessment of Personal Income and Unincorporated Business Taxes, wherein the statute of limitations for assessment for the year 1975 was extended to any time on or before April 15, 1980. A second Form IT-75 was executed by petitioner on December 11, 1979, wherein the statute of limitations for assessment for the years 1975 and 1976 were extended to any time on or before April 15, 1981.

3. On March 25, 1981, the Audit Division issued two notices of deficiency to petitioner each for the years 1975 and 1976. The first Notice of Deficiency (Exhibit "A") proposed additional unincorporated business tax due of \$1,977.03, plus interest. The second Notice of Deficiency (Exhibit "B") proposed additional New York State and City personal income tax due of \$2,667.06, plus interest.

4. The Audit Division's assertion of additional unincorporated business tax due was based on its determination that the income earned by petitioner as a soliciting agent was so interrelated and integrated with his unincorporated business (i.e. his activities as a general agent) as to subject the income earned as a soliciting agent to unincorporated business tax.

The assertion of additional New York State and City personal income tax due was based on the Audit Division's disallowance of petitioner's claimed allocation of soliciting agent's income to sources within and without the State and City. The claimed allocation was disallowed on the ground that petitioner did not maintain a place of business outside New York State and City and was therefore not entitled to allocate income earned as a soliciting agent to sources outside the State and City.

5. (a) On or about June 27, 1979, petitioner submitted an amended return for 1978 requesting a refund of \$2,819.00. On said amended return, petitioner

reported a New York State personal income tax liability of \$12,092.00, a New York City personal income tax liability of \$860.00 and a New York State unincorporated business tax liability of \$5,090.00.

(b) The Audit Division, in response to the 1978 amended return, initially issued to petitioner an undated Statement of Refund Adjustment which indicated a refund due Mr. West of \$214.91, plus interest. Subsequent to the issuance of the aforementioned undated Statement of Refund Adjustment, the Audit Division issued a second document, an undated Voucher for Income Tax Refund. The undated Voucher for Income Tax Refund indicated an additional refund due petitioner of \$1,753.90, plus interest.

(c) On both refund documents issued by the Audit Division, petitioner's New York State personal income tax liability was determined to be \$11,947.64 and his New York City personal income tax liability was determined to be \$860.00. Petitioner agrees with the Audit Division's computation of his New York State and City personal income tax liability for 1978.

(d) In computing petitioner's 1978 unincorporated business tax liability of \$6,084.55, as shown on the undated Voucher for Income Tax Refund, the Audit Division combined the compensation earned by petitioner as a soliciting agent with the income earned by petitioner as a general agent. Petitioner contends that the income earned as a soliciting agent is not subject to unincorporated business tax and that he is due a refund of unincorporated business tax for 1978 of \$994.55, said amount computed as follows:

Unincorporated business tax liability as computed by the Audit Division	\$6,084.55
Unincorporated business tax liability as computed on the amended return	<u>5,090.00</u>
Additional refund due petitioner	<u>\$ 994.55</u>

(e) On December 28, 1981, the Audit Division advised petitioner that the refund of \$2,819.00, as claimed on his 1978 amended return filed on or about June 27, 1979, was disallowed in the amount of \$1,065.10. The actual amount of refund of unincorporated business tax in dispute is the \$994.55 set forth in Finding of Fact "5(d)", supra.

6. After the close of the hearing held on January 11, 1984, petitioner's representative asserted, pursuant to a letter dated January 27, 1984, that his client never received the refunds of \$214.91, plus interest and \$1,753.90, plus interest, as set forth in the undated Statement of Refund Adjustment and the undated Voucher for Income Tax Refund, respectively. By memorandum dated March 19, 1984, the Audit Division produced a photocopy of check #77200850 dated November 7, 1980 in the amount of \$243.74 (\$214.91 + \$28.83 of interest) which was issued to and endorsed by David F. West and Carol M. West. Said memorandum further stated that refund #82177516 in the amount of \$2,204.26 (\$1,753.90 + \$450.36 of interest) was still outstanding.

7. On December 6, 1957, petitioner entered into a "Soliciting Agent's Contract" with The Penn Mutual Life Insurance Company (hereinafter "Penn Mutual"). On April 1, 1970, petitioner entered into a "General Agency Contract" with Penn Mutual which became effective as of August 1, 1969.

8. During the years at issue, petitioner performed services for Penn Mutual in the dual capacity of a soliciting agent and a general agent. However, petitioner's primary and most time-consuming function for Penn Mutual was that of running the general agency. When petitioner became a general agent for Penn Mutual, it was required that he minimize his activities as a soliciting agent and devote his time to the management of the general agency. Penn Mutual did

not wish to have petitioner, as a general agent, selling in competition with the men he supervised and directed.

9. The income received by petitioner as a soliciting agent was earned primarily through accommodation sales to prior clients who wished to continue with his services. All sales generated by petitioner as a soliciting agent had to be offered first to Penn Mutual and, if the sale was rejected by Penn Mutual, petitioner was free to place the sale with other insurance companies. The following chart details the gross commission income earned by petitioner as a soliciting agent and the amounts he received from Penn Mutual as compared to amounts he received from other insurance companies:

	<u>1975</u>	<u>1976</u>	<u>1978</u>
Penn Mutual commission income	\$18,213.92	\$19,574.06	\$18,288.46
Commission income from other companies	275.08	1,954.94	5,114.54
Gross commission income	<u>\$18,489.00</u>	<u>\$21,529.00</u>	<u>\$23,403.00</u>

10. As a soliciting agent, petitioner received commission income in two forms: a first year commission on the sale of new policies and renewal commissions and service fees on policies written in prior years. The commission income received by petitioner from Penn Mutual as a soliciting agent is broken down between first year commissions on new policies and renewal commissions and service fees in the following manner:

	<u>1975</u>	<u>1976</u>	<u>1978</u>
First year commissions on new policies	\$10,022.13	\$12,234.35	\$ 8,688.89
Renewal commissions and service fees	8,191.79	7,339.71	9,599.57 ⁴
Total commissions from Penn Mutual	<u>\$18,213.92</u>	<u>\$19,574.06</u>	<u>\$18,288.46</u>

⁴ The record contains contradictory evidence as to the exact amount of renewal commissions and service fees received by petitioner from Penn Mutual during 1978. Petitioner's representative stated, in a letter dated January 27, 1984, that 1978 renewal commissions from Penn Mutual amounted to \$9,611.03. Said representative subsequently advised, via a letter dated June 6, 1984, that 1978 renewal commissions totalled \$9,599.57. The discrepancy is small (\$11.46) and therefore deemed insignificant.

The record is devoid of any evidence as to what portion of the commission income received from other insurance companies represented first year commissions on new policies as compared to renewal commissions and service fees on policies written in prior years.

11. As a soliciting agent for Penn Mutual, petitioner was furnished office space at his general agency. He was also furnished telephone and secretarial services by the general agency and Penn Mutual provided a health insurance program for all soliciting agents. Petitioner was required to attend meetings and to abide by the rules and regulations of Penn Mutual. Petitioner, as a soliciting agent, was not required to work stated days or hours and did not report on a regular basis to a supervisor. No withholding taxes or social security taxes were withheld from the compensation earned by petitioner as a soliciting agent.

12. As a general agent for Penn Mutual, petitioner managed the office and recruited, trained and supervised some 50 soliciting agents. For his services as a general agent, petitioner received overrides and allowances on the commissions earned by the soliciting agents. Petitioner, as a general agent, received overrides and allowances on insurance policies sold by himself as a soliciting agent. Petitioner conceded that his activities as a general agent constituted the carrying on of an unincorporated business and also conceded that, as a general agent, he maintained no place of business outside New York State or City and that, therefore, his general agent's income is attributable entirely to New York State and City sources.

13. Petitioner kept separate books and records with respect to his activities as a soliciting agent and his activities as a general agent. Penn Mutual furnished petitioner with separate statements (Federal Forms 1099) detailing

the income generated by petitioner from each activity. There existed no clear division of time between petitioner's activities as a soliciting agent and a general agent. Petitioner carried on his activities as a general agent and as a soliciting agent simultaneously from the same location.

14. Petitioner allocated, for personal income tax purposes, the income he received as a soliciting agent to New York State and City sources based on a percentage determined by placing the volume of business transacted by him in New York State over the total volume of business transacted from all sources. The Audit Division does not dispute the accuracy of the amounts allocated to New York State and City sources; however, it does maintain that since petitioner did not have an office outside New York State or City, no allocation was allowable.

CONCLUSIONS OF LAW

A. That petitioner has failed to sustain the burden of proof [Tax Law §§722 and 689(e)] to show that his activities as a soliciting agent were directed and controlled to the extent necessary to be considered an employee within the meaning and intent of subsection (b) of section 703 of the Tax Law and 20 NYCRR 203.10. DeSimone v. Tully, 62 A.D.2d 1054.

Moreover, assuming arguendo that petitioner's activities as a soliciting agent constituted services performed as an employee, it is clear that such services were interrelated and integrated with his unincorporated business and were also performed in furtherance of and for the direct benefit of the unincorporated business. Accordingly, the income earned by petitioner as a soliciting agent is subject to unincorporated business tax, even if earned in the capacity of an employee, within the meaning and intent of Tax Law §703(b) and 20 NYCRR

203.10(d). Matter of the Petition of E. Parker Colborn, State Tax Commission, September 20, 1978 and DeSimone v. Tully, supra.

B. That in addressing the issue of allocation of petitioner's soliciting agent's income for New York State and New York City personal income tax purposes, New York State Personal Income Tax Regulation 20 NYCRR 131.15 provides that commissions for sales made by a nonresident traveling salesman, agent or other employee which depends directly on the volume of business transacted by him is to be allocated to New York State sources on the basis of the volume of business transacted within New York State placed over the total volume of business transacted. [For New York City purposes see 20 NYCRR 295.2 and 20 NYCRR Appendix 20 section 4-4(c).]

C. That 20 NYCRR 131.4(a) provides that a business or occupation is carried on within New York State by a nonresident:

"...when he occupies, has, maintains or operates desk room, an office, ...where his affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without the State. This definition is not exclusive. Business is carried on within the State if activities within the State in connection with the business are conducted in this State with a fair measure of permanency and continuity... If a taxpayer pursues an undertaking continuously as one relying on the profit therefrom for his income or part thereof, he is carrying on a business or occupation."

D. That 20 NYCRR 131.11 provides:

"A business...or occupation (as distinguished from personal services as an employee) is carried on by a nonresident wholly within this State when the activities described in subdivision (a) of section 131.4 are carried on solely within this State and no such activities are carried on outside of this State, even though the nonresident or his representative travels outside of the State for purposes of buying, selling, financing or performing any duties in connection with the business, and even though sales may be made to, or services performed for, or on behalf of, persons or corporations located outside of the State. If a nonresident individual carries on a business...or occupation wholly within this State all his items of income, gain, loss and deduction attributable to the business are derived from or connected with New York sources."

E. That section U46-4.0(b)(1) of Chapter 46, Title U of the Administrative Code of the City of New York provides that:

"If a taxpayer has no regular place of business outside the city all of his net earnings from self-employment shall be allocated to the city."

F. That for New York State purposes, petitioner's activities as a soliciting agent during the years at issue constituted a business as that term is contemplated in 20 NYCRR 131.4(a) and 20 NYCRR 131.11, supra. For New York City purposes, the income earned from petitioner's activities as a soliciting agent constituted net earnings from self-employment (sections U46-1.0(f) and U46-4.0(b)(1) of Chapter 46, Title U; 20 NYCRR Appendix 20 sections 1-7 and 4-1). Since petitioner maintained no place of business outside the State or City, the income generated from his activities as a soliciting agent cannot be allocated to out-of-State or out-of-City sources. Regulation 20 NYCRR 131.15 (applicable for New York State purposes) and Regulation 20 NYCRR Appendix 20 section 4-4(c) (applicable for New York City purposes) are not appropriate in the instant matter since the soliciting agent's income was derived from a business (for State purposes) and constituted net earnings from self-employment (for City purposes) and was not earned in the capacity of a nonresident traveling salesman, agent or other employee.

G. That since refund #82177516 in the amount of \$2,204.26 is still outstanding (Finding of Fact "6", supra) and is presumed to have been lost or misplaced by petitioner, the Audit Division shall take such steps as necessary to cause a new check to be issued.

H. That the petition of David F. West and Carol M. West for 1975 and 1976 for redetermination of the deficiencies dated March 25, 1981 is denied; and that, except as so granted in Conclusion of Law "G", supra, the petition for

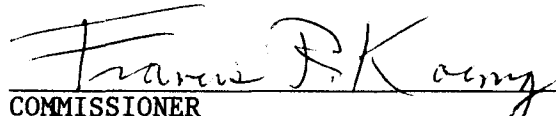
1978 for an additional refund of unincorporated business tax of \$994.55 is also denied.

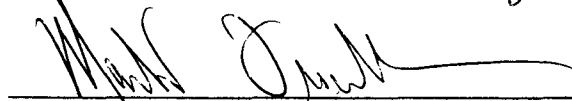
DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER