

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Arnold S. 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 Years 1972 - 1975. :

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 16th day of July, 1982, he served the within notice of Decision by certified mail upon Arnold S. Ross, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arnold S. Ross  
145 Central Park W.  
New York, NY 10023

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  
16th day of July, 1982.

*Ann P. Haglund*

*J. Vredenburg*

STATE OF NEW YORK

STATE TAX COMMISSION

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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 16th day of July, 1982, he served the within notice of Decision by certified mail upon Richard Feiman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard Feiman  
Feiman, Geller & Feiman  
295 Madison Ave.  
New York, NY 10017

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  
16th day of July, 1982.

*James A. Chaplin*

*J. Vredenburg*

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

July 16, 1982

Arnold S. Ross  
145 Central Park W.  
New York, NY 10023

Dear Mr. 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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Richard Feiman  
Feiman, Geller & Feiman  
295 Madison Ave.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

ARNOLD S. ROSS

DECISION

for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Years 1972  
through 1975.

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Petitioner, Arnold S. Ross, 145 Central Park West, New York, New York 10023, 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 1972 through 1975 (File No. 19969).

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 November 2, 1979 and was continued to its conclusion before Frank A. Romano, Hearing Officer, at the same offices on February 26, 1980. Petitioner appeared by Feiman, Geller & Feiman, CPA's (Richard Feiman, CPA). Roberts & Holland, Esqs., filed a memorandum of law on petitioner's behalf subsequent to the hearing. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner was an independent contractor for and not a full-time employee of an insurance company for the years at issue.

FINDINGS OF FACT

1. Petitioner, Arnold S. Ross, filed New York State Income Tax Resident Returns (IT-201) for each of the years 1972 through 1975 identifying his

occupation thereon as "Insurance Agent". These returns were filed jointly with his wife, Lila, who is not a party to this proceeding.

2. On November 22, 1976, the Audit Division issued a Notice of Deficiency to petitioner advising that it had determined an unincorporated business tax liability was owed for the years 1972 through 1975, totaling \$20,125.05, plus accrued interest. Attached to said Notice was a Statement of Audit Changes dated November 22, 1976, informing Mr. Ross that his activities as a life insurance agent were subject to unincorporated business tax.

3. Petitioner was a "full-time" career agent for New England Mutual Life Insurance Company ("New England Life") pursuant to an "Agent's Career Contract" dated November 5, 1962 (effective as of October 1, 1962) between petitioner and New England Life's General Agent, David Marks, Jr., and the General Agent's successor, Marks/Kronish Agency.

4. Petitioner contends that he was at all times subject to the substantial direction and control over his business activities by the General Agent, and that he was required to follow the rules and regulations of the General Agent and of New England Life with respect to all matters pertaining to his work as a life insurance agent. Petitioner admitted that while the Agency could impose substantial direction and control over its agents, day to day control over petitioner's whereabouts and methods of selling was not imposed in view of petitioner's years of experience and success as an insurance agent.

5. Petitioner, during the years in issue, did not have to account for his time, did not call in to his supervisor when in the field, and did not make daily or weekly reports to anyone concerning his activities. At the end of each quarter petitioner would sit down with the general agent and discuss what he had done, where he had been and what the projections were for the next six

months. The geographic area in which petitioner could sell insurance for New England Life was limited to the area within the General Agent's jurisdiction, and petitioner's procedures had to comply with the established solicitation and underwriting procedures of New England Life. Petitioner was subject to discharge by the General Agent, and he was required to first offer to place all life insurance business he solicited with New England Life. If New England declined to place the insurance offered, Mr. Ross could then seek access to some other insurance company. Petitioner was also required to attend agency sales meetings regularly as well as other company meetings. New England Life provided petitioner with office facilities.

6. New England Life provided petitioner with medical insurance, group life insurance and deferred compensation, and allegedly required petitioner to devote at least thirty hours per week to New England Life. The General Agent furnished petitioner with office facilities and with technical and clerical assistance. Petitioner paid no rent for the office provided him, nor did he pay any part of his secretary's salary. New England Life paid petitioner's "agent" license fees and cost of annual renewals.

7. Petitioner filed as part of his tax returns a "Schedule C, Profit or (Loss) From Business or Profession" for the years at issue, whereon he claimed as deductions against income certain unreimbursed expenses incurred in connection with selling life insurance for New England Life.

8. Petitioner was required to meet certain minimum production standards in terms of insurance sales quotas for New England Life. Petitioner has always exceeded these minimum quotas. In addition, section 5 of the New England Mutual Life Insurance Company "Agent's Career Contract" between petitioner and the General Agent provides that "[n]othing in this Contract shall be construed to

create the relationship of employer and employee", and also that "[t]he Agent shall be free to determine for himself the time, place and manner for the solicitation of applications for policies,...".

9. Petitioner has been certified as a Chartered Life Underwriter (CLU), a designation conferred by a privately endowed institution (American College of Life Underwriters).

10. During the years in question, petitioner was also a principal stockholder in two corporations, Moyer & Ross, Inc. ("Moyer & Ross") and Hirschfeld, Stern, Moyer & Ross, Inc. ("Hirschfeld, Stern"). These corporations, from whom petitioner received compensation for services performed as an officer and employee and in whom petitioner was a 50 percent stockholder, were located at 666 Fifth Avenue, the same address as that of New England Life's General Agent.

11. Moyer & Ross was in the business of employee benefits consulting, primarily in the areas of pension and profit sharing plans and also in providing actuarial services. Moyer & Ross's income consisted almost entirely of fees for consulting services rendered, which fees were generally computed on the basis of time expended.

12. Hirschfeld, Stern was primarily engaged in the business of employee benefit plan consulting, such as the planning and sale of employer sponsored group disability, life and health insurance plans. These included self-insurance plans for which Hirschfeld, Stern received no commissions whatever (since no insurance was sold) but only fees for services rendered. Hirschfeld, Stern was also actively engaged in the drafting and organization of employee stock ownership plans (ESOP's) and provided clients with advice and guidance with respect to the life insurance aspects of business and estate planning. Hirschfeld, Stern did on occasion secure individual life insurance for clients who were

unable to qualify for insurance under New England Life's standards, but its principal source of commission income involved the sale of group or "multilife" insurance.

13. According to petitioner's testimony, the two corporations were formed due to a belief that clients will do business more readily with an entity than with an individual agent of an insurance company. Petitioner asserts that the various services performed by the two corporations generally arose due to or were incidental to the primary purpose of making contact with clients for the purpose of selling life insurance for New England Life.

14. It was with the knowledge and consent of New England Life and of the General Agent that the two corporations were located in and operated out of the same offices as petitioner occupied with the General Agent. None of the expenses of office rental or secretarial and clerical help were paid by the corporations, but were paid by New England Life or by the General Agent. However, the corporations did pay their own telephone expenses.

15. In each year at issue (except 1972) petitioner's principal source of income was not derived from his activities on behalf of New England Life.

16. Arnold S. Ross, the petitioner herein, received compensation from New England Life which he reported as business income for the years 1972 through 1975 inclusive, in the amounts of \$31,620.00, \$21,836.00, \$30,479.00 and \$33,673.00 respectively. Said amounts are the net figures reported after being reduced by substantial deductions claimed for commissions paid, and various business expenses. (See reference to Schedule C in Finding of Fact "7".)

17. In addition to the above stated income, petitioner received wages from Hirschfeld, Stern and from Moyer & Ross for the same years (1972 through 1975 inclusive) in the combined amounts of \$27,000.00, \$82,000.00, \$84,000.00 and



\$108,000.00 for the respective years 1972 through 1975. Both New York corporations paid franchise taxes under Article 9-A of the Tax Law and withheld federal and New York State income taxes, and social security taxes from wages paid petitioner.

#### CONCLUSIONS OF LAW

A. That "[i]t is the degree of control and direction exercised by the employer which determines whether the taxpayer is an employee or an independent contractor subject to the unincorporated business tax." Lieberman v. Gallman, 41 N.Y.2d 774, 396 N.Y.S.2d 159, (1977). That regulations adopted by the State Tax Commission during the period at issue herein provide:

"[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case." 20 NYCRR 203.10(c), (adopted February 1, 1974).

B. That a 1959 ruling by the State Tax Commission, reported originally at 20 NYCRR 281.3 and indicative of the factors to be considered in determining whether or not an insurance agent is subject to unincorporated business tax provides:

"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. \* \* \* In every case all the relevant facts and circumstances will be considered before a decision is made whether or not the agent is subject to the unincorporated business tax". (emphasis added).<sup>1</sup>

C. That in light of all the relevant facts and circumstances herein, petitioner was not subject to sufficient control and restrictions to be an employee of New England Life but rather was an independent contractor. Accordingly, so much of petitioner's income as was received from New England Life during the years at issue is subject to the imposition of the unincorporated business tax.

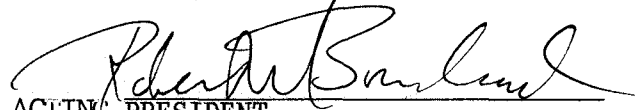
D. That income received by petitioner from the two corporations during the years at issue is not subject to the imposition of the unincorporated business tax.

E. That the petition of Arnold S. Ross is granted to the extent indicated by Conclusion of Law "D". That the Audit Division is directed to recompute the deficiency in accordance therewith, and that the petition is in all other respects denied.

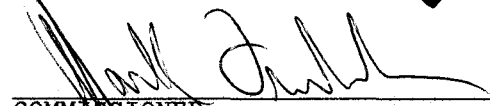
DATED: Albany, New York

JUL 16 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

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<sup>1</sup> The essence of this ruling is encompassed by the definition of an employee as provided in current regulations of the State Tax Commission found at 20 NYCRR 203.10(b). (Effective date February 1, 1974.)