

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ethel Leaf :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1978 & 1979. :
_____ :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of July, 1984, he served the within notice of Decision by certified mail upon Ethel Leaf, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ethel Leaf
152 Lawrence Park Terrace
Bronxville, NY 10708

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
18th day of July, 1984.

David Parchuck

James A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ethel Leaf :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1978 & 1979. :
:

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of July, 1984, he served the within notice of Decision by certified mail upon Emanuel Kuflik, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Emanuel Kuflik
Suite 800, E. Bldg.
160 Broadway
New York, NY 10038

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
18th day of July, 1984.

David Parbuck

Constance A. K. Smith
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 18, 1984

Ethel Leaf
152 Lawrence Park Terrace
Bronxville, NY 10708

Dear Mrs. Leaf:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Emanuel Kuflik
Suite 800, E. Bldg.
160 Broadway
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ETHEL LEAF	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1978	:	
and 1979.	:	

Petitioner, Ethel Leaf, 152 Lawrence Park Terrace, Bronxville, New York 10708 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 1978 and 1979 (File No. 36422).

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 November 2, 1983 at 10:45 A.M., with all briefs to be submitted by December 23, 1983. Petitioner appeared by Emanuel Kuflik, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner's activities as a booking agent constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Ethel Leaf and her husband, George Leaf, filed a joint New York State Income Tax Resident Return for each of the years 1978 and 1979 whereon Ethel Leaf (hereinafter petitioner) reported business income of \$24,589.00 and \$18,309.00 respectively. Such income was derived from petitioner's activities engaged in as a "booking agent" (sic). Petitioner also filed a New York State Unincorporated Business Tax Return for each of said years whereon she reduced

her reported net profit from business by "wages" of \$23,464.00 (1978) and \$23,217.00 (1979). Accordingly, no unincorporated business tax was paid since the balances remaining each year were not sufficient to produce a tax liability.

2. On April 22, 1981, the Audit Division issued a Statement of Audit Changes to petitioner and her husband wherein the subtractions claimed for "wages" were disallowed and unincorporated business taxes were computed on petitioner's full net profit from business as reported for each year at issue. Accordingly, a Notice of Deficiency was issued against petitioner and her husband on September 10, 1981 asserting unincorporated business tax of \$1,138.71, penalty of \$36.68, plus interest of \$199.87, for a total due of \$1,375.26. Said penalty was asserted pursuant to section 685(a)(1) of the Tax Law for failure to timely file the 1978 return.

3. Petitioner's husband, George Leaf, was not involved in petitioner's booking agent activities.

4. During the years at issue petitioner's activities consisted primarily of soliciting tour groups for reservations in hotels owned by her principal, American Motor Inns, Inc. (hereinafter "American").

5. Petitioner alleged that she was an employee of American and as such her income derived therefrom is properly exempt from the imposition of unincorporated business tax.

6. American was located in Roanoke, Virginia. Petitioner conducted her activities from an office which she maintained at her personal residence.

7. Petitioner filed a Federal Schedule C for each year at issue whereon she claimed substantial business expenses as follows:

	<u>1978</u>	<u>1979</u>
Car and truck expenses	\$ 3,750.00	\$ 3,825.00
Postage	581.00	673.00
Rent on business property	1,350.00	1,402.00
Telephone	300.00	141.00
Travel and entertainment	4,888.00	3,894.00
Utilities	253.00	268.00
Trade journals & memberships	577.00	706.00
TOTAL	<u>\$11,699.00</u>	<u>\$10,909.00</u>

8. Petitioner's representative submitted a 1979 form 1099 - MISC, issued by American Holiday, Inc., purported to be a subsidiary of American. Such form shows \$6,000.00 paid to petitioner as "other fixed or determinable income". Petitioner's representative contended that the \$6,000.00 represented an expense allowance paid to petitioner at a fixed rate of \$500.00 per month and that such amount was included in gross receipts reported. No evidence was submitted to support such contention.

9. Petitioner's representative submitted a letter from American, dated July 6, 1982, wherein it is stated that:

"This will confirm the employment of Mrs. Ethel Leaf with American Motor Inns.

Mrs. Leaf has been employed by us on a regular salary basis for about the past 14 years. Regular deductions are made from her salary for income tax and FICA.

Mrs. Leaf is under our supervision and control on a daily basis and does sales work for all the properties we operate."

10. The returns for the years at issue show that New York State personal income taxes were not withheld from petitioner's compensation.

11. Although the aforestated letter from American refers to petitioner being compensated on a "regular salary basis", petitioner's representative submitted documentation evidencing that petitioner was compensated on a commission basis in 1983 wherein she received commissions from bookings with American as

well as other unrelated hotels and inns. He claimed that she was similarly compensated during the years at issue.

12. Subsequent to the hearing held herein, petitioner submitted a letter from American, dated December 21, 1983, wherein petitioner's duties and relationship with American is explained. However, such letter describes petitioner's current relationship with American as a "Vice President" of one of American's subsidiaries, not the relationship in existence during the years at issue herein.

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. Furthermore, "[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).

B. That petitioner has failed to sustain her burden of proof, required pursuant to section 689(e), as incorporated into section 722(a) of the Tax Law to show that sufficient direction and control was exercised by American over her day-to-day activities so as to constitute a relationship of employer-employee. Accordingly, the services rendered by petitioner did not constitute services rendered as an employee of American within the meaning and intent of section 703(b) of the Tax Law.

C. That petitioner's booking agent 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.

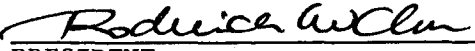
D. That the name of George Leaf is to be removed from the Notice of Deficiency.


E. That the petition of Ethel Leaf is denied and the Notice of Deficiency dated September 10, 1981 is hereby sustained together with such additional penalty and interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER