

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Irwin Gorman

:

:

: 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 1968-70 & 1973-75.

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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Irwin Gorman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Irwin Gorman
110 Estate Dr.
Jericho, NY 11753

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
2nd day of October, 1981.

Connie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of :
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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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Harvey M. Lifset the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

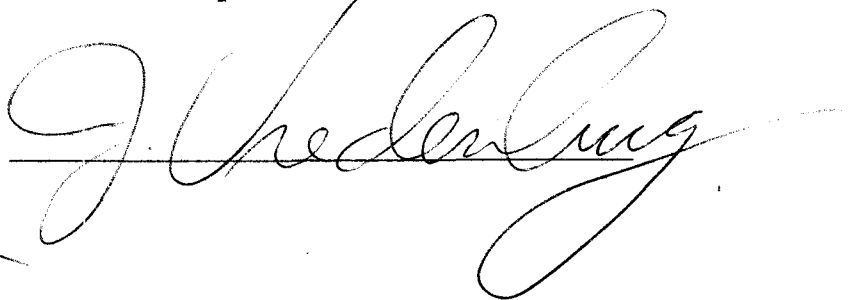
Harvey M. Lifset
112 State St.
Albany, NY 12207

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
2nd day of October, 1981.





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

October 2, 1981

Irwin Gorman
110 Estate Dr.
Jericho, NY 11753

Dear Mr. Gorman:

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,

Kathy Pfaffenbach

STATE TAX COMMISSION

cc: Petitioner's Representative
Harvey M. Lifset
112 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
IRWIN GORMAN	:	DECISION
for Redetermination of Deficiencies or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1968	:	
through 1970 and 1973 through 1975.	:	

Petitioner, Irwin Gorman, 110 Estate Drive, Jericho, New York 11753, filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1968 through 1970 and 1973 through 1975 (File Nos. 16328 and 17370).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Albany, New York, on December 8, 1980 at 9:15 A.M. Petitioner Irwin Gorman appeared with Lifset and Deily (Harvey M. Lifset, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether commissions received by petitioner which were derived from the sale of life and health insurance policies as a soliciting agent during the years 1968 through 1970 and 1973 through 1975 were subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, together with his wife, timely filed joint New York State resident income tax returns for the years 1968, 1969, 1970, 1973, 1974 and

1975. Unincorporated business tax returns were filed by Irwin Gorman only for the years 1973, 1974 and 1975.

2. Petitioner's personal income tax returns reported business income from his activities as a soliciting life and health insurance agent and as a general agent of \$11,785.00 for 1968, \$18,949.00 for 1969, \$19,286.00 for 1970, \$40,819.00 for 1973, \$47,411.00 for 1974 and \$56,359.00 for 1975. The unincorporated business tax returns reported total income from business of \$15,757.00 for 1973, \$17,199.00 for 1974 and \$19,148.00 for 1975. The discrepancy between business income reported on the 1973, 1974 and 1975 personal income tax returns and those amounts reported on the corresponding unincorporated business tax returns was explained in a statement attached to said returns as "insurance commissions received from Prime Co. as per NYS Ct. of Appeals - Nov. 16, 1973".

3. On August 30, 1971 the Audit Division issued a Notice of Deficiency against petitioner for the years 1968 and 1969, assessing unincorporated business tax of \$802.30, plus interest. A second Notice of Deficiency was issued to petitioner and Rhoda Gorman on October 25, 1976, assessing unincorporated business tax of \$5,290.72, plus interest, for the years 1970, 1973, 1974 and 1975. Both the aforementioned notices of deficiency were based on explanatory statements of audit changes wherein unincorporated business tax due was computed based on total business income as reported on the respective personal income tax returns.

4. From January 1, 1968 to April 30, 1968 petitioner was a licensed insurance agent for the Mutual Benefit Life Insurance Company (hereinafter "Mutual"). While associated with Mutual, petitioner worked out of the Solomon Huber General Agency, where his duties included the supervision of other career

agents and the sale of life and health insurance policies. Petitioner received a salary of \$1,699.55 from the Solomon Huber General Agency for supervising the career agents within his unit and received from Mutual an override commission on those sales generated from the agents which he supervised and also a commission on sales which he personally consummated. Federal, New York State and Social Security taxes were deducted from the \$1,699.55 salary received by petitioner, however, no amounts were deducted from the commissions received.

5. Petitioner Irwin Gorman was permitted to place insurance with other companies only after first offering the contract to Mutual and only with the approval of the Solomon Huber General Agency. The Solomon Huber General Agency provided petitioner with secretarial services and desk space, along with a telephone free of charge for all incoming calls and a telephone for outgoing calls where the agency would pay the first \$15.00 per month toward said outgoing calls. Petitioner testified that he utilized his own style, technique and judgment in the solicitation of applications for individual or group life insurance and health insurance and that he maintained no set working schedule.

6. By contractual agreement petitioner, on May 1, 1968, undertook to conduct a general agency for the Guardian Life Insurance Company of America (hereinafter "Guardian"). He was responsible for the management of the general agency, recruitment, training and supervision of career agents working out of the general agency and also to expend personal efforts in the sale of life and health insurance policies. The contract which petitioner executed with Guardian was entitled "Agreement of General Agency" and a portion of that agreement was identical to the full-time career agents' contract.

7. For the years 1968, 1969 and 1970 petitioner received a salary from Guardian of \$2,400.00, \$2,000.00 and \$1,400.00, respectively. No salary was

paid by Guardian to petitioner for the years 1973, 1974 and 1975. Petitioner also received remuneration from Guardian in the form of general agency override commissions on sales made by career agents working out of the agency and commissions from sales personally made by him. The salary received by petitioner in 1968 was subjected to Federal, New York State and Social Security tax deductions while only Social Security taxes were deducted from the salaries paid in 1969 and 1970. No amounts were deducted from the commissions earned from Guardian. The unincorporated business tax returns filed for 1973, 1974 and 1975 excluded from unincorporated business gross income only the commissions earned as the result of sales personally made by petitioner.

8. Petitioner was required to offer all contracts to Guardian and, if thereafter rejected by Guardian, he was free to place the business with any other firm. Guardian required petitioner to file formal reports, activity reports and financial reports, to attend sales and educational meetings and conventions. There was also one-to-one contact with representatives from Guardian's home office on an average of once every two weeks. During the initial phase of the opening of the general agency the one-to-one contact was more frequent and, as petitioner became more familiar with Guardian's operations, the contacts were less extensive. With respect to the solicitation of applications for insurance for Guardian, petitioner, as was the case with Mutual, used his own style, technique and judgment.

9. Petitioner received partial reimbursement from Guardian for the expenses incurred in the operation of the general agency. For the years 1968 and 1969 petitioner's expenses, as shown on Federal Schedule C, were \$6,345.00 and \$9,356.00, respectively. No evidence was submitted to show the amount of reimbursement received from Guardian for 1968 and 1969 and no evidence was

adduced with respect to expenses or reimbursement for the year 1970. The following chart indicates the total expense incurred, reimbursement received and net out-of-pocket expense for 1973, 1974 and 1975:

	<u>1973</u>	<u>1974</u>	<u>1975</u>
Total Expense	\$41,035	\$45,593	\$47,932
Less Reimbursement	<u>24,001</u>	<u>23,400</u>	<u>22,800</u>
Net Expense	<u>\$17,034</u>	<u>\$22,193</u>	<u>\$25,132</u>

There is no breakdown as to what portion of the above mentioned expenses were personally incurred by petitioner as the result of his sales activities and what portion represent expenses incurred in the operation of the general agency.

10. The office from which petitioner operated his general agency was leased by Guardian. This was done so as to allow Guardian the option of removing a general agent whose performance was unacceptable and still be able to retain control of the office space. Guardian maintained a retirement plan of which petitioner was a member and which was contributory on both Guardian's and petitioner's part. Petitioner did not maintain a set work schedule nor did he receive any vacation pay. It was not required of petitioner that he advise Guardian of his daily whereabouts, however, Guardian required that the agency office be open every weekday from 9 to 5.

11. Petitioner's spouse, Rhoda Gorman, was not actively or otherwise involved in the conduct of his selling activities or running of the general agency.

CONCLUSIONS OF LAW

A. That petitioner's activities as a sales agent and supervisor of agents for Mutual Benefit Life Insurance Company constituted the carrying on of an

unincorporated business within the meaning and intent of section 703(a) of the Tax Law and that the income derived from said activities is thereby subject to unincorporated business tax. That Mutual lacked sufficient direction and control over petitioner's activities and sales routines so as to classify him as an employee within the purview of subsection (b) of section 703 of the Tax Law (Matter of Liberman v. Gallman, 41 N.Y.2d 774; Matter of Minken v. State Tax Commission, 60 A.D.2d 420, aff'd 45 NY 2d 991).

B. That petitioner's activities as a general agent and a sales agent for Guardian Life Insurance Company of America constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law and that the income derived from said activities is thereby subject to unincorporated business tax (Matter of De Simone v. Tully, 63 A.D.2d 1054).

C. That Rhoda Gorman was not involved in petitioner Irwin Gorman's unincorporated business activities and, accordingly, her name is to be removed from the Notice of Deficiency issued on October 25, 1976.

D. That the petitions of Irwin Gorman are granted to the extent indicated in Conclusion of Law "C", supra; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER