

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Carl J. Kaufman

:

:

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 1974 & 1975.

State of New York
County of Albany

David Parchuck, 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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Carl J. Kaufman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl J. Kaufman
75-06 Utopia Pkwy.
Flushing, NY 11366

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
11th day of February, 1983.

David Parchuck

Emile D. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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David Parchuck, 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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Herbert S. Tepper the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert S. Tepper
31-53 Crescent St.
Long Island City, NY 11106

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
11th day of February, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

February 11, 1983

Carl J. Kaufman
75-06 Utopia Pkwy.
Flushing, NY 11366

Dear Mr. Kaufman:

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
Herbert S. Tepper
31-53 Crescent St.
Long Island City, NY 11106
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CARL J. KAUFMAN
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1974
and 1975.

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DECISION

Petitioner, Carl J. Kaufman, 75-06 Utopia Parkway, Flushing, New York 11366, 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 1974 and 1975 (File No. 27507).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 28, 1982 at 10:45 A.M. Petitioner appeared with Herbert S. Tepper, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether certain activities carried on by petitioner were as an employee and thus exempt from the imposition of the unincorporated business tax.

FINDINGS OF FACT

1. Carl J. Kaufman (hereinafter petitioner) filed a joint New York State Income Tax Resident Return with his wife for each of the years 1974 and 1975 whereon he reported business income of \$16,974.16 and \$34,364.44 respectively.

This income was derived from his activities as an insurance agent. He did not file an unincorporated business tax return for either year at issue herein.

2. On April 13, 1979, the Audit Division issued a Statement of Audit Changes to petitioner wherein, as the result of his failure to reply to two inquiry letters, his aforestated business income was held subject to the unincorporated business tax for 1974 and 1975. Accordingly, a Notice of Deficiency was issued against petitioner under the same date asserting unincorporated business tax of \$1,792.36, plus interest of \$494.65, for a total due of \$2,287.01.

3. Although petitioner was present at the hearing he chose not to testify and relied exclusively on the documentation submitted and the presentation made by his representative. As a result, the hearing record is void of information with respect to petitioner's day-to-day activities or the degree of direction and control exercised over such activities by his principals.

4. Petitioner filed a Federal Schedule C for both 1974 and 1975 whereon he claimed business expenses of approximately \$11,000.00 each year. For each year at issue deductions were claimed inter alia for rent, commissions, auto expense, telephone, advertising, stationery and supplies and travel and entertainment. For 1974, petitioner claimed a business deduction for salaries and wages paid.

5. Pursuant to schedules annexed to petitioner's Federal Schedules C, he derived gross "business income" of \$28,349.46 from eleven principals in 1974 and \$45,012.48 from eight principals in 1975. Petitioner also derived wage income during the years at issue for which he received W-2 forms. Such wage income, which was not held subject to the unincorporated business tax, was derived from two principals in 1974 and three principals in 1975.

6. Petitioner contended that he was an employee of five of the eleven principals he reported income from on his 1974 Federal Schedule C. For 1975, he contended that he was an employee of four of the eight principals he reported income from on his Schedule C as follows:

<u>PRINCIPAL</u>	<u>1974</u>	<u>INCOME</u>
(a) Fischman - Kooper, Inc.		\$17,696.33
(b) Davis - Kooper - Holzberg Agency, Inc.		1,125.14
(c) Davis - Kooper - Holzberg Planning Corp.		1,979.35
(d) The Mutual Benefit Life Insurance Co.		5,177.75
(e) The Life Underwriter Training Council		272.00
Total reported as business income which is claimed to have been derived as an employee		<u>\$26,250.57</u>

<u>PRINCIPAL</u>	<u>1975</u>	<u>INCOME</u>
(a) Fischman - Kooper, Inc.		\$31,067.12
(b) Davis - Kooper - Holzberg Agency, Inc.		734.84
(c) The Mutual Benefit Life Insurance Co.		2,404.03
(d) Security Mutual Life Insurance Company of N.Y.		<u>7,494.74</u>
Total reported as business income which is claimed to have been derived as an employee		<u>\$41,700.73</u>

7. Petitioner submitted a hearing decision issued November 13, 1975 by the New York State Department of Labor, Unemployment Insurance Referee Section, wherein it was determined that C.K. (alleged to be petitioner) was an employee of Fischman - Kooper, Inc. for the years 1972, 1973 and 1974. Said decision was appealed by the employer and affirmed by the Unemployment Insurance Appeal Board on July 14, 1976 and the Appellate Division of the Supreme Court, Third Department on May 26, 1978. Pursuant to the decision rendered by the Referee Section:

"These salesman (inclusive of C.K.), with the authorization of the president of the employer corporation, represented themselves to be vice-presidents of the insurance agency and their business cards indicated that they were vice-presidents of the employer corporation. The employer provided office accommodations together with a telephone, clerical assistance, and stationery and postage for the salesmen. All of their insurance sales was placed through the employer. They

could not deal directly with the insurance companies." Said decision found that "Although they (inclusive of C.K.) were not required to attend meetings and, although they were not closely supervised, they still were employees and not independent contractors. Because of their expertise in the insurance brokerage business, it was not necessary for the employer to closely supervise the salesmen. There are sufficient indices of supervision, direction and control to reestablish an employer-employee relationship."

8. Petitioner relies exclusively on said decision and the facts provided therein (as stated above) to establish that he was an employee of Fischman - Kooper, Inc. during both 1974 and 1975.

9. With respect to petitioner's income derived from Davis - Kooper - Holzberg Planning Corp. (Planning) and Davis - Kooper - Holzberg Agency, Inc. (Agency), petitioner relies exclusively on the contents of a "Sales Supervisors' Agreement" with Planning to establish that he was an employee of both Planning and Agency during 1974 and 1975. Said agreement, dated May 2, 1974, provided that petitioner was to act as a supervisor of certain agents and brokers with specific duties of training, assisting and developing the salesmen in his unit. Pursuant to such agreement, petitioner was compensated on a salary plus commission basis and he was not reimbursed for business expenses incurred.

10. With respect to petitioner's income derived from The Mutual Benefit Life Insurance Company, petitioner relies exclusively on the contents of an "Agreement For Standard Soliciting Agents" and the fact that said company withheld social security taxes from his compensation to establish that he was an employee. Said contract, dated May 1, 1971, between Victor R. Goldberg, CLU as general agent and petitioner was a standard, pre-printed, full time career agent's contract providing for appointment of the agent "to procure and forward to the General Agent applications for life insurance, annuities and health insurance in The Mutual Benefit Life Insurance Company --- and to deliver

contracts issued on such applications." Compensation received under this contract was on a commission basis.

11. With respect to petitioner's income derived from The Life Underwriter Training Council, petitioner relies exclusively on the fact that social security taxes were withheld from his compensation paid by this principal to establish that he was an employee.

12. No documentation was submitted with respect to petitioner's activities for, or status with Security Mutual Life Insurance Company of New York.

13. The record is void of information with respect to how petitioner divided his time between principals.

CONCLUSIONS OF LAW

A. That pursuant to 20 NYCRR 203.10(c) "The fact that the individual has been determined to be an employee or independent contractor by a court or administrative tribunal under any State, local or Federal law, generally has little bearing on the individual's status for the purposes of this section".

B. That it is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee. (E.g., Matter of Greene v. Gallman, 39 A.D.2d 270, 272 aff'd. 33 N.Y.2d 778; Matter of Frishman v. New York State Tax Comm., 33 A.D.2d 1071, mot. for lv. to app. den. 27 N.Y.2d 483; Matter of Hardy v. Murphy, 29 A.D.2d 1038; see 20 NYCRR 203.10; cf. Matter of Sullivan Co., 289 N.Y. 110, 112.) Matter of Liberman v. Gallman, 41 N.Y.2d 774, 778.

C. That petitioner has failed to sustain his burden of proof required pursuant to sections 689(e) and 722 of the Tax Law to show that sufficient direction and control was exercised by any of his principals over his activities so as to constitute a relationship of employer-employee. Accordingly, petitioner's

activities did not constitute services rendered as an employee of any of his principals scheduled in Finding of Fact "6" supra, within the meaning and intent of section 703(b) of the Tax Law.

D. That petitioner's insurance related activities constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701(a) of the Tax Law.

E. That the petition of Carl J. Kaufman is denied and the Notice of Deficiency dated April 13, 1979 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER

COMMISSIONER