

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alfred & Elizabeth Howes : 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 1971 & 1972. :

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 8th day of July, 1983, she served the within notice of Decision by certified mail upon Alfred & Elizabeth Howes, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alfred & Elizabeth Howes
42 Fenimore Rd.
Scarsdale, NY 10503

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
8th day of July, 1983.

Connie A. Hagelund

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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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 8th 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.
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
8th day of July, 1983.




Kathy Pfaffenbach
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

July 8, 1983

Alfred & Elizabeth Howes
42 Fenimore Rd.
Scarsdale, NY 10503

Dear Mr. & Mrs. Howes:

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 & 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 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.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ALFRED S. and ELIZABETH HOWES	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1971	:	
and 1972.	:	

Petitioners, Alfred S. and Elizabeth Howes, 42 Fenimore Road, Scarsdale, New York 10503, 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 1971 and 1972 (File No. 21603).

A formal hearing was held before Jerome M. Hesch, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on July 11, 1979 at 1:00 P.M. Petitioner appeared by Harvey M. Lifset, Esq. The Audit Division appeared by Peter Crotty, Esq. (Barry M. Bresler, Esq. of counsel).

ISSUES

- I. Whether the income earned by petitioner Alfred S. Howes from his activities as an insurance salesman was subject to unincorporated business tax.
- II. Whether petitioner Alfred S. Howes is entitled to an allocation of business income if found subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioners Alfred S. and Elizabeth Howes timely filed New York State combined personal income tax returns (Form IT-208) for 1971 and 1972. No unincorporated business tax returns were filed by petitioners for 1971 and 1972.

2. The Audit Division issued a Statement of Audit Changes on February 28, 1977 contending that the income from petitioners' activities in the insurance business was subject to unincorporated business tax. Accordingly, it issued a Notice of Deficiency to petitioners on February 28, 1977, in the amount of \$4,814.60 in unincorporated business tax for 1971 and 1972, plus \$1,401.27 in interest, for a total of \$6,215.87.

3. Petitioner Alfred S. Howes was associated with The Harvey Blutstein Agency, general agent in New York City for the Connecticut Mutual Life Insurance Company (hereinafter referred to as "Connecticut Mutual"). He began work with Connecticut Mutual in 1938.

4. The contract currently in force between said petitioner and Connecticut Mutual was executed on May 7, 1945.

5. The contract provides that "The Agent shall be free to exercise his own judgement as to the time, place and means of soliciting and procuring applications for insurance and annuities under the authorization contained in this Agreement. Nothing contained herein shall be construed to create the relationship of employer and employee between the Company and the Agent."

6. Mr. Howes devotes about 80 percent of his working time to the solicitation of life insurance and pension plans for Connecticut Mutual. He placed some life insurance and casualty insurance with other insurance companies since Connecticut Mutual did not write all forms of life insurance.

7. Mr. Howes was concerned about the continuation of the life insurance business he had created in the event of his death. He established the Bering Trading Corporation (hereinafter referred to as "Bering") in 1959 as a broker first-line with Connecticut Mutual.

8. Mr. Howes solicited life insurance in Bering's name. Bering was required under its contract with Connecticut Mutual to submit all potential policies to Connecticut Mutual. Bering did not submit policies to any other insurance company.

9. Mr. Howes also solicited life insurance in his own name.

10. If Mr. Howes were to have died, Connecticut Mutual would continue the business generated by Bering and would continue to pay commissions to Bering.

11. Connecticut Mutual frequently declined to accept life insurance policies solicited by Mr. Howes and by Bering.

12. Mr. Howes had the opportunity to place certain types of insurance risks that Connecticut Mutual did not insure, such as casualty insurance, with other companies.

13. Mr. Howes established Employee Incentive Plans of America, Inc. (hereinafter referred to as "EIPA") to place with other insurance companies those risks Connecticut Mutual declined to cover or did not provide coverage for.

14. Mr. Howes, in his individual capacity, also placed risks with other insurance companies. These were risks Connecticut Mutual did not provide coverage for or declined to cover. He concedes that the income from commissions paid to him by these other insurance companies was subject to unincorporated business tax.

15. Mr. Howes was expected to obtain the consent of Connecticut Mutual before he or Bering could place any insurance risk with another insurance company.

16. Mr. Howes was expected to first offer to Connecticut Mutual, either individually or through Bering, all life insurance risks he solicited. This

right of first refusal was a verbal understanding and did not appear in either his or Bering's contract with Connecticut Mutual.

17. Connecticut Mutual provided Mr. Howes with office space, furniture, equipment, telephone and clerical and secretarial help (however, see Findings of Fact "19" and "20", infra).

18. Mr. Howes does not reimburse Connecticut Mutual for these facilities and services when he is soliciting policies for Connecticut Mutual in his individual capacity.

19. Mr. Howes reimbursed Connecticut Mutual for that portion of its facilities and services devoted to time spent on business for Bering or EIPA.

20. Bering and EIPA each paid Mr. Howes a management fee, out of which he reimbursed Connecticut Mutual for overhead and clerical help provided.

21. Mr. Howes does not hire any of the clerical or secretarial staff who provide services for him.

22. Mr. Howes is not reimbursed by Connecticut Mutual for his business expenses such as travel, entertainment and gifts to customers.

23. Connecticut Mutual did not withhold any income taxes from the commissions paid to Mr. Howes, but did withhold social security taxes. A breakdown of the commissions and management fees paid to Mr. Howes is as follows:

	<u>1971</u>	<u>1972</u>
Connecticut Mutual Commissions	\$ 47,904.39	\$ 57,960.47
Other Companies Commissions	5,021.64	8,690.06
Management Fees - Bering	40,000.00	52,000.00
Management Fees - E.I.P.A.	17,000.00	50,000.00
Total	<u>\$109,926.03</u>	<u>\$168,650.53</u>

24. Mr. Howes participated in Connecticut Mutual's health insurance plan and qualified pension plan.

25. As an agent for Connecticut Mutual, Mr. Howes was under the supervision of its general agent, Harvey Blutstein. While in the office he met daily with the general agent. He also kept in frequent contact with the general agent when traveling. Approximately twenty five employees and twenty insurance agents were employed by the general agent.

26. Connecticut Mutual periodically reviewed the nature and amount of insurance Mr. Howes placed with it and with other insurance companies.

27. Connecticut Mutual suggested markets for Mr. Howes to pursue, but he was on his own in developing individual leads and he determined which customers to contact.

28. Mr. Howes would discuss the leads he was pursuing with the Connecticut Mutual general agent to determine if they were the type of risks the company would insure. The general agent had a right to disapprove a particular lead Mr. Howes was pursuing.

29. Mr. Howes was allowed to solicit business in any state in which he and the general agent were licensed.

30. Mr. Howes received training from Connecticut Mutual and was expected to attend its sales meetings.

31. Petitioner Elizabeth Howes was not engaged in the insurance business.

32. During the hearing held herein, Mr. Howes contended, for the first time, that he is entitled to allocate income received from Connecticut Mutual, Bering and E.I.P.A. since offices were maintained in California, Massachusetts and Connecticut. He submitted schedules for the years in issue showing group commissions, first-year commissions, renewals and fees attributable to sources within and without New York State. E.I.P.A. maintained an office in California for itself, Bering, and petitioner Alfred Howes. He stated, in regard to the

offices maintained in Massachusetts and Connecticut, "In addition we had other arrangements in other states with individuals who would represent us."

CONCLUSIONS OF LAW

A. That petitioner Alfred S. Howes was free to exercise his own judgment as to the time, place and manner of soliciting insurance and did, in fact, develop his own leads and determine which customers to contact. Although Connecticut Mutual did assert some supervision over petitioner, it did not govern the manner in which he solicited business; therefore, petitioner's activities as an insurance salesman constituted the carrying on of an unincorporated business within the meaning and intent of section 703 of the Tax Law and the commissions and management fees derived therefrom (Finding of Fact "23") are subject to the imposition of tax pursuant to section 701 of the Tax Law.

B. That petitioner of Alfred S. Howes is not entitled to allocate the excess of his unincorporated business gross income over his unincorporated business deductions since office space was provided and maintained by the individual concerns for whom he provided services; therefore, since petitioner himself did not maintain an office outside New York State, he is not entitled to an allocation within the meaning and intent of section 707 of the Tax Law and 20 NYCRR 207.2 (see Giordano v. State Tax Commission, 52 A.D.2d 691).

C. That petitioner, Elizabeth Howes, was not engaged in the unincorporated business, and the Audit Division is directed to remove her name from the Notice of Deficiency.


D. That the petition of Alfred S. Howes and Elizabeth Howes is granted to the extent provided in Conclusion of Law "C," supra and is in all other respects denied and the Notice of Deficiency as modified is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 08 1983


PRESIDENT


COMMISSIONER


COMMISSIONER