

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert L. Tinkler : 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 1975-1978. :

State of New York
County of Albany

Connie Hagelund, 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 15th day of July, 1983, she served the within notice of Decision by certified mail upon Robert L. Tinkler, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert L. Tinkler
24 Oakledge Drive
East Northport, NY 11731

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
15th day of July, 1983.

Connie A. Hagelund

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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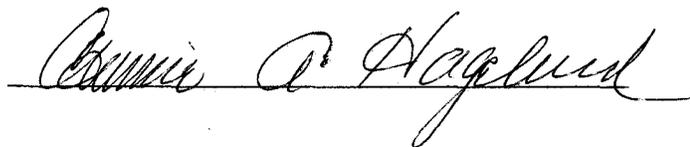
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Harvey M. Lifset the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harvey M. Lifset
112 State St., Suite 1300
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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

July 15, 1983

Robert L. Tinkler
24 Oakledge Drive
East Northport, NY 11731

Dear Mr. Tinkler:

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) 690 & 720 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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Harvey M. Lifset
112 State St., Suite 1300
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ROBERT L. TINKLER : DECISION
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Years 1975 :
through 1978.

Petitioner, Robert L. Tinkler, 24 Oakledge Drive, East Northport, New York 11731, 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 1975 through 1978 (File No. 41486).

A small claims hearing was held before Anthony J. Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Room 107, Albany, New York, on December 7, 1982 at 10:45 A.M. Petitioner appeared with Harvey M. Lifset, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioner's selling activities for New England Mutual Life Insurance Company and for its general agent, The Nadel Agency, were performed as an employee and his income therefrom was thus not subject to unincorporated business tax.

II. If petitioner was conducting an unincorporated business, whether his activities as an officer and employee of Robert L. Tinkler Associates, Inc. were so interrelated and integrated with his other selling activities as to constitute part of an unincorporated business and thereby subjecting his corporate salary to the unincorporated business tax.

III. Whether that part of the Notice of Deficiency issued for 1976 was properly issued within the statutory period of limitation for assessment.

FINDINGS OF FACT

1. Petitioner, Robert L. Tinkler, with his wife, timely filed a combined New York State Income Tax Resident Return for 1975, 1977 and 1978. Petitioner and his wife timely filed a joint New York State Income Tax Resident Return for 1976. An unsigned New York State Unincorporated Business Tax Return was attached to the 1976 personal income tax return. No unincorporated business tax returns were filed for the other years at issue. On each of the returns filed, petitioner listed his occupation as "Ins. Exec."; his wife listed her occupation as "H/W Travel Agent".

2. On May 30, 1980, the Audit Division issued a Notice of Deficiency against petitioner, Robert L. Tinkler, for the years 1975 through 1978 asserting unincorporated business tax of \$6,930.05, plus interest of \$1,575.78 for a total of \$8,505.83. A Statement of Unincorporated Business Tax Audit Changes dated April 4, 1980, was attached to the above Notice and contained the following explanation:

"Based on the examination of your tax return, it has been determined that your activity as an Insurance Broker/Salesman is subject to Unincorporated Business Tax."

The Audit Division computed petitioner's unincorporated taxable business income for each year as follows:

	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
Wages from Robert L. Tinkler Assoc., Inc.	\$24,800.00	\$25,200.00	\$30,300.00	\$19,000.00
Other Income from Insurance Commission	13,955.00	14,050.00	16,807.00	23,718.00
Allowance for Taxpayer Services	(5,000.00)	(4,771.00)	(5,000.00)	(5,000.00)
Exemption	(5,000.00)		(5,000.00)	(5,000.00)
Net Adjustment per Audit	<u>\$28,755.00</u>	<u>\$34,479.00</u>	<u>\$37,107.00</u>	<u>\$32,718.00</u>
Taxable Business Income Previously Stated		(4,084.00)		
Corrected Taxable Income	<u>\$28,755.00</u>	<u>\$30,395.00</u>	<u>\$37,107.00</u>	<u>\$32,718.00</u>

3. Petitioner, Robert L. Tinkler, was an independent insurance agent/broker, when in 1966 he entered into an Agent's Career Contract with The Nadel Agency, general agent of the New England Mutual Life Insurance Company (hereinafter, New England). In 1968 Mr. Tinkler incorporated his property and casualty insurance business under the name of Robert L. Tinkler Assoc., Inc. (hereinafter the Corporation). During the years at issue, Mr. Tinkler characterized his occupation as insurance agent and insurance owner.

4. Mr. Tinkler handled individual and group life insurance and pension plans for New England. New England had right of first refusal on all policies it issued. New England did not have group policies for groups of twenty-five or less employees, health insurance or substandard life insurance. New England permitted Mr. Tinkler to place these types of policies with other companies. Mr. Tinkler handled these insurance policies as a broker. He testified that this commission income was earned as an individual. The commission income from these activities was added to the commissions which he received from New England and the total commissions reported as other income on his personal income tax return.

5. Mr. Tinkler testified that he was not only obligated to but did spend at least one day a week working at The Nadel Agency. He usually used the same desk to do his work. However, the desk was not assigned to him and if someone was using it, he would be allowed to use another desk. He claimed that he met regularly with his supervisor either at The Nadel Agency office or sometimes at his Corporation office. Mr. Tinkler had production standards and quotas to meet; he was required to service "orphan" policyholders when requested and to attend sales meetings when and where scheduled by The Nadel Agency.

6. New England, through The Nadel Agency, reimbursed Mr. Tinkler for certain office expenses at the rate of twenty percent of his first year commissions. They supplied him with some office supplies. They withheld FICA tax from his commissions. However, Federal and State income taxes were not withheld by New England. He was not covered by New England for State disability insurance or worker's compensation. Mr. Tinkler did participate in New England's group life insurance plan, pension plan and profit sharing plan.

7. The Corporation consisted of five employees. Mr. Tinkler was founder and president of the Corporation. He supervised the other four employees. The Corporation handled general insurance (property and casualty) as an agent and broker. The Corporation serviced insurance policies sold by Mr. Tinkler prior to incorporation. It billed and issued policies, collected premiums, transmitted net premiums to the companies and handled insurance claims. The Corporation also acted as a real estate manager for the office building in which the Corporation was located. Neither petitioner nor the Corporation owned said building. The Corporation was dissolved on October 1, 1978. The Corporation provided for its key employees: group life insurance, individual disability insurance, corporate pension plan and profit sharing plan.

8. Mr. Tinkler performed services for both New England and the Corporation at the Corporation offices. He used business letters printed with either the name of the Corporation or New England on them and the address and telephone numbers of the Corporation. Mr. Tinkler's time and efforts in selling insurance were based on the needs of the business. He primarily decided his work day except if he had a sales meeting with The Nadel Agency or with his supervisor. No evidence was submitted to show that separate books were kept for the expenses of the Corporation, New England or as an individual broker. Mr. Tinkler

testified that the expenses of the Corporation office attributable to work performed for New England and the other companies were estimated. The clerical employees of the Corporation performed services for both New England and the Corporation. Mr. Tinkler claimed that part of his expense reimbursement was turned over to the Corporation. He received a wage statement each year from the Corporation on which Federal and State income taxes and FICA tax were deducted.

9. For 1976 petitioner reported other income of \$14,050.00. He attached to his New York return Form 1099 - Misc. which indicated The Nadel Agency (New England) paid to him \$7,343.29 in commissions and fees to nonemployees. For the other years at issue, no breakdown or Form 1099 was attached to the returns to determine the amount of commission earned from New England or the other companies.

10. For the years at issue petitioner reported on his federal income tax returns, under miscellaneous deductions, office expenses. The office expenses so listed referred to a schedule headed insurance office expense. Salary expenses were not included on such schedule. For the years at issue he incurred office expenses in total as follows:

<u>YEAR</u>	<u>AMOUNT</u>
1975	\$1,872.02
1976	\$2,236.56
1977	\$1,663.72
1978	\$1,457.46

The Audit Division did not deduct these expenses in computing the unincorporated business taxable income.

11. At the hearing petitioner claimed that the Audit Division was barred by the statute of limitations from assessing the tax for 1976. He claimed that since an unincorporated business tax return was filed for 1976, the three year

statute of limitation had run and no assessment for that year was proper. In the alternative, he claimed, if the unincorporated business tax return filed is not accepted as a filed return, the fact that an unincorporated business tax return was attached to his personal income tax return was sufficient notice to the Audit Division to start the running of the statute of limitations.

12. The unincorporated business tax return filed for 1976 listed Margaret H. Tinkler as the taxpayer and her social security number. Her name and number were typed over "white out" areas on the return. Mr. Tinkler submitted a copy of his 1976 Federal income tax return. Attached to the return was a New York State Unincorporated Business Tax Return which listed his name and social security number. He claimed, without testifying, that the return was filed for him by his accountants. No information was on the return to indicate the kind of business or the name and address of the business. No information was typed on Federal Schedule C, Profit or (Loss) From Business or Profession, except see Form-7 and net profit \$1,145.00. Form-7 had Margaret H. Tinkler and her social security number clearly typed on the form. The form also indicated that the gross receipts on sales and the net profit were \$1,145.00.

CONCLUSIONS OF LAW

A. That the performance of services as an employee or officer will not be deemed to be the carrying on of an unincorporated business by such individual unless the services so performed constitute part of a business regularly carried on by such individual (section 703(b) of the Tax Law).

B. That the term employee means an individual performing services for an employer under an employer-employee relationship. This relationship exists when the person for whom services are performed has the right to control and

direct the individual who performs the services (see 20 NYCRR 203.10(b), Matter of Liberman v. Gallman, 41 N.Y.2d 774,778).

C. That sufficient direction and control was not exercised by New England Mutual Life Insurance Company or The Nadel Agency over petitioner, Robert L. Tinkler, to form a relationship of employer-employee within the meaning and intent of section 703(b) of the Tax Law. Mr. Tinkler's day to day activities were primarily decided by him. He had no division of his time and efforts among his various activities (Matter of Menin v. Tully, 73 A.D.2d 715, Matter of Tilden, S.T.C. dated November 27, 1981).

D. That petitioner, Robert L. Tinkler, was carrying on an unincorporated business with respect to his activities for New England and the other insurance companies within the meaning and intent of section 703(a) of the Tax Law and the commission income derived therefrom constituted unincorporated business gross income within the meaning of section 705(a) of the Tax Law.

E. That the services performed by petitioner, Robert L. Tinkler, as an employee of the Corporation were so interrelated and integrated with his unincorporated business as to constitute part of the unincorporated business regularly carried on by him. There was no division of his time and effort between the Corporation and the unincorporated business. The same office and telephone serviced both the Corporation and the unincorporated business. The employees of the Corporation performed services for the unincorporated business without a separate accounting between the Corporation and the unincorporated business. Furthermore, no evidence was submitted to show that separate accounts were maintained for any office expenses. Therefore, the salary received by Mr. Tinkler was includible in his business income within the meaning and intent of section 703(b) of the Tax Law.

F. That sections 722 and 683(a) of the Tax law provide for a three year limitation on assessments after a return is filed. However, section 683(c)(1)(A) of the Tax Law states that the tax may be assessed at any time if no return is filed.

G. That the statute of limitations on assessment for 1976 was not tolled. There is no doubt that the unincorporated business tax return was filed for Margaret L. Tinkler. The filing of this return did not start the running of the statutory period of limitation for assessments against petitioner. His business was separate and distinct from her business. Also, it cannot be argued that the Audit Division had sufficient information to determine that an unincorporated business tax was due from petitioner. (See Matter of Arbesfeld, Goldstein v. State Tax Commission, 62 A.D.2d, 627, mot. for lv. to app. den. 46 N.Y.2d 705.)

H. That the Audit Division is directed to recompute petitioner's unincorporated business tax for each year by deducting the expenses indicated in Finding of Fact, "10", supra. That the Audit Division is additionally directed to recompute petitioner's unincorporated business tax for 1976 by increasing the allowance for taxpayer's services to the maximum \$5,000.00, and allowing an exemption of \$5,000.00.

I. That the petition of Robert L. Tinkler is granted to the extent indicated in Conclusion of Law "H", supra and is in all other respects denied; and the Notice of Deficiency dated May 30, 1980, as modified herein, is sustained.

DATED: Albany, New York

JUL 15 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER