

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Daniel M. & Norma Ross :  
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 Year 1973. :

State of New York  
County of Albany

Jean Schultz, 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 29th day of February, 1980, she served the within notice of Decision by certified mail upon Daniel M. & Norma Ross, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Daniel M. & Norma Ross  
208 Victory Blv.  
New Rochelle, NY 10804

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  
29th day of February, 1980.

Joanne Knapp

Jean Schultz

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Daniel M. & Norma Ross :

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 Year 1973. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Jean Schultz, 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 29th day of February, 1980, she served the within notice of Decision by certified mail upon Paul Gottlieb 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. Paul Gottlieb  
Pomeranz & Pomeranz  
276 Fifth Ave.  
New York, NY

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  
29th day of February, 1980.

Joanne Knapp

Jean Schultz

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

February 29, 1980

Daniel M. & Norma Ross  
208 Victory Blv.  
New Rochelle, NY 10804

Dear Mr. & Mrs. Ross:

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  
Paul Gottlieb  
Pomeranz & Pomeranz  
276 Fifth Ave.  
New York, NY  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|---|---|----------|
| In the Matter of the Petition               | : |          |
|   | : |          |
| of  | : |          |
|   | : |          |
| DANIEL M. ROSS and NORMA ROSS               | : | DECISION |
|   | : |          |
| for Redetermination of a Deficiency or      | : |          |
| for Refund of Unincorporated Business Tax : | : |          |
| under Article 23 of the Tax Law for the     | : |          |
| Year 1973.                                  | : |          |

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Petitioners, Daniel M. Ross and Norma Ross, 208 Victory Boulevard, New Rochelle, New York 10804, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1973 (File No. 18858).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 23, 1979 at 9:15 A.M. Petitioners appeared by Pomeranz & Pomeranz, Esqs. (Paul Gottlieb, Esq., of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the 1973 income earned by petitioner Daniel M. Ross with The Equitable Life Assurance Society of the United States was subject to the unincorporated business tax.

FINDINGS OF FACT

1. On April 14, 1977, the Income Tax Bureau issued a Notice of Deficiency to petitioners, Daniel M. Ross and Norma Ross, indicating a deficiency of \$8,276.22, plus interest, for 1973.

2. In 1973 Mr. Ross worked with The Equitable Life Assurance Society of the United States ("Equitable"), pursuant to a contract dated January 2, 1954.

Section VIII of the contract provides the following:

Society's Prior Right. The agent agrees not to submit to any other company proposals for any forms of policies or annuity contracts of a class of business issued by the Society, unless authorized by the Society.

Section XVI of the contract provides the following:

Independent Contractor. Nothing contained herein shall be construed to create the relationship of employer and employee between the Society and the agent. The agent shall be free to exercise independent judgment as to the persons from whom applications for policies and annuity contracts will be solicited and the time and place of solicitation. The agent shall abide by the rules and regulations of the Society in accordance with Clause IX hereof but such rules and regulations shall not be construed so as to interfere with the freedom of action of the agent as described in this Clause.

3. In 1973 Mr. Ross earned \$140,097.00 in life insurance commissions with Equitable.

4. Mr. Ross worked out of Equitable's office at 355 Lexington Avenue, New York, New York. His name appeared under Equitable on the lobby directory. The company name, and not his own, was on the office door. Mr. Ross paid no rent. He paid for personal and long distance telephone calls, but not for business calls. Secretaries were provided by Equitable. Mr. Ross used Equitable letterheads, on which his name appeared.

5. Each Equitable agent was assigned to an agency manager, Mr. Ross being assigned to the Julian C. Light Agency.

Meetings were held every Monday morning with the manager to discuss the status of sales. He would see each agent at the meeting and ask questions such as "How many calls did you make last week? How many sales?" Insurance salesmen were subject to a minimum sales quota to continue to use Equitable's facilities. Each month agents submitted sales reports to the agency manager. A chart was posted on the office wall listing clients being seen during each month by individual agents. The agency manager had to report to the company on how much business the agents were producing and the amount of time they spent in the office.

Mr. Ross and the agency manager had adjoining offices. The door was open most of the time and they would frequently confer.

Vacations were cleared by each agent with the agency manager to ensure that the office would not be left uncovered. More experienced salesmen were expected to assist younger salesmen in the office.

6. Mr. Ross had to attend various Equitable national and regional conferences and sales campaign meetings.

7. Pursuant to his agent's contract with Equitable, Mr. Ross agreed not to transmit to any other company, proposals for any forms of policies or annuity contracts of a class of business issued by Equitable, unless authorized to do so by Equitable. When Mr. Ross received such permission, he would have to inform the company in writing as to what transpired as a result.

8. As a full-time life insurance salesman for the company, Mr. Ross was treated as an employee for social security tax purposes. In addition, Mr. Ross was treated as an employee for purposes of coverage under Equitable's retirement, investment and group insurance plans for agents.

9. On Schedule C of his 1973 Federal Income Tax Return, Mr. Ross deducted \$3,109.00 for messenger service and other office expenses. Mr. Ross testified at the formal hearing that Equitable did not pay for messenger service except between the home office and the office at 355 Lexington Avenue. He found it useful to have messengers pick up policies at clients' offices rather than to do so himself; thus, he preferred to personally absorb the expense.

10. Another item taken as a deduction on Schedule C was pension consulting fees and services of \$19,055.00. Mr. Ross testified that Equitable would pay for actuarial or computer services. This was something that an agent had to cover himself. As a result of making this investment, Mr. Ross testified that he earned \$35,000 to \$40,000 in commissions with Equitable for pension work done.

11. In 1973 Mr. Ross paid \$3,040.00 to a secretary at Equitable. He testified that these payments were for overtime work and for Christmas and birthday bonuses. These did not constitute salary payments which were the responsibility of Equitable.

12. Mr. Ross also earned \$21,633.09 in insurance and real estate commissions in 1973 through Daniel M. Ross, Inc., a business located in Mr. Ross's house. Daniel M. Ross, Inc. sold insurance which was not offered by Equitable. Equitable was informed of Mr. Ross's involvement with this corporation.

#### CONCLUSIONS OF LAW

A. That a State Tax Commission Ruling dated June 9, 1959, reported at 20 NYCRR 281.3 (Page 602), provides as follows:

A full-time life insurance soliciting agent whose principal activity is the solicitation of insurance for one life insurance company and who is forbidden by contract or practice from placing insurance with any other company without the consent of his principal company; who uses office space provided by the company or its general agent, is furnished stenographic assistance and telephone facilities without cost, is subject to general and particular supervision by his company over sales, is subject to company established production standards, will generally not be subject to the unincorporated business tax on commissions received from his prime company, regardless of the provisions of the agreement existing between him and the insurance company, but commissions received from other companies will be subject to such tax.

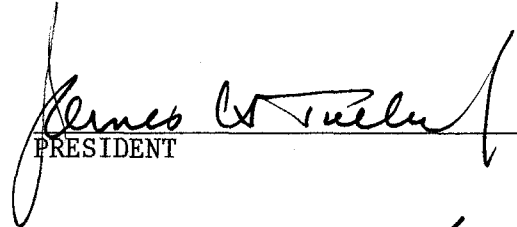
B. That as to commissions received from Equitable, Mr. Ross is not subject to the unincorporated business tax. Mr. Ross's principal activity was the solicitation of insurance for one life insurance company. He was forbidden by contract to place insurance with any other company without the consent of his principal company. He used office space provided by Equitable and was furnished stenographic assistance and telephone facilities without cost. Mr. Ross was subject to supervision by his company over sales, and was also subject to company-established production standards.


C. That the petition of Daniel M. Ross and Norma Ross is granted and the Notice of Deficiency issued on April 14, 1977 is cancelled.

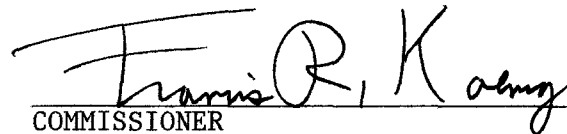
DATED: Albany, New York

STATE TAX COMMISSION

FEB 29 1980

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER