

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
RALPH WINTHROP

:  
:  
:  
AFFIDAVIT OF MAILING  
OF NOTICE OF DECISION  
BY (CERTIFIED) MAIL

For a Redetermination of a Deficiency or  
a Refund of Unincorporated Business:  
Taxes under Article(s) 23 of the  
Tax Law for the Year(s) 1963, 1964 & :  
1965 & 1967

State of New York  
County of Albany

Martha Funaro , 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 30th day of April , 1974 , she served the within  
Notice of Decision (or Determination) by (certified) mail upon Ralph Winthrop  
(representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid

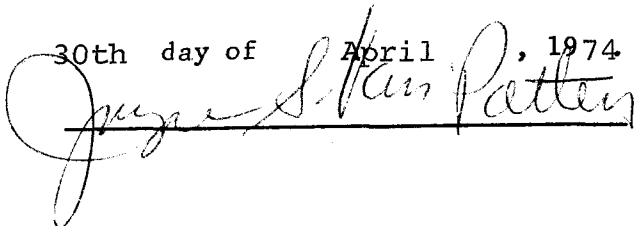
wrapper addressed as follows: Mr. Ralph Winthrop  
2 Dicks Lane  
Roslyn, New York 11576

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative  
of) 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

30th day of April , 1974

  
James S. Patten

  
Martha Funaro

STATE OF NEW YORK  
STATE TAX COMMISSION

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For a Redetermination of a Deficiency or  
a Refund of Unincorporated Business:  
Taxes under Article(s) 23 of the  
Tax Law for the Year(s) 1963, 1964 & :  
1965 & 1967

State of New York  
County of Albany

Martha Funaro, 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 30th day of April, 1974, she served the within  
Notice of Decision (or Determination) by (certified) mail upon Richard H. Sonet,  
C.P.A.

(representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Richard H. Sonet, C.P.A.

660 Madison Avenue  
New York, New York 10021

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative  
of) 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

30th day of April, 1974

James L. Van Patten

Martha Funaro



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
RALPH WINTHROP	:	DECISION
for a Redetermination of a Deficiency	:	
or for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1963, 1964, 1965 and 1967.	:	

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Ralph Winthrop filed petitions under sections 722 and 689 of the Tax Law for the redetermination of deficiencies in unincorporated business tax under Article 23 of the Tax Law issued on August 21, 1967, for the years 1963 through 1965 in the amount of \$1,811.19 plus interest of \$245.13 and a penalty for failure to file 1963 and 1964 tax returns of \$278.86 for a total of \$2,335.18 and issued on May 25, 1970, for the year 1967 in the amount of \$871.35 plus interest of \$110.35 for a total of \$981.70.

A hearing was duly held on May 1, 1973, at the offices of the State Tax Commission, 80 Centre Street, New York City, before Nigel G. Wright, Hearing Officer. Petitioner was represented by Vincent W. Witt, C.P.A., of Sonet & Witt. The Income Tax Bureau was represented by Saul Heckelman, Esq., appearing by Solomon Sies, Esq. The record of said hearing has been duly examined and considered.

ISSUE

The issue in this case is whether the petitioner, a life insurance soliciting agent and "pension planner", is engaged in an unincorporated business.

FINDINGS OF FACT

1. Petitioner is a life insurance soliciting agent and has been so since 1955. He has had major associations with two companies,

first, the New England Mutual Life Insurance Company of Boston, Massachusetts, through the David Marks, Jr. agency in Manhattan and subsequently the Canada Life Insurance Company of Toronto, Canada, through two of its branches in Manhattan. With both companies, he had a "career" contract which appears typical in providing for renewal commissions and stating that petitioner shall determine the time, place and manner of solicitation.

2. Petitioner had a special agreement, first with New England Mutual and then Canada Life, that he would act as a "pension consultant". This was for the purpose of procuring applications for pension policies and for such other duties as the company may require. Petitioner was to be paid a salary of a stipulated annual rate but this was contingent upon the production of a minimum amount of business by petitioner, his "subagents" and "subbrokers". He also received a commission on business produced above this minimum. Petitioner explained that this agreement in effect allowed him to aid other insurance agents without splitting a commission with the agent but rather getting paid out of the general agents overriding commission. The reason for the minimum was to cover the occasions when on a small sale, the commissions were not enough to cover petitioner's time. The amount of the split commission would be negotiated with each agent he helped.

3. Petitioner did his business since 1965, under the name Ralph Winthrop Associates, although he, in fact had no associates. This was first done at the suggestion of the David Marks, Jr. agency in order to impress prospective customers and give the impression that he acted as an "advisor". He is listed as a broker as well as a dealer. He had an office first at 666 Fifth Avenue and after 1965, at 509 Madison Avenue. This business had

gross commission income as follows: from the David Marks, Jr. agency, \$17,731.87 in 1963, \$13,952.32 in 1964, and \$5,015.61 in 1965; from S.J. Merken Life Associates, nothing in 1963, \$11,124.85 in 1964, and \$4,810.06 in 1965; from other life insurance companies, \$3,345.92 in 1963, \$4,276.94 in 1964, and \$5,778.82 in 1965; from mutual fund sales, \$943.20 in 1963, \$1,170.03 in 1964, and \$5,793.82 in 1965. The total gross commissions were \$22,020.99 in 1963, \$30,524.14 in 1964 and \$21,398.16 in 1965. The net income after expenses was \$10,472.99 in 1963, \$16,893.96 in 1964 and \$6,789.37 in 1965. These net amounts were reported as business income in petitioner's personal tax returns.

4. Petitioner incorporated his business in January 1966 under the name Ralph Winthrop Associates, Inc. It describes its business on tax returns as an "insurance and securities dealer". It is licensed to sell insurance although petitioner claims its work is that of an advisor and consultant with respect to both insured and noninsured pensions and was formed to insulate him from legal liability for erroneous advice. Some of its income was from fees computed independently of any insurance sold. It appears, however, that some of the consultation service would be given in the course of helping another agent sell a policy and the fee would be a split commission; at other times, the corporation would sell the related insurance or mutual fund and collect a commission.

5. The gross income of the corporation in 1966 and 1967, does not appear in the record. Its net income for fiscal years ending July 31, 1966 and July 31, 1967, is \$2,879.82 and \$493.84. It paid a salary to petitioner of \$4,700.00 in the fiscal year 1966 and \$23,500.00 in the fiscal year 1967. In 1967, it paid its own franchise tax on the alternative basis including salaries. The

fiscal year 1967 salary is included in petitioner's own personal tax return for calendar year 1967. No dividends are reported in said return.

6. Petitioner reported certain "salaries" on his personal income tax returns. These were: from the David Marks, Jr. agency, \$12,200.06 in 1963 and \$7,083.39 in 1964; from Canada Life, \$708.34 in 1963, \$20,603.38 in 1965, an unknown amount in 1966, and \$38,982.25 in 1967; from Ralph Winthrop Associates, Inc., \$23,500.00 in 1967. Both taxes and social security were withheld on these amounts.

7. The "salary" from the David Marks, Jr. agency and from Canada Life was simply a minimum income guarantee against commission. This was pursuant to the pension consulting agreements.

8. The office of Ralph Winthrop Associates, Inc. was on the same premises as the David Marks, Jr. agency at first, and then on the same premises as Canada Life. He did not pay rent. He paid all of his other expenses, however, and they were substantial.

9. Petitioner did not file returns for unincorporated business taxes in 1963 and 1964. No reason was given for the failure to file these returns. Petitioner did file a return for 1965, but included only the commission income and not the "salary" income.

#### CONCLUSIONS OF LAW

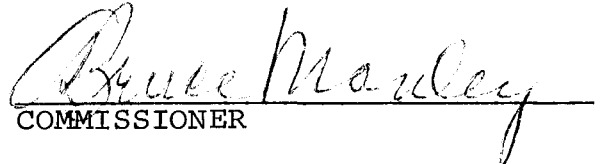
It is abundantly clear that petitioner is an independent contractor with respect to all of his income received directly from insurance companies, whether in the form of commission or "salaries". With respect to the salary received from his own corporation, it is clear that said salary is received for the same kind of services for which he receives commission income. The penalty here is entirely justified.


The deficiency is correct in all respects and is due together with such interest as may be computed under section 684 of the Tax Law.

DATED: Albany, New York  
April 30, 1974

STATE TAX COMMISSION

  
COMMISSIONER

  
COMMISSIONER

  
COMMISSIONER