

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Harvey Dickler :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Unincorporated Business Tax :
under Article 23 of the Tax Law
for the Years 1969 through 1974. :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 13th day of February, 1980, he served the within notice of Decision by certified mail upon Harvey Dickler, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harvey Dickler
33 Cloverfield Rd.
Valley Stream, NY 11581

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
13th day of February, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION

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Unincorporated Business Tax :
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for the Years 1969 through 1974. :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 13th day of February, 1980, he served the within notice of Decision by certified mail upon Bertrand Leopold the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Bertrand Leopold
18 Joseph St.
New Hyde Park, NY 11040

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 February, 1980.

Joanne Knapp

J. Vredenburg

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

February 13, 1980

Harvey Dickler
33 Cloverfield Rd.
Valley Stream, NY 11581

Dear Mr. Dickler:

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) 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Bertrand Leopold
18 Joseph St.
New Hyde Park, NY 11040
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HARVEY DICKLER	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business Tax :	:	
under Article 23 of the Tax Law for the	:	
Years 1969 through 1974.	:	

Petitioner, Harvey Dickler, 33 Cloverfield Road, Valley Stream, New York 11581, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax due under Article 23 of the Tax Law for the years 1969 through 1974 (File No. 20479).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 13, 1978 and was continued on July 21, 1978. Petitioner appeared by Bertrand Leopold, Tax Accountant. The Audit Division appeared by Peter Crotty, Esq. (Aliza Schwadron and Irving Atkins, Esqs., of counsel).

ISSUE

Whether petitioner, a life insurance salesman, was an employee and his income thus not subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Harvey Dickler, filed timely New York State income tax returns for the calendar years 1969 through 1974. Petitioner did not file unincorporated business tax returns for those years.

2. On September 26, 1977, a Notice of Deficiency and a Statement of Audit Changes were issued against petitioner, Harvey Dickler, for 1969 through 1974, for unincorporated business taxes due of \$4,559.73, plus \$1,416.99 in interest, for a total of \$5,976.72.

3. Petitioner subsequently filed a timely perfected petition for revision of these determinations.

4. On February 1, 1954, petitioner executed a "Soliciting Agent's Contract" with Charles E. Drimal, who acted in the capacity of General Agent for the Penn Mutual Life Insurance Company of Philadelphia, Pennsylvania. The relevant terms of this contract governed the years in question.

5. Clause no. "(3)" of this contract provides:

"Exclusive Representation Except as may be otherwise agreed in writing, Agent agrees to devote all his working time to solicitation of applications under this agreement and to submit to General Agent all applications secured by Agent."

6. Clause no. "(5)" of this contract elaborates work requirements for the first four years; then it states:

"Upon completion of the fourth contract year all responsibility of Agent to meet and the right of General Agent to require performance of the work requirements shall terminate, and Agent shall thereafter continue in the status of an independent full time life insurance salesman to the same effect as if this agreement had originally been entered into without provision for salary or work requirements."

7. During the years in question, petitioner was a life insurance salesman, chiefly for the Penn Mutual Life Insurance Company. He was under the supervision of the company's General Agent, Charles E. Drimal.

8. During the years at issue, petitioner worked out of an office supplied to him without charge by the general agent (Drimal), which was part of the general agent's offices. Petitioner reported there every morning at about 9 A.M., as Drimal required. He made frequent reports to Drimal about his sales production, usually weekly and no less than monthly. When he went out for sales calls on behalf of Penn Mutual (which in the nature of the business was frequently), he reported where he was going to Drimal. He usually left the Drimal office, to go home, at about 5 P.M. each workday.

9. Petitioner serviced existing policy holders of the Penn Mutual Company, which he had not originally solicited, under Drimal's direction.

10. He supervised other salesmen under Drimal's direction.

11. Petitioner did sell some insurance for other companies after obtaining permission from Penn Mutual, pursuant to the exclusive representation clause quoted in Finding of Fact "5".

12. During the years in question, the bulk of petitioner's income was commission income for selling Penn Mutual policies. In 1969, 55 percent of his earnings were Penn Mutual commissions. For the remaining years in question, the comparable figures are: 1970 - 72 percent; 1971 - 91 percent; 1972 - 74 percent; 1973 - 82 percent; and 1974 - 76 percent.

13. In a prior proceeding, petitioner was held liable for unincorporated business tax for 1965. The decision in this matter was placed in the record of the instant proceeding. However, the factual basis for this decision is not in the record, and the taxpayer went to great lengths to impeach it. Under all the circumstances, the decision for the year 1965 is irrelevant to this proceeding.

14. Petitioner entered in evidence his Penn Mutual Field Manual as evidence of Penn Mutual's supervision. An examination of the manual however, failed to disclose any supervisory requirements. The Field Manual explains technical aspects of life insurance such as dividends and loans.

15. On both his Federal and State income tax returns, petitioner reported his commission income as business income and not wages. On these returns, petitioner took deductions for his business expenses, such as telephone charges and secretarial expenses.

16. Petitioner's expense arrangement with Drimal was as follows. He was given an additional 5 percent commission (this was later raised) to cover

expenses including secretarial services. His use of a secretary in Drimal's office was charged against his allowance on an hourly basis. Periodically he received an accounting on this matter.

17. During the years in question, petitioner's compensation from Penn Mutual was based on commissions and a fee which he received for his supervisory duties.

18. Penn Mutual made a contribution for petitioner's social security, health insurance and pension plan.

19. Petitioner worked under the close supervision of the Drimal Agency. The fact that compensation was based almost exclusively on commissions reinforces this because that fact created an even greater incentive to produce more sales for Penn Mutual and Drimal.

20. Petitioner was originally trained by Penn Mutual and Drimal.

21. Petitioner became a supervisor for Drimal in 1960. In connection with this, he received a memorandum from Drimal which went into some detail about the manner in which petitioner was to supervise. The memo also indicated sales quotas. Although the memo was apparently issued before the period in question, the memo fairly reflected the relationship that existed during 1969 through 1974.

22. Petitioner had charitable contributions of \$711.00 in 1969, \$785.00 in 1970, \$671.00 in 1972, \$1,050.00 in 1973 and \$1,361.00 in 1974.

CONCLUSIONS OF LAW

A. That, in a similar case, the Appellate Division of the Third Department put the matter very succinctly:

"The pivotal concern in resolving the issue of whether the taxpayer is an employee or an independent contractor is the amount of direction and control which the company exercises over the taxpayer." (Gutmann v. Tully 53 AD2d 751, 384 NYS2d 267 at p. 268 (1976).)

Drimal's close monitoring of petitioner's activities is evident when all the testimony and exhibits are examined. He was on Drimal's premises, reported frequently and kept Drimal aware of his comings and goings. The memo from Drimal to petitioner concerning the latter's supervisory duties goes into considerable detail about the manner in which he should supervise his subordinates. This fits the test articulated by the Court of Appeals:

"The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used." Matter of Morton 284 NY 167, at p. 172; quoted in Lieberman v. Gallman 41 NY2d 774 at p. 778 (1977).

B. That this case is very similar to Greene v. Gallman 39 AD2d 270, 333 NYS2d 787 (1972). There are really only two differences with the case at bar. In Greene, supra, secretarial services were either supplied or reimbursed by the employer; however, they were dependent upon the quantity of sales generated the taxpayer. In the instant case, petitioner was charged for them against an extra commission that was intended to cover expenses. This difference is not major, and the same can be said for the other difference. In Greene, supra, there is a specific contract disclaimer of an employment relationship. In the case at bar, petitioner is described as "an independent full time life insurance salesman" in the contract. In both cases, the employer exercised substantial control over petitioner. Since control is the most important element in these cases, Greene v. Gallman, supra, governs this case. See also, Kent v. State Tax Commission 55 AD2d 727, 389 NYS2d 184 (1976).

C. That this case is distinguishable from the following cases in which less control was exercised by the insurance company or the company's general agent, and in which the taxpayer was held to be an independent contractor

subject to unincorporated business taxes: Winthrop v. Procaccino 56 AD2d 969, 393 NYS2d 110 (1977), wider activities with less supervision; Cohen v. Gallman 48 AD2d 754, 368 NYS2d 336 (1975) less supervision, especially since petitioner did not work out of the general agent's offices; and Silver v. Gallman 51 AD2d 633, 378 NYS2d 830 (1976) less control and the insurance company did not have a legal right to exclusive representation.

D. That determinations by the State Tax Commission concerning one taxable year do not control proceedings addressed to other years. Petition of Nathan Melman, State Tax Commission decision, Sept. 13, 1974, New York Tax Reports Par. 99-926.

E. That for purposes of Article 23 of the Tax Law, petitioner was an employee of the Charles E. Drimal Agency during 1969 through 1974. His income from Drimal and the Penn Mutual Life Insurance Company was not unincorporated business income.

F. That petitioner's other commission income during these years was subject to unincorporated business tax and the Audit Division is directed to recompute the unincorporated business tax based on the following income:

<u>Year</u>	<u>Net Income</u>	<u>Non-Penn Mutual Income</u>	<u>Unincorporated Business Income</u>
1969	\$20,610.25	45%	\$9,274.59
1970	12,774.66	28%	3,576.88
1971	24,070.68	9%	2,166.36
1972	29,998.40	26%	7,799.58
1973	21,819.00	18%	3,927.42
1974	29,486.00	24%	<u>7,076.64</u>

G. That petitioner should be allowed a deduction for charitable contributions as indicated in Finding of Fact "22" in accordance with section 706(1) of the Tax Law.

H. That the petition of Harvey Dickler is granted to the extent indicated in Conclusion of Law "E". The Notice of Deficiency dated September 26, 1977 is modified in accordance with Conclusions of Law "F" and "G" and such modified Notice of Deficiency is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

FEB 13 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER