

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER TAX
DECISION NO. 2327 AS A PRECEDENT
DECISION PURSUANT TO SECTION
409 OF THE UNEMPLOYMENT
INSURANCE CODE.

In the Matter of:

HERBERT OWEN AND JOSEPH SILVERSTEIN, DBA
JAY HERBERT OF CALIFORNIA
(Petitioner-Appellant)

PRECEDENT
TAX DECISION
No. P-T-346

DEPARTMENT OF EMPLOYMENT (Respondent)

STATEMENT OF FACTS

The petitioner-appellant appealed from Referee's Decision No. LA-T-1146 which denied a petition for review of a denial of a claim for refund under section 1180 of the Unemployment Insurance Code.

The petitioner originally petitioned for reassessment of an assessment levied by the Department of Employment under section 1127 of the Unemployment Insurance Code in the amount of \$756.89 contributions, together with interest as provided by law. The assessment covered the period from May 1, 1956 through December 31, 1958 and represented contributions due on unreported remuneration of salesmen. Subsequent to the filing of the petition for reassessment, the petitioner paid the assessment in full. The parties have stipulated that the matter be considered as a petition for review of a denial of a claim for refund pursuant to the provisions of section 1180 of the code.

The petitioner was engaged in the manufacture and sale of ladies' dresses. Two salesmen were utilized in the State of California. One operated in the northern part of the State and the other in the southern part of the State. The salesmen were given exclusive "territorial rights" to commissions on all sales within their territories, whether made personally or by correspondence with the petitioner. While there was no specific requirement as to the amount of time the salesmen would devote to their business, the northern salesman, who carried two other noncompetitive lines, derived 50 percent of his income from sales of the petitioner's product. The Southern California salesman derived all of his income from sales of the petitioner's product. Although the salesmen were not restricted to carrying lines noncompetitive with the petitioner's product, in practice they did not carry any competitive lines. The salesmen were provided with regular drawing accounts against future commissions. The sales prices and terms and conditions of sales were established by the petitioner and all sales were subject to the petitioner's approval. The petitioner furnished the salesmen with business cards upon which they could imprint their own names at their own expense, sales books and samples. All sales were completed in the petitioner's name. The duration of the relationship was of an indefinite and continuing nature and could be terminated at will by either party without liability to the other.

The northern representative maintained his own business establishment where he displayed the merchandise of the petitioner as well as the two other noncompetitive lines. The Southern California salesman maintained an office and showroom in his home. Each of the salesmen belonged to salesmen's organizations which promoted sales shows several times each year. All expenses in displaying and selling the petitioner's merchandise at these shows were borne by the salesmen. The salesmen were free to use the petitioner's showroom to display and sell the petitioner's merchandise to prospective customers. The Southern California salesman occasionally used this showroom. Although office space and facilities were not customarily furnished to the salesmen, they could use the petitioner's office facilities when necessary to make a sale.

REASONS FOR DECISION

The issue presented to us in the present case is whether the salesmen utilized by the petitioner were employees or independent contractors. By way of general observation in resolving the issue involved, it may be stated that the relationship of employer-employee is a mixed one of fact and law and is not susceptible of establishment by any hard and fast rule of measurement.

The leading California case setting forth criteria for determining whether an employment relationship exists is Empire Star Mines Co., Ltd. V. California Employment Commission (1946), 28 Cal. 2d 33, 168 P. 2d 686. The Supreme Court said therein:

"In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. (Citations omitted) Other factors to be taken into consideration are:

(a) Whether or not the one performing services is engaged in a distinct occupation or business;

(b) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;

(c) The skill required in the particular occupation;

(d) Whether the principal or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;

(e) The length of time for which the services are to be performed;

(f) The method of payment, whether by the time or by the job;

(g) Whether or not the work is a part of the regular business of the principal;

(h) Whether or not the parties believe they are creating the relationship of employer-employee. (Rest., Agency, 220; Cal. Ann. § 220)."

Section 220 of the American Law Institute's Restatement of Agency 2d, in which the above enumerated factors are included, also provides:

"It is important to distinguish between a servant and an agent who is not a servant, . . . One who is employed to make contracts may, however, be a servant. Thus, a shopgirl is, and a traveling salesman may be, a servant. . . . The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants. They may be agents, agreeing to use care and skill to accomplish a result and subject to the fiduciary duties of loyalty and obedience to the wishes of the principal; or they may be persons employed to accomplish or to use care to accomplish physical results, without fiduciary obligations, as where a contractor is paid to build a house. An agent who is not subject to control as to the manner in which he performs the acts that constitute the execution of his agency is in a similar relation to the principal as to such conduct as one who agrees only to accomplish mere physical results."

In the absence of any express terms affirming or negating a power of control and direction, its existence must be determined from the reasonable inferences to be drawn from all the circumstances surrounding and attending the making and execution of the contract and the duties ordinarily to be performed thereunder (Press Publishing Co. v. Industrial Accident Commission, 190 Cal. 114, 210 P. 820). Complete abnegation of control is not essential to the establishment of a status of independent contractor. Where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control which looks to the results to be obtained without creating the relationship of employer-employee (Bates v. Industrial Accident Commission (1958) 156 Cal. App. 2d 713, 320 P. 2d 167; Tax Decisions Nos. 87, 115, 148, 260, 658, 1176, 1858, 1972 and 2167).

We have previously considered numerous situations involving salesmen and sales representatives (wholesale) who were paid on a commission basis. In most instances, there were indicia present to indicate that certain activities were loosely controlled. We held that a considerable freedom of activity is inherent in the nature of the work and, therefore, this condition was not controlling. The right to terminate the relationship at will was present in practically all situations. Depending upon other factors present, this right was given considerable weight in some situations and scarcely considered in others. In analyzing our prior decisions, it appears that where the salesmen received training, were assigned quotas, were required to follow leads, to furnish reports, to attend sales meetings, were given expense allowances or a guaranteed salary, or they performed services of a continuous nature, as a direct and essential part of the petitioner's business operation, we concluded that the salesmen were employees (Tax Decisions Nos. 127, 174, 230, 634, 1005, 1326, 1573, 2054, and 2219). Where the salesmen paid their own expenses, established their own hours of work and itineraries of travel, were not required to attend sales meetings or make reports, and the only direction from the principal consisted of establishing selling prices, terms and conditions of the sale, approval of credit, and furnishing samples, literature or order blanks, we held that the salesmen were independent contractors (Tax Decisions Nos. 80, 190, 231, 1005, 1138, 1203, 1421 and 1626).

In the matter before us, the salesmen maintained their own offices and showrooms and paid their own expenses. They belong to salesmen's organizations which promoted sales shows several times a year. All expenses in displaying and selling the petitioner's merchandise at these shows were borne by the salesmen. Although the Southern California salesman occasionally used the petitioner's showroom and the petitioner's office facilities were available, these factors do not in themselves indicate the existence of a right of control (Tax Decision No. 948).

Under all the circumstances of this case we conclude that each salesman involved herein was an agent appointed to use care and skill to accomplish a result, and subject as an agent to the fiduciary duties of loyalty and obedience to the wishes of his principal; but that he was not subject to control as to the manner in which he performed the acts that constituted the execution of his agency. We conclude that the control exercised by the petitioner related fundamentally to the result for which the agency was created; namely, the promotion of the sale of petitioner's merchandise, and not to the manner and means of accomplishing that result. Accordingly, we conclude that the salesmen involved herein were not employees of the petitioner.

DECISION

The decision of the referee is reversed. The claim for refund is granted.

Sacramento, California, January 15, 1960.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ERNEST B. WEBB, Chairman

ARNOLD L. MORSE

WM. A. NEWSOM

Pursuant to section 409 of the Unemployment Insurance Code, the above Tax Decision No. 2327 is hereby designated as Precedent Decision No. P-T-346.

Sacramento, California, May 10, 1977.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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