

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

P. GERALD DE SIMONE

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article (X) 23 of the :
Tax Law for the Year(s) ~~xx-Period(s)~~ :
1968, 1969 and 1972.

AFFIDAVIT OF MAILING

State of New York
County of Albany

Catherine Steele, 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 13th day of September, 1976, she served the within
Notice of Decision by (certified) mail upon P. Gerald DeSimone

(~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Mr. P. Gerald DeSimone
39 Morgan Drive
Old Westbury, New York 11568

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
13th day of September, 1976.

Catherine Steele

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

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age, and that on the 13th day of September, 1976, she served the within
Notice of Decision by (certified) mail upon James Tenzer, Esq.

(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: James Tenzer, Esq.
Margolin, Weiner & Evans
600 Old Country Road
Garden City, New York 11530
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.

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Janet Back



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

ADDRESS YOUR REPLY TO

September 13, 1976

TELEPHONE: (518) 457-2850

Mr. P. Gerald DeSimone
39 Morgan Drive
Old Westbury, New York 11568

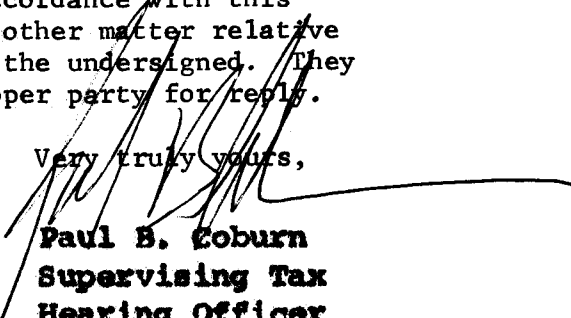
Dear Mr. DeSimone:

Please take notice of the **DECISION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section(x) **722** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned. They
will be referred to the proper party for reply.

Very truly yours,


Paul B. Coburn
Supervising Tax
Hearing Officer

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE TAX COMMISSION

The penalties for unincorporated business tax are asserted for

(2)

failure to file returns or pay taxes for the years in question. Against any amounts found to be owing, petitioner is due a credit or refund of personal income tax in the amount of \$19,984.78 plus interest of \$1,190.89 for a total of \$21,175.67 resulting from a 1972 loss carryback to 1969.

A hearing was duly held on August 6, 1975, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, before Niegel G. Wright, Hearing Officer. The petitioner appeared by Margolin, Weiner & Evans, Esqs. (James Tenzer, Esq. of counsel). The Income Tax Bureau appeared by Saul Heckelman, Esq., (Alexander Weiss, Esq. of counsel). The record of said hearing has been duly examined and considered.

ISSUES

I. Whether petitioner who concedes he is liable for unincorporated business tax as a general agent of a life insurance company must include in such tax income he received from the personal solicitation of life insurance policies, income from renewal commissions on policies written in prior years as a soliciting agent, income from a securities business and income from certain consulting work.

II. Whether a net operating loss carryback is properly computed and whether penalties are properly applied.

FINDINGS OF FACT

1. Petitioner is a resident of Old Westbury, New York. During the years in question he was a general agent of an insurance company and received other income from various sources.

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2. Petitioner first became a life insurance salesman in 1958 and 1959. He worked for IRE Estates, Inc., a general agent on Long Island for Citizens Life Insurance Company of New York. After that he sold for National Life of Vermont as a broker. He then was a career agent for Life Consultants, Inc., a general agent for North Atlantic Life Insurance Company. During the years in question, petitioner continued to receive commissions on policies written in these earlier years. These commissions amounted to \$13,094.00, \$18,884.00 and \$13,313.00 in the years 1968, 1969 and 1972 respectively.

3. On July 1, 1967, petitioner became the general agent for State Mutual Life. He remained as such until late 1973 when he resigned as general agent but remained with the company as a career agent. As general agent, petitioner received overriding commissions on the sales of the career agents working from his agency and an extra "career builders" overriding commission on the sales of new agents to compensate him for the portion of their guaranteed draw which he had to bear. He also received amounts from the insurance company to reimburse him for the expenses of the agency. These were based on the productivity of the agency and were intended to cover all office and selling expenses except for agent's travel and entertainment expenses. Petitioner's income as general agent amounted to \$10,587.00, \$48,605.00 and \$9,657.00 in the years 1968, 1969 and 1972 respectively.

(4)

4. Petitioner personally solicited life insurance during the years in question under a contract signed by himself both as career agent and as general agent. Petitioner's commissions on policies he personally solicited as a part time career agent amount to \$46,130.00, \$54,594.00 and \$42,400.00 in the years 1968, 1969 and 1972 respectively.

5. The general agent's contract provided that the general agent would get commissions on business that he personally wrote and that this would be on the same basis as a career agent's commissions. He also would get the general agent's overriding commissions on this same business.

6. The career agent's contract with State Mutual provided that the contract should not be construed to create the relationship of employer and employee. It was the practice of State Mutual to withhold social security taxes from the commissions remitted to the career agents.

7. Around 1961 or 1962 the petitioner had gone into the securities business. He was licensed as a salesman for a firm in which he had a fifty percent ownership interest. When petitioner became general agent for State Mutual in 1967 he referred his securities clients to a man who worked for the firm in return for an interest in the commissions earned. Petitioner's income from this source was \$1,653.00, \$25,377.00 and \$9,871.00 in the years 1968, 1969 and 1972 respectively.

(5)

The securities income of \$9,871.00 for 1972 was omitted in the deficiency notice. He finally sold the securities firm.

8. Petitioner received consulting fees during the years in question from clients. These amounted to \$7,400.00 and \$8,000.00 in 1968 and 1969 and nothing in 1972. These were from more than three sources in each year. In one year the fee was for general financial advice with respect to securities. Some fees were for advice in part connected with the insurance business.

9. Petitioner for purposes of his 1969 Federal income tax filed a joint return with his wife. For New York purposes, petitioner and his wife elected to file separate returns and this was done on combined form IT-208. On this return, all "itemized deductions" and \$4,200.00 of personal exemptions were deducted against petitioner's individual income. A personal exemption of \$600.00 was deducted from his wife's individual income. On the claim for refund, petitioner recalculated taxable income by first deducting his net operating loss deduction entirely against his own income, and then deducting all of the exemptions originally claimed but only a portion of the itemized deductions originally claimed. The remainder of the itemized deductions were shown as deductions for his wife. This resulted in identical amounts of New York taxable income for both petitioner and his wife and showed refunds due to both. Petitioner's wife did not file a claim

(6)

for refund or amended return. The deficiency notice computes petitioner's taxable income by allowing all deductions only against his own individual income resulting in a refund for him alone.

10. Petitioner had gross receipts from his general agency business of over \$100,000.00 in each year under review. He concedes that an unincorporated business tax is due on the net income from such business. He did not file returns for unincorporated business tax in any year under review.

CONCLUSIONS OF LAW

A. That petitioner is subject to unincorporated business tax on all amounts included in the deficiency notice. He concedes the taxability of his general agents income. His renewal commissions from policies written in prior years would be taxable to the extent that the original commissions were taxable in the prior years and petitioner has failed to produce evidence with respect to his status in such prior years.

B. That petitioner's income under his career agents contract cannot be considered to be the income of an employee so long as the alleged contract was not with another individual. A person cannot be his own employee.

C. That the commissions earned on the securities business were income from a business and not the salary of an employee.

(7)

D. That the consulting fees were for work which were related to petitioners taxable activities in the insurance and securities fields. In any event, these fees were not so infrequent to prevent them from being considered in their own right as business income.

E. That petitioner's claim for an increased deduction in 1969 for net operating loss is denied since his claim herein is made on behalf of his wife who, however, did not file a claim for refund or a petition to the Commission.

F. That the penalties in issue in this case are entirely justified since petitioner cannot deny that by reason of his general agents activities alone he was obligated to file returns for the years in question.

G. That because of the above reasons, the deficiency under review is correct in all respects and the amount thereof is due together with such further interest as shall be computed under Section 684 of the Tax Law.

DATED: Albany, New York
September 13, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER