

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jack Tilden :

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 - 1973.

State of New York
County of Albany

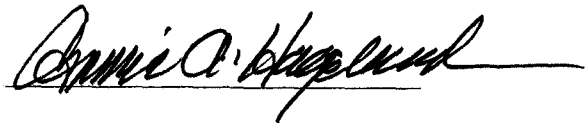
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Jack Tilden, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

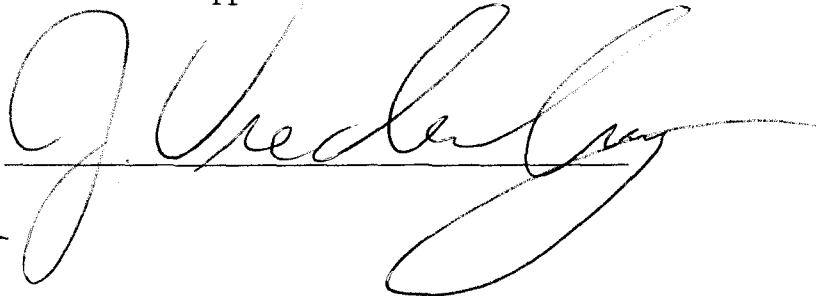
Jack Tilden
16 Cameo Ridge Rd.
Monsey, NY 10952

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
27th day of November, 1981.





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

November 27, 1981

Jack Tilden
16 Cameo Ridge Rd.
Monsey, NY 10952

Dear Mr. Tilden:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JACK TILDEN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1968	:	
through 1973.	:	

Petitioner, Jack Tilden, 16 Cameo Ridge Road, Monsey, New York 10952, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1968 through 1973 (File No. 17049).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 9, 1981 at 9:30 a.m. Petitioner Jack Tilden appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner's activities as a soliciting life insurance agent constitute the carrying on of an unincorporated business, thereby subjecting the commission income derived from said activities to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Jack Tilden, timely filed New York State resident income tax returns for the years 1968 through 1973. On said returns petitioner

reported business income derived from his activities as a soliciting life insurance agent. Unincorporated business tax returns were not filed for the years at issue.

2. On November 22, 1976 the Audit Division issued to petitioner a Notice of Deficiency asserting that for the years 1968 through 1973 unincorporated business tax of \$3,166.41 was due together with interest. Said notice also allowed petitioner a credit of \$200.00 plus interest for an overpayment of his 1970 personal income taxes. Petitioner does not contest the \$200.00 overpayment.

3. The aforementioned Notice of Deficiency was based on three separate statements of audit changes which were originally dated November 3, 1971 (for 1968, 1969 and 1970), February 21, 1975 (for 1973) and August 4, 1976 (for 1971 and 1972). All three of said statement of audit changes held that petitioner's activities as an insurance agent constituted the carrying on of an unincorporated business and that the income derived from said activities was therefore subject to unincorporated business tax.

4. In 1958 petitioner joined the New England Mutual Life Insurance Company (a/k/a New England Life and hereinafter "New England") as a soliciting life insurance agent. During the years at issue petitioner earned commission income from the sale of life insurance for New England through the David Marks, Jr. General Agency and ten other insurance companies or agencies. Petitioner also earned income from the sale of mutual funds. The following chart shows a breakdown of the commission income earned by petitioner:

<u>YEAR</u>	<u>NEW ENGLAND (%)</u>	<u>MUTUAL FUNDS (%)</u>	<u>OTHER (%)</u>	<u>TOTAL</u>
1968	32,515.59 (73.1)	8,377.27 (18.9)	3,559.51 (8.0)	44,452.37
1969	27,830.37 (60.3)	5,613.05 (12.2)	12,708.24 (27.5)	46,151.66
1970	26,857.86 (57.1)	2,375.73 (5.1)	17,825.23 (37.8)	47,058.82
1971	31,513.33 (68.0)	(209.76) (-)	14,801.55 (32.0)	46,105.12
1972	25,458.42 (59.0)	(721.09) (-)	17,723.66 (41.0)	42,460.99
1973	23,557.69 (65.0)	(926.52) (-)	12,664.56 (35.0)	35,295.73

5. Petitioner conceded that the mutual fund income and other commission income was subject to unincorporated business tax, but points out that after taking into consideration a proportionate amount of expenses, that no unincorporated business tax would be due. Of the \$79,283.00 of total other commission income earned by petitioner, \$51,044.00 (64.4%) was earned as the result of the sale of a major medical plan and a long-term disability plan to the Technicon Corporation. The Technicon Corporation's major medical plan was written through Mass. Mutual (it was offered by petitioner to New England) and the long-term disability plan was written through Union Mutual (New England did not write disability plans). The remaining portion of petitioner's other commission income (\$28,239.00) was primarily generated by placing policies for problem cases (mostly health impairments) with companies that specialized in substandard business. These substandard cases would first be offered to New England, who would either reject the policy or set too high a premium.

6. New England paid petitioner on a commission basis and deducted from said commissions social security taxes, however, no Federal or State income taxes were withheld. Petitioner was a participant in New England's retirement plan, deferred compensation plan and group life, health and long-term disability plan. His acts were covered by a blanket bond issued to New England and his agent's license fee and the annual renewals were paid by New England.

7. Petitioner worked primarily out of his home in Monsey, New York and from time to time utilized the office space, stenographic assistance and

telephone facilities provided by the Marks Agency at its office located in New York City. No charge was made to petitioner for the services which he received from the Marks Agency.

8. Since petitioner was not working out of the general agent's office, he received an override commission based on the amount of insurance he sold during the year as reimbursement for expenses which he incurred. The following chart indicates the nature and amount of expenses claimed by petitioner in connection with his life insurance sales activity:

<u>ITEM</u>	<u>1968</u>	<u>1969</u>	<u>1970</u>	<u>1971</u>	<u>1972</u>	<u>1973</u>
Depreciation	\$ 43.16	\$ 43.16	\$ 43.16	\$ 43.16	\$ 43.16	\$ 43.16
Office in home	1,022.24	1,120.84	1,302.25	1,414.65	1,100.22	1,084.49
Car Amortization	-0-	807.85	807.85	1,802.95	1,802.95	995.10
Lunches & Dinners	8,690.30	9,919.40	11,369.60	10,630.40	9,363.50	10,555.10
Transportation	960.20	1,212.09	1,625.30	1,560.30	840.60	963.40
Postage	634.02	1,011.99	1,359.40	1,272.28	1,362.40	1,589.70
Telephone	841.88	869.05	846.32	855.88	868.72	628.91
Gas & Oil	1,007.12	1,156.06	1,264.45	1,342.40	1,102.88	1,227.33
Tolls	702.10	942.20	1,148.40	1,059.30	1,146.30	1,433.40
Parking	751.60	970.30	1,286.00	1,013.20	1,378.40	1,524.60
Car Repair & Ins.	1,812.80	1,486.62	1,593.74	2,467.62	1,933.90	1,921.79
Office Expense	894.95	1,971.13	2,082.69	2,123.30	4,070.79	2,760.05
Dues, fees, etc.	<u>2,445.61</u>	<u>1,707.00</u>	<u>1,267.00</u>	<u>1,100.35</u>	<u>1,825.00</u>	<u>1,003.00</u>
Totals	<u>\$19,900.19</u>	<u>\$23,227.63</u>	<u>\$25,995.96</u>	<u>\$26,685.80</u>	<u>\$26,943.03</u>	<u>\$25,729.87</u>

The expense reimbursement received by petitioner from New England for the year 1971 totalled \$2,033.40. No evidence was adduced at the hearing held herein with respect to the reimbursement received for any of the other years at issue.

9. Petitioner also claimed expenses in connection with his sale of mutual funds. Said expenses consisted of office rent, dues and subscriptions, professional fees, telephone, miscellaneous and bank charges and totalled \$4,293.69, \$7,028.55, \$3,137.68, \$3,664.91, \$3,249.97 and \$3,424.16 for the years 1968 through 1973, respectively.

10. Petitioner offered all sales to New England on a first refusal basis. Should New England refuse the policy or set too high a rating, then petitioner was free to place the risk with another company. He was also permitted to sell types of insurance not written by New England. The record in this matter concerning the element of control is somewhat vague and contradictory. In one instance, petitioner submits a letter from his general agent dated January 13, 1972 which indicated that "Mr. Tilden has been, and is subject to, general and meticulous supervision by our agency over his sales activities and is subject to the established minimum standard of production...". On the other hand, petitioner testified that "After 10 years I moved to my house because I didn't need the supervision...".

11. Petitioner was provided a business card by New England and he also used his own card which indicated "Jack Tilden, C.L.U., Financial, Estate and Pension Planning". Both the general agent's address and petitioner's home address were shown on his own card. Petitioner used a neutral business card so as not to scare off potential purchasers.

CONCLUSIONS OF LAW

A. That the degree of control and direction exercised by the employer is of paramount importance when determining whether a taxpayer is an employee or independent contractor (Matter of Greene v. Gallman, 39 A.D.2d 270, aff'd. 33 N.Y.2d 778).

B. That petitioner has failed to sustain the burden of proof imposed by sections 722 and 689(e) of the Tax Law to show that his sales activities for New England were controlled to the degree necessary to be considered an employee

within the purview of subsection (b) of section 703 of the Tax Law (See Matter of Silver v. Gallman, 51 A.D.2d 633, Mot. for Lv to appeal denied 39 N.Y. 2d 712, 39 N.Y. 2d 1055; Matter of Menin v. Tully, 73 A.D.2d 715).

C. That the petition of Jack Tilden is denied and the Notice of Deficiency dated November 22, 1976 is sustained, together with such additional interest as may be lawfully due and owing.

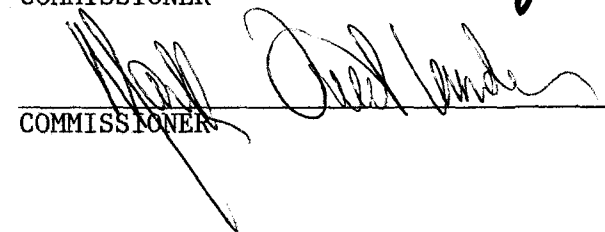
DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER