

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Daniel Luxenberg :  
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 1976 - 1978. :  
\_\_\_\_\_

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of February, 1986, he/she served the within notice of Decision by certified mail upon Daniel Luxenberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Daniel Luxenberg  
c/o Sherman, Feigen & Slivka  
292 Madison Ave.  
New York, NY 10017

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 February, 1986.

Doris E. Steinhardt

Jan Carl  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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Business Tax under Article 23 of the Tax Law for :  
the Years 1976 - 1978. :  
\_\_\_\_\_ :

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of February, 1986, he served the within notice of Decision by certified mail upon William Slivka, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Slivka  
Sherman, Feigen & Slivka  
292 Madison Ave.  
New York, NY 10017

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 February, 1986.

Doris E. Steinhardt

Jean Coughlin  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

February 18, 1986

Daniel Luxenberg  
c/o Sherman, Feigen & Slivka  
292 Madison Ave.  
New York, NY 10017

Dear Mr. Luxenberg:

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  
William Slivka  
Sherman, Feigen & Slivka  
292 Madison Ave.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
DANIEL G. LUXENBERG	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1976,	:	
1977 and 1978.	:	

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Petitioner, Daniel G. Luxenberg, c/o Sherman, Feigen & Slivka, 292 Madison Avenue, New York, New York 10017, 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 1976, 1977 and 1978 (File No. 36155).

A 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 June 13, 1985 at 11:00 A.M., with all briefs to be submitted by August 29, 1985. Petitioner appeared by William Slivka, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether petitioner's activities as an insurance agent for New York Life Insurance Company for the years 1976 through 1978 constituted the carrying on of an unincorporated business thereby rendering his commissions derived therefrom, as well as his commissions derived from other insurance companies, subject to unincorporated business tax.

FINDINGS OF FACT

1. Daniel G. Luxenberg (hereinafter "petitioner") filed joint New York State income tax resident returns with his wife, Mary Luxenberg, for the years

1976, 1977 and 1978 whereon he reported business income derived from the sale of insurance of \$44,253.75, \$50,640.32 and \$77,225.72, respectively. Petitioner did not file an unincorporated business tax return for any of said years at issue. Annexed to each return was a Federal Schedule C, Profit or (Loss) From Business or Profession, whereon petitioner reported his business name as "Daniel G. Luxenberg" and his main business activity as "insurance sales".

2. On August 18, 1981, the Audit Division issued a Statement of Unincorporated Business Tax Audit Changes to petitioner wherein his reported business income was held subject to unincorporated business tax for each year at issue on the basis that he was "an independent insurance salesman". Additionally, adjustments were made for each year at issue increasing petitioner's reported business income by the amount required to conform to the total amount reported each year pursuant to the Federal forms 1099 which were issued to him by the various insurance companies. A further adjustment was made for 1976 based on unreported Federal audit changes for said year. Accordingly, a Notice of Deficiency was issued against petitioner and his wife<sup>1</sup> asserting unincorporated business tax for the years 1976, 1977 and 1978 of \$8,854.30, penalties of \$3,695.03 and interest of \$2,762.82, for a total due of \$15,312.15. Said penalties were asserted for failure to file unincorporated business tax returns for the years at issue and failure to pay the taxes determined to be due, pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law, respectively, as incorporated into Article 23 by section 722(a).

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1 Petitioner's wife, Mary Luxenberg, was not involved with petitioner's activities as an insurance salesman. Accordingly, the Notice of Deficiency was erroneous with respect to the inclusion of her name.

3. At a pre-hearing conference held August 16, 1982, the original adjustments were reduced. Accordingly, the tax deficiency was reduced for each year at issue to the amounts as follows:

<u>Year</u>	<u>Unincorporated Business Tax Deficiency</u>
1976	\$2,302.12
1977	2,235.22
1978	3,361.29
Total	<u>\$7,898.63</u>

4. Petitioner argued that he was an employee of New York Life Insurance Company ("NYLIC") during the years at issue and, as such, his income derived therefrom is exempt from the imposition of unincorporated business tax.

5. Petitioner commenced his relationship with NYLIC in January, 1961, at which time he entered into a "Field Underwriter's Contract" which stated, in pertinent part, that:

"NEW YORK LIFE INSURANCE COMPANY (hereinafter called the Company) hereby authorizes the Field Underwriter, named above, to solicit applications for individual life insurance policies, individual annuity policies, pension trust policies, individual accident and sickness insurance policies, group insurance policies, Employee Protection Plans, franchise insurance plans and group annuity policies, all on such plans as are issued by the Company at the time such applications are procured."

6. Provision "5" of said contract stated that:

"Neither the term 'Field Underwriter' (used herein solely for convenience in designating one of the parties) nor anything contained herein or in any of the rules or regulations of the Company shall be construed as creating the relationship of employer and employee between the Company and the Field Underwriter. Subject to the provisions hereof and within the scope of the authority hereby granted, the Field Underwriter, as an independent contractor, shall be free to exercise his own discretion and judgment with respect to the persons from whom he will solicit applications and with respect to the time, place, method and manner of solicitation and of performance hereunder. But the Field Underwriter agrees that he will not conduct himself in such a manner as to affect adversely the good standing or reputation of the Company."

7. The aforestated contract was in effect during the years at issue herein.

8. During the years 1976, 1977 and 1978, petitioner was issued Federal forms 1099 which reported his receipt of commission income from eleven (11), eleven (11) and nine (9) insurance companies, respectively. According to the Federal forms 1099, petitioner's commission income from NYLIC constituted 91.7 percent of his total commission income for 1976. For 1977 his NYLIC commissions constituted 77.7 percent of his total commission income and for 1978 his NYLIC commissions constituted 93.1 percent of his total commission income.

9. During the years 1976, 1977 and 1978, petitioner claimed total deductions on his Federal schedules C of \$24,546.51, \$30,184.08 and \$32,906.06, respectively. Such deductions included, inter alia, the following:

<u>Deduction</u>	<u>1976</u>	<u>Amount</u> <u>1977</u>	<u>1978</u>
Automobile expenses	\$3,528.00	\$4,378.95	\$4,755.63
Telephone	\$ 663.87	\$ 955.46	-0-
Stationery, Supplies, Postage	\$1,360.64	\$ 638.39	\$2,509.82
Secretarial Services	\$ 684.00	\$1,380.00	\$2,586.27
Meetings & Seminars	\$2,069.94	\$3,344.44	\$3,685.00
Advertising & Promotional Material	\$2,698.90	\$1,758.50	\$2,654.22

10. Petitioner received an expense reimbursement allowance which was based on production. During the years at issue, such reimbursement allowances represented between approximately ten (10) and twenty (20) percent of petitioner's expenses as reported on his Federal schedules C.

11. On September 8, 1980, the Audit Division sent petitioner an inquiry letter with respect to his insurance sales activities. In response to the specific questions therein, petitioner submitted a letter dated October 22, 1980 from one Edward A. Dunleavy, Manager of NYLIC's Benefit's Division, wherein it was stated, inter alia, that:

"You work out of the New York Life, White Plains Office, 709 Westchester Avenue, White Plains, New York 10609. The rent for such office space is paid for by New York Life Insurance Company.

Office space, secretarial help and telephone service were supplied by the New York Life Insurance Company.

The amount of expense incurred by you and reimbursed by New York Life for 1976 - 1978 are shown below:

1976	-	\$3,168.70
1977	-	\$6,391.63
1978	-	\$3,622.22

The Name of the Company - New York Life appears on the front door and on any telephone listing or ads. The lease is in the name of New York Life and New York Life owns the furniture.

Social Security Tax is the only amount withheld inasmuch as you are an independent contractor full-time Life Insurance Salesman. The Company does not pay unemployment insurance on your behalf.

You are a participant in the Group Life and Health Benefit Plan provided by New York Life for its agents.

Although you are an independent contractor and not contractually required to report to any particular supervisor, you do so on a cooperative basis with your General Manager.

Although attendance at sales meetings is not mandatory, you attend sales meetings whenever necessary.

As a full-time independent contractor agent, you solicit your own business at time and places and according to methods of your own choosing. The manner in which you select your own business is based upon your own choosing, subject, however, to company guidelines as related to proper business conduct and ethics.

In accordance with the terms of the contract under which you operate as a full-time agent of the Company and the Nylic Plan of Compensation it is necessary for you to procure at least \$50,000 of new business which counts for Nylic qualification.

If, in your professional judgement as an agent, the best interests of insurance applicants can be served only by submitting an application to another insurer in certain instances, you may do so. The instances thereof, however, cannot be excessive.

It is not necessary for you to secure prior approval from New York Life for vacations and you are not required by the Company to work during stated days and hours."



12. The aforesated production quota of \$50,000.00 was easily attainable by any competent agent.

13. A NYLIC "Agent Communication", dated December 29, 1981, from the Executive Vice President to "all agents", stated, in pertinent part, that:

"The NYLIC Contract has provided an attractive career path for thousands of independent businessmen and businesswomen for nearly a century. A major factor in the development of successful agents has been the NYLIC requirement of full time service to New York Life. From time to time the Company has amended the contract or clarified the meaning of full time service.

For example, until December 1976 agents were required to obtain the Company's written consent before placing business with another company. We decided to amend the rules at that time so that agents could place insurance elsewhere if, in their professional judgement, this was the only way to serve the best interests of their clientele."

14. During the years at issue, petitioner was a member of the "Nylic" system of benefits for soliciting agents. In the introductory statement of a booklet entitled "Nylic No. 5", it is stated that:

"'Nylic' as used herein is not an abbreviated name for the corporation and does not refer to the Company, but instead is simply a name for the plan or system described herein under which an eligible soliciting agent of the Company may become a member of a body of persistent and successful agents and receive the benefits of such membership.

The soliciting agents of New York Life Insurance Company who are eligible to qualify for membership in Nylic are in business for themselves. They are their own masters. Within the authority granted by his agency contract and subject to the provisions thereof, the soliciting agent is free to operate without direction and control by the Company as to persons from whom he will solicit applications and as to the time, place, method and manner of solicitation and of performance under his agency contract. To succeed, such a soliciting agent must have or acquire the executive ability necessary to direct and control effectively the performance of his work."

15. Petitioner did not personally appear for the hearing.

#### 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 independent

contractor subject to the unincorporated business tax." Lieberman 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<sub>2</sub> is subject to the unincorporated business tax." (emphasis added).<sup>2</sup>

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 an employee of NYLIC, but rather was an independent contractor. Therefore, petitioner's activities for NYLIC, as well as those for the various other insurance companies during the years 1976 through 1978, constituted the carrying

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2 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.

on of an unincorporated business in accordance with the meaning and intent of section 703(a) of the Tax Law. Accordingly, petitioner's income derived from the sale of insurance during the years at issue was thus subject to the imposition of the unincorporated business tax.


E. That the Notice of Deficiency issued November 25, 1981 is cancelled insofar as it applies to Mary Luxenberg (see Finding of Fact "2", supra).


F. That the petition of Daniel G. Luxenberg is denied and the Notice of Deficiency issued November 25, 1981 is to be modified so as to assert the reduced tax deficiency determined as the result of the pre-hearing conference held August 16, 1982 (see Finding of Fact "3", supra), together with such additional penalties and interest as may be lawfully owing.

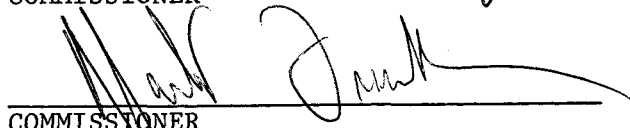
DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER