

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 of :
 Edgar J. Miller :
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 1975 & 1976. :
_____ :

AFFIDAVIT OF MAILING

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 25th day of May, 1984, he served the within notice of Decision by certified mail upon Edgar J. Miller, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edgar J. Miller
708 W. Lake Dr.
Canandaigua, NY 14424

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
25th day of May, 1984.

David Parchuck

James A. Hayes
Authorized to administer oaths
pursuant to Tax Law section 174

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

May 25, 1984

Edgar J. Miller
708 W. Lake Dr.
Canandaigua, NY 14424

Dear Mr. Miller:

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
John R. Kennedy
Harkness & Kennedy
20 Gorham St.
Canandaigua, NY 14424
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EDGAR J. MILLER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1975	:	
and 1976.	:	

Petitioner, Edgar J. Miller, 708 West Lake Drive, Canandaigua, New York 14424, 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 and 1976 (File No. 33397).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, 1 Marine Midland Plaza, Room 1300, Rochester, New York, on Tuesday, November 1, 1983 at 1:15 P.M. Petitioner appeared by Harkness & Kennedy (John R. Kennedy, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the income generated from petitioner's activities as an agent for the Mutual of Omaha Insurance Company was done so in the capacity of an independent contractor subject to unincorporated business tax or that of an employee exempt from said tax.

FINDINGS OF FACT

1. Petitioner herein, Edgar J. Miller, timely filed New York State resident income tax returns for the years 1975 and 1976. On said returns

petitioner reported business income of \$40,601.65 for 1975 and \$43,276.43 for 1976.

2. On March 5, 1981, the Audit Division issued a Notice of Deficiency to petitioner for the years 1975 and 1976, asserting that \$575.64 of personal income tax and \$3,711.29 of unincorporated business tax was due, for a total of \$4,286.93. Petitioner does not contest the \$575.64 of personal income tax asserted due in the Notice of Deficiency and, therefore, same will not be addressed hereinafter. The unincorporated business tax was assessed based on the Audit Division's assertion that the income generated from petitioner's activities as a "...life insurance broker..." was subject to unincorporated business tax.

3. During the years at issue petitioner was a career agent for the Mutual of Omaha Insurance Company (hereinafter "Mutual"). As a soliciting agent for Mutual, petitioner was primarily responsible for the sale of health and accident insurance, life insurance and mutual funds to individual clients. Pursuant to a career contract dated July 27, 1962, petitioner was limited to the sale of only those products carried by Mutual or its partially or wholly owned subsidiaries. Mr. Miller was compensated by Mutual solely on a commission basis.

4. Petitioner was required to submit to his general agent weekly field progress reports detailing the number of potential clients he contacted during the week, the number of clients actually visited and to whom sales presentations were made and the number of policies sold. In the solicitation of sales petitioner was required to use Mutual's prepared sales presentation. Petitioner was also required to attend weekly sales meetings with his general agent and the general agent also contacted petitioner every day via telephone to check on

the results of petitioner's activities the previous day and to find out what petitioner had planned for the current day.

5. During the years at issue petitioner was included in the general agent's group health, disability and life insurance plans. Said plans were funded approximately two-thirds by the general agent and one-third by petitioner. Petitioner also participated in a deferred compensation plan maintained and funded by Mutual.

6. Both Mutual and petitioner's general agent established minimum sales quotas which petitioner was required to meet. If said quotas were not met, petitioner would first be required to contribute more extensively to the group health, disability and life insurance plans maintained by the general agent and, second, his renewal commissions and the amount of his deferred compensation would be reduced or forfeited altogether.

7. Pursuant to the career contract with Mutual, petitioner's sales territory was limited to an eight county area located in central New York State. The general agent provided petitioner with office space, telephone service and secretarial help on its premises, without charge. However, because the general agent's premises were located on the extreme fringe of petitioner's sales territory (and petitioner lived more centrally in said territory) petitioner worked out of his home and received a monthly stipend of \$150 from the general agent to offset business expenses and overhead. Petitioner also occasionally employed his wife and daughter on a part-time basis to perform clerical tasks. Petitioner hired no sales assistants.

8. Petitioner reported the net profit generated from his sales activities for Mutual on Federal Schedule C, Profit or (Loss) From Business or Profession. In computing net profit, petitioner, for the year 1975, claimed total business

deductions of \$10,818.57 and, for the year 1976, claimed total business deductions of \$9,393.95.

9. Mutual did not deduct any Federal, New York State or Social Security taxes from the compensation paid to petitioner. For each of the years at issue petitioner claimed a deduction for contributions made to a self employed retirement plan.

10. The career contract which petitioner executed with Mutual provided that no provision of said contract was to be construed to create an employee/ employer relationship and that petitioner was free to use his own judgment as to the persons he wished to solicit and the time, place, manner and amount of such solicitation. An addendum to the career contract, also dated July 27, 1962, provided that petitioner was required to pay to his general agent fixed amounts for the furnishing by the general agent of such things as sales material, office or desk space, telephone services, stationery and visual sales aids. The addendum further provided that petitioner was not required to attend sales meetings or training schools nor was he required to learn or sell from a sales track.

The aforementioned provisions contained in the career contract and the addendum were contradicted by the provisions contained in a training agreement. Said training agreement, also dated July 27, 1962, was a supplement to and made part of the career contract. The training agreement provided that petitioner was required to attend pre-schooling sessions, the national sales training school, learn and use without deviation the prescribed sales technique, complete weekly field progress reports and meet minimum quotas with respect to the number of clients contacted each week and the number of complete sales presentations made each week.

CONCLUSIONS OF LAW

A. That the provisions contained in the career contract and the addendum, as outlined in the first paragraph of Finding of Fact "10", supra, are not representative of petitioner's true working relationship with Mutual. That the record herein supports that petitioner was required to use a prescribed sales technique, make detailed weekly reports to his general agent, was limited to the sale of only those types of insurance carried by Mutual, attend weekly sales meetings with his general agent, had to meet minimum sales quotas and participated in both insurance plans (provided by the general agent) and a deferred compensation plan (provided by Mutual).

B. That Mutual exercised sufficient direction and control over petitioner's activities as to consider him an employee exempt from unincorporated business tax within the meaning and intent of section 703(b) of the Tax Law and 20 NYCRR 203.10.

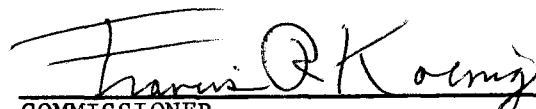
C. That the petition of Edgar J. Miller is granted and that the Audit Division is directed to modify the Notice of Deficiency dated March 5, 1981 by deleting therefrom the unincorporated business tax of \$3,711.29 plus any interest charges applicable to said unincorporated business tax.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 25 1984


PRESIDENT


COMMISSIONER


COMMISSIONER