

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Sidney Gothelf :

: 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 1977 - 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 3rd day of October, 1985, he served the within notice of Decision by certified mail upon Sidney Gothelf, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney Gothelf
1341 East 22nd St.
Brooklyn, NY 11210

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
3rd day of October, 1985.

David Parchuck

Ann M. O'Hagerty
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 State Tax Commission, that he is over 18 years of age, and that on the 3rd day of October, 1985, he 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
Lifset & Lifset
112 State St., Suite 1300
Albany, NY 12207

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
3rd day of October, 1985.

David Parchuck

Conrad A. Haglund

Authorized to administer oaths
pursuant to Tax Law section 174

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

October 3, 1985

Sidney Gothelf
1341 East 22nd St.
Brooklyn, NY 11210

Dear Mr. Gothelf:

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
Harvey M. Lifset
Lifset & 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	:	
	:	
SIDNEY GOTHELF	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1977	:	
through 1979.	:	

Petitioner, Sidney Gothelf, 1341 East 22nd Street, Brooklyn, New York 11210, 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 1977 through 1979 (File No. 35489).

A formal hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on April 24, 1985 at 9:15 A.M. Petitioner appeared by Lifset and Lifset, Esqs. (Harvey M. Lifset, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner's activities as an insurance agent for New England Mutual Life Insurance Company for the years 1977 through 1979 constituted the carrying on of an unincorporated business thereby subjecting the commissions received by petitioner to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Sidney Gothelf, filed New York State income tax resident returns for each of the years 1977 through 1979 identifying his occupation thereon as "Insurance Sales". These returns were filed jointly with his wife,

Edith Gothelf, who is not a party to this proceeding. For the year 1977, petitioner filed a New York State Unincorporated Business Tax Return. Petitioner did not file New York State unincorporated business tax returns for the years 1978 and 1979.

2. On April 3, 1981, the Audit Division issued to petitioner a Statement of Audit Changes finding additional personal income tax due for 1977 in the amount of \$105.94 and unincorporated business tax due for the years 1977, 1978 and 1979 totalling \$6,797.37, for a total tax due of \$6,903.31 plus accrued interest. Accordingly, on September 25, 1981, the Audit Division issued a Notice of Deficiency to petitioner in the amount of \$6,903.31, plus interest of \$1,430.96, for a total amount due of \$8,334.27.

At a pre-hearing conference, petitioner conceded the personal income tax portion of the deficiency and the additional personal income tax due in the amount of \$105.94 was paid on November 17, 1983. Therefore, only the unincorporated business tax portion of the deficiency remains at issue.

3. The Statement of Audit Changes issued to petitioner on April 3, 1981, contained the following explanation as to the additional unincorporated business tax due:

"All of your net business income from Insurance Sales is subject to the Unincorporated Business Tax since you maintain an office and employ outside help."

Petitioner's unincorporated business tax for the years 1977 through 1979 was, therefore computed as follows:

<u>Unincorporated Business Tax</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
Corrected business income	\$51,005.00	\$46,102.00	\$70,822.00
Less: contributions	1,216.00	-0-	-0-
Balance	<u>\$51,005.00</u>	<u>\$46,102.00</u>	<u>\$70,822.00</u>
Less: allowance for services	5,000.00	5,000.00	5,000.00
Balance	<u>\$46,005.00</u>	<u>\$41,102.00</u>	<u>\$65,822.00</u>
Less: business exemptions	<u>5,000.00</u>	<u>5,000.00</u>	<u>5,000.00</u>

Taxable income	\$41,005.00	\$36,102.00	\$60,822.00
Unincorporated business tax on above	\$ 2,255.28	\$ 1,805.10	\$ 2,736.99
Unincorporated business tax previously stated	-0-	-0-	-0-
Additional Unincorporated Business Tax Due	\$ 2,555.28	\$ 1,805.10	\$ 2,736.99

Subsequent to the issuance of the Statement of Audit Changes, the Audit Division determined that a mathematical error existed in the computation of the unincorporated business tax for the year 1977 due to the failure to credit petitioner the amount of \$1,216.00 for contributions. Petitioner's unincorporated business tax for 1977 was, therefore, recomputed as follows:

<u>Unincorporated Business Tax</u>	<u>1977</u>
Corrected business income	\$51,005.00
Less: contributions	1,216.00
Balance	\$49,789.00
Less: allowance for services	5,000.00
Balance	\$44,789.00
Less: business exemptions	5,000.00
Taxable income	\$39,789.00
Unincorporated business tax on above	\$ 2,188.40
Unincorporated business tax previously stated	-0-
Additional Unincorporated Business Tax Due	\$ 2,188.40

As a result of the correction of the mathematical error in the computation of petitioner's 1977 unincorporated business tax liability, the amounts of unincorporated business tax remaining in issue are \$2,188.40 for the year 1977, \$1,805.10 for the year 1978 and \$2,736.99 for the year 1979, for a total tax due of \$6,730.49 plus accrued interest.

4. Petitioner concedes that the commission income which he received from insurance companies other than his principal company, New England Mutual Life Insurance Company (hereinafter "New England") is subject to unincorporated business tax. He contends, however, that the commission income from New England is exempt from unincorporated business tax. Pursuant to Federal forms 1099 (Statement for Recipients of Miscellaneous Income) issued to petitioner by

the various insurance agencies for whom petitioner sold insurance for the years at issue, petitioner's commission income from New England and from other sources for the years at issue was as follows:

		<u>New England</u>	<u>Other Insurance Agencies</u>
1977	--	\$37,032.88	\$33,188.31
1978	--	39,468.42	56,380.60
1979	--	83,262.02	81,802.58

5. During the years at issue, petitioner was a career agent for New England. On April 1, 1977, petitioner entered into an Incentive Career Contract with New England's General Agent, Paul Kronish. Petitioner operated under a similar contract for the period in issue prior to April 1, 1977. Section 1(d) of the contract provisions states, "Nothing in this Contract shall be construed to create the relationship of employer and employee." Although petitioner sold life insurance and disability income insurance for other insurance companies, he has conceded that the commissions received from these other companies is subject to unincorporated business tax. Therefore, only petitioner's commissions derived from his activities on behalf of New England remain at issue herein.

6. Petitioner was provided with office space at the place of business of the general agent at 666 Fifth Avenue, New York, New York. The general agent also provided petitioner with secretarial help, office supplies, illustrations and telephone service. Petitioner's commissions on first-year policies were applied against the cost of office space, supplies and services provided to petitioner. If petitioner's sales of new policies were too low, he was required to pay the difference to the general agent. If his sales exceeded the formula established by the general agent, he was paid the difference as commissions by the general agent. Secretarial help in excess of \$95.00 per week and telephone service in excess of \$40.00 per week were not provided by the general agent.

7. Petitioner and three other agents with whom petitioner shared office space spent their own funds for office refurbishing, additional secretarial services and special illustrations.

8. New England paid petitioner on a commission basis. Social security taxes were deducted from petitioner's commissions, but neither Federal nor New York State income taxes were withheld. Petitioner was provided with group life insurance and medical insurance and was included in New England's pension plan. Petitioner received no paid vacations from New England.

9. Petitioner was required to offer to place all life insurance contract applications with New England first. If New England declined to accept an application, petitioner could place it with any other insurance company.

10. The general agent's primary control over petitioner's activities was limited to requiring that petitioner meet certain minimum production standards in terms of insurance sales quotas for New England. Petitioner has always exceeded these quotas. Day-to-day control over petitioner's work hours, sales methods or locations for soliciting business were not imposed, in view of petitioner's years of experience and success as an insurance agent.

11. Petitioner filed as part of his tax returns for the years at issue a Schedule C, Profit or (Loss) from Business or Profession whereon he claimed as deductions against income certain unreimbursed expenses incurred in connection with selling life insurance for New England.

12. Petitioner, in light of his success and experience as an insurance agent, conducted training programs for other agents and, in return therefor, received fifty percent of these agents' commissions.

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." Liberman v. Gallman (1977), 41 N.Y.2d 774, 396 N.Y.S.2d 159.

B. That regulations promulgated by the State Tax Commission during the period at issue herein provide:

"[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).

C. That a June 9, 1959 ruling by the State Tax Commission, reported originally at 20 NYCRR 281.3, stating the factors to be considered in determining whether or not an insurance agent is subject to unincorporated business tax provides:

"A full-time insurance soliciting agent whose principal activity is the solicitation of insurance for one life insurance company and who is forbidden by contract or practice from placing insurance with any other company without the consent of his principal company; who uses office space provided by the company or its general agent, is furnished stenographic assistance and telephone facilities without cost, is subject to general and particular supervision by his company over sales, is subject to company established production standards, will generally not be subject to the unincorporated business tax on commissions received from his prime company... In every case all the relevant facts and circumstances will be considered before a decision is made whether or not the agent is subject to the unincorporated business tax." (emphasis added).

D. That in view of all of the relevant facts and circumstances herein, petitioner was not subject to sufficient direction and control to be considered

1 The essence of this ruling is encompassed by the definition of "employee" as provided in current regulations of the State Tax Commission found at 20 NYCRR 203.10(b) which became effective February 1, 1974.


an employee of New England, but rather was an independent contractor. Therefore, petitioner's activities for New England during the years 1977 through 1979 constituted the carrying on of an unincorporated business in accordance with the meaning and intent of section 703(a) of the Tax Law. Petitioner's income received from New England during the years at issue was thus subject to the imposition of the unincorporated business tax.

E. That the petition of Sidney Gothelf is granted to the extent indicated in Findings of Fact "2" and "3", supra; that the Audit Division is directed to modify the Notice of Deficiency issued September 25, 1981 accordingly; and that, except as so granted, the petition is in all other respects denied.

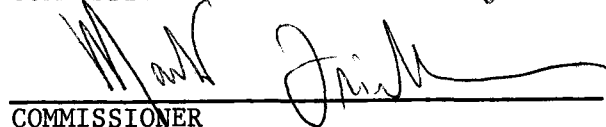
DATED: Albany, New York

STATE TAX COMMISSION

OCT 03 1985


PRESIDENT


COMMISSIONER


COMMISSIONER