

STATE OF NEW YORK
STATE TAX COMMISSION

Casualty Insurance
State Farm Insurance
own - held to be
employee

IN THE MATTER OF THE PETITION

OF

MORTIMER O'KANE

FOR A REDETERMINATION OF A DEFICIENCY OR
FOR REFUND OF PERSONAL INCOME TAXES UNDER
~~ARTICLE 23 OF THE TAX LAW FOR~~
UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW FOR
THE YEARS 1961, 1962 AND 1963

AFFIDAVIT OF MAILING

State of New York
City and County of Albany } ss.:

Kathleen O'Neil, being duly sworn, deposes and says:

That your deponent is over the age of eighteen and an
employee in the Office of the State Tax Commission, Department of
Taxation and Finance, Law Bureau.

That on the 20th day of July 1967, your deponent
deposited at a post office station maintained and controlled by
the United States Government at Herbert Drive, Town of Latham
~~precise copy~~ and County of Albany, New York, a copy of the decision
of the State Tax Commission in this proceeding, a copy of which
is hereto annexed, contained in a securely closed, postpaid cover,
directed to be mailed by certified mail (certificate No. 976668)
to the herein below named taxpayer in this proceeding at the
address set forth below:

Mr. Mortimer O'Kane
59-25 41st Avenue
Woodside, New York

/s/ Kathleen O'Neil

Sworn to before me this 21st day
of July 1967.

/s/ Florence C. Winter

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF
MORTIMER O'KANE

:
:
:
: AFFIDAVIT OF MAILING

FOR A REDETERMINATION OF A DEFICIENCY OR
~~FOR REFUND OF PERSONAL INCOME TAXES UNDER~~
~~ARTICLE 22 AND UNINCORPORATED BUSINESS~~
TAXES UNDER ARTICLE 22 OF THE TAX LAW FOR
THE YEAR(S) **1961, 1962 AND 1963**

State of New York
City and County of Albany } ss.:

Kathleen O'Neil, being duly sworn, deposes and says:

That your deponent is over the age of eighteen and an
employee in the Office of the State Tax Commission, Department
of Taxation and Finance, Law Bureau.

That on the **20th** day of **July** **1967**, your deponent
deposited in a letter box exclusively maintained and controlled
by the United States Government at **Herbert Drive, Town of Latham**
~~in the City and County of Albany,~~

New York, a copy of the decision of the State Tax Commission in
this proceeding, copy of which is annexed hereto, contained in a
securely closed, postpaid cover, directed to the herein below named
representative of the taxpayer in this proceeding at the address
set forth below:

Mr. Joseph S. Gullo
52-28 Leith Place
Little Neck, New York 11362

Sworn to before me this **21st** day
of **July** **1967**.

/s/ Kathleen O'Neil

/s/ Florence C. Winter

July 20, 1967

Mr. Mortimer O'Kane
59-25 41st Avenue
Woodside, New York

Re: In the Matter of the Petition of
MORTIMER O'KANE for a Redetermination
of a deficiency of Unincorporated
Business Taxes under Article 23 of the
Tax Law for the Years 1961, 1962 and
1963

Dear Mr. O'Kane:

Enclosed herein is the decision of the State Tax
Commission granting the above petition for revision or
refund.

Very truly yours,

EDWARD H. BEST
Counsel

MS:kon

Enc.

cc: Mr. Joseph S. Gullo
52-28 Leith Place
Little Neck, New York 11362

BUREAU OF LAW
MEMORANDUM

TO: Commissioners Murphy, Macduff and Conlon
FROM: Vincent P. Molineaux, Hearing Officer
SUBJECT: Mortimer O'Kane

Petition for redetermination of deficiency
for unincorporated business tax for the
years 1961, 1962 and 1963

A hearing on the above matter was held before me at
80 Centre Street, New York, New York on December 1, 1966.

The question involved herein is whether taxpayer's
income, earned as a non-financed casualty insurance agent for
State Farm Insurance Companies, is subject to unincorporated
business tax under Article 23 of the Tax Law.

For the first two years that they represent State Farm
Insurance Companies agents are financed by the company, they are
called employees and deductions are made for income tax and
social security. After two years they receive a new contract
which calls them an independent contractor (III c, of petitioner's
exhibit A). They are then non-financed agents and deductions are
no longer made. Petitioner formerly held a life insurance license
and a broker's license for general insurance but on coming with
State Farm he was required to relinquish them and now holds only
an agent's license and may sell only State Farm policies.

Taxpayer would be permitted to use his home as his
business headquarters or could use either of two local offices
of the company where he would be provided with desk space and
telephone service for a nominal charge, but he chooses to have
a separate office for which he pays the rent, telephone and
utilities. The location and condition of the office had to
have prior approval of the company, but he is not reimbursed
for his costs. He hires one part-time clerk for which he is
not reimbursed by the company.

Taxpayer is required to attend meetings about every
ten days at locations designated by the company, at which
sales and office procedures are discussed and directions on

these matters issued by the company. The expenses of these meetings are usually divided between the agent and the company. Quotas are set up for each agent. All money received by the agent is deposited immediately to the credit of the company. The agent may not deduct commissions and he is paid bi-monthly by the company. His payment is not called commissions but "service fee compensation" based upon the time that the agent services the business, and his payments are six months behind the actual writing of the business.

Taxpayer's contract with the company provides certain benefits on termination by death or otherwise. Such benefits are based partly on the number of "years of service as local agent." The agent has no vested interest in the insurance he writes. He is not permitted to hire other solicitors or sub-agents and he may not sell or transfer his accounts. The company, however, may and does transfer accounts which move to more than 25 miles from taxpayer's office.

With respect to life insurance soliciting agents who normally work for only one company, the State Tax Commission ruling of June 9, 1959 states that such an agent will generally be considered an independent contractor where, for example, he operates from his own office, paying rent for which he is not reimbursed or where, for example, he himself employs one or more permanent employees, paying their salaries which are not reimbursed. It then goes on to say that:

"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."

In the case of casualty agents when operating independently they are normally free to place their risks where they wish and where the insurer is willing to accept. They deduct commissions and send the company the net amount due and run their offices to suit themselves. In the case of State Farm agents they may write for only the one company, they deposit the gross premiums to the credit of the company, the location and condition of the office must be approved, and they must attend sales meetings regularly and are closely supervised.

In Matter of Briton, 22 A D 2d 987, the Court said that to hold a salesman engaged in business it must be found that (a) he maintains an office; (b) employs one or more assistants or (c) otherwise regularly carries on a business. However, they were discussing a man who represented eleven companies.


The taxpayer pointed out at the hearing that in a decision of the National Labor Relations Board, Second Region, dated October 19, 1964, State Farm Insurance Companies, Employer, and Insurance Workers International Union, AFL-CIO, Petitioner, it was held that State Farm agents are not independent contractors but are employees within the meaning of Section 2(3) of the National Labor Relations Act (29 USCA 152) (taxpayer's Exhibit A). The Assistant Director, Second Region of the National Labor Relations Board advises there has been no change in that decision and no later decision which would overrule it. The taxpayer has submitted a copy of such decision hereto attached which provides in part:

"The record in the instant case establishes that the employer has reserved to itself the right to control and direct the manner and means by which non-financed agents perform their work. Therefore it is found that they are not independent contractors but instead are employees . . . The fact that they may hire and supervise clerical help who are not employees of this employer does not affect their own status as employees."

The National Labor Relations Board decision took into consideration that non-financed agents may have their own office, may not be reimbursed for office and business expenses, and are requested but not required to submit weekly reports of sales and services. Although these facts are indicia that the taxpayer is an independent contractor and not subject to the control of the principal, the National Labor Relations Board based its decision that an employee-employer relationship existed on its finding that Farm Mutual had the right to control over its non-financed agents. The incidents of control of salesmen's activities had been discussed in the case of Feinberg v. Chapman, 274 App. Div. 715. There the court cited the Matter of Sullivan Co., 289 N. Y. 110, for the proposition that the distinction between independent contractors and employees is a question of control. The Sullivan case, supra, involving the question of an employee-employer relationship for the purposes of unemployment insurance lays down the rule that the control required is the control to be ascertained according to "common law principles." Although cases subsequent to the decision of Sullivan Co., supra, do not further discuss the definition of the word "control" such cases involving unemployment insurance inquire into the actual facts of control and not the right of control, the guide apparently

established in National Labor Relations Board case. Whether or not a criterion based upon the right to control rather than actual common law control as presently used should be herein applied does not have to be resolved herein since the record herein discloses sufficient general and particular control by the principal over the activities of the taxpayer.

After considering the entire record, including the fact that the National Labor Relations Board found the taxpayer to be an employee for the purpose of bargaining and of the further fact that the taxpayer was required and did, in fact, work for only one principal subject to its general and particular supervision and control, I am of the opinion that the taxpayer is an employee of State Farm Insurance Co. within the meaning of Section 703(b) of the Tax Law. Therefore, I recommend that the decision of the Tax Commission in the above matter cancelling the determination be substantially in the form submitted herewith.


Hearing Officer

MS:io

Enc.

June 12, 1967

6-2A-67

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION OF
MORTIMER O'KANE
FOR A REDETERMINATION OF A DEFICIENCY
OF UNINCORPORATED BUSINESS TAXES UNDER
ARTICLE 23 OF THE TAX LAW FOR THE YEARS
1961, 1962 and 1963

Mortimer O'Kane, having duly filed a petition for redetermination of deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1961, 1962 and 1963, and a hearing having been held at the office of the State Tax Commission at 80 Centre Street, New York, N. Y. on the 1st day of December 1966 before Vincent P. Molineaux, Hearing Officer of the Department of Taxation and Finance and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed New York State resident income tax returns for the years 1961, 1962 and 1963 on which the amount shown to be due was paid but did not file unincorporated business tax returns or pay unincorporated business tax.

(2) That on December 13, 1965 the State Tax Commission issued notices of deficiency in the amounts of \$146.76 for the year 1961; \$253.86 for the year 1962; and \$258.60 for the year 1963 (File No. 3-6484470) on the ground that income received as an insurance agent is income from an unincorporated business subject to Article 23 of the Tax Law for each of the above years.

(3) That taxpayer's income is derived from his occupation as a non-financed casualty insurance agent for State Farm Insurance Companies.

(4) That all of the income from petitioner's office is deposited to an account in the name of State Farm Insurance Company.

(5) That taxpayer's income is paid to him by company check, bi-monthly. That no deductions are made by the corporation from the taxpayer's earnings for Federal or State income tax or social security payments. Taxpayer is required to attend meetings about every ten days at locations designated by the company at which sales and office procedures are discussed and directions issued by the company. Taxpayer's contract with the company provides certain benefits on termination based partly on the number of years of service. He has no vested interest in the insurance he writes.

(6) That taxpayer hires one part-time clerk for which he is not reimbursed by the company.

(7) That taxpayer is permitted to use his home as his business headquarters or may use either of two local offices of the company where he would be provided with desk space and telephone service for a nominal charge but he chooses to have a separate office for which he pays rent but the location and condition of which had to be approved by the company.

(8) That taxpayer has no authority to hire other solicitors or sub-agents, he may not sell or transfer accounts, and the company, without his permission, can and does transfer accounts where the customer moves to more than 25 miles from his office, and he may write insurance for State Farm only.

(9) That in a decision of the National Labor Relations Board dated October 19, 1964, State Farm Insurance Companies, Employer, and Insurance Workers International Union, AFL-CIO, Petitioner, it was held that State Farm agents are not independent contractors but are employees within the meaning of section 2(3) of the National Labor Relations Act (29 USCA 152(3)).

Based upon the foregoing findings, the State Tax Commission hereby

DECIDES:

(A) That taxpayer is an employee within the meaning of section 703(b) of the Tax Law and his income as a non-financed casualty insurance agent for State Farm Insurance Companies is not subject to unincorporated business tax under Article 23 of the Tax Law.

(B) That the determination of deficiency, File No. 3-6484470 for the years 1961, 1962 and 1963 is incorrect and unauthorized and is canceled in full.

Dated: Albany, New York this 20th day of July 1967.

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER