BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

MISSION FURNITURE
MANUFACTURING COMPANY
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-329
Case No. T-74-22

DEPARTMENT OF BENEFIT PAYMENTS

Referee's Decision No. LA-T-6283

The Department appealed from that portion of the referee's decision which granted the petitioner's claim for refund with respect to Larry Freeborn and Ellsworth Molter. No appeal has been filed by the petitioner with respect to the portion of the referee's decision adverse to it. Both parties have presented oral argument in support of their positions on appeal, and at that hearing the Department withdrew its appeal with respect to Larry Freeborn, leaving the status of Ellsworth Molter as the only issue before the Board.

STATEMENT OF FACTS

During the period of assessment, which extended from January 1, 1972 through March 31, 1973, the petitioner was engaged in the business of manufacturing occasional tables for resale to retailers, contractors and operators of hotels and motels. It had engaged Molter upon a full-time basis as a traveling or city salesman for the solicitation of orders from such establishments, on a commission basis.

Molter had an office in his rented apartment for the performance of his services for the petitioner. He rented a two-bedroom apartment at $200 a month. One bedroom was used exclusively as his office. The office was used both for personal and business purposes. The office was used in preparing his income tax papers, writing letters and sending cards to his customers in connection with the representation of petitioner and for making phone calls to the customers. He usually wrote his orders at the customer's premises. He claims an income tax deduction for the use of the office. He has equipment consisting of a desk, file cabinets and typewriter which he estimates to be valued at $1,000 to $1,500.

REASONS FOR DECISION

Prior to 1972, the question as to whether Ellsworth Molter would have been an employee or independent contractor for unemployment insurance purposes would have been determined solely in accordance with the principles of the common law. Under these principles he clearly would have been the latter. As an independent contractor, the remuneration that he received would not have been subject to unemployment insurance taxes.

Effective with the commencement of the calendar year 1972, the California Legislature added section 621 to the Unemployment Insurance Code. This section now provides a statutory definition of the term "employee" for unemployment insurance purposes, for the first time. As pertinent to the status of Ellsworth Molter, the new section states that:

> " 'employee' means . . . :
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> * * *
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> "(b) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.
>
> "(c)(1) Any individual . . . who performs services for remuneration for any employing unit if the contract of service contemplates that substantially all of such services are to be performed personally by such individual . . . :
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> * * *
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> "(B) As a traveling or city salesman . . . engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors . . . for merchandise for resale or supplies for use in their business operations.
>
> "(2) An individual shall not be included in the term 'employee' under the provisions of this subdivision if such individual has a substantial investment in facilities used in connection with the performance of such services, other than in facilities for transportation, or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed."

It is to be noted that paragraph (b) above continues to include as an "employee" for unemployment insurance purposes any person who is an employee under the usual rules of common law. However, it then goes on in paragraph (c) to extend the meaning of the term "employee" for unemployment insurance purposes to certain additional persons who are admittedly independent contractors under common law principles. The question presented is whether Ellsworth Molter is properly includable in the group of salesmen to whom section 621(c) now extends unemployment insurance coverage.

It is quite clear that in enacting code section 621, the California Legislature had certain provisions of the Federal Internal Revenue Code particularly in mind. The year before Congress had enacted Public Law 91-373 which is known as the Employment Security Amendments of 1970. That law broadened the Federal Unemployment Tax Act (FUTA) definition of an "employee" (26 U.S. Code section 3306(i)) so as to extend federal unemployment tax coverage to exactly the same individuals to whom our Legislature extended coverage under code section 621.

In the case of the FUTA, Congress accomplished this extension of coverage by incorporating most of the Federal Insurance Contribution Act (FICA) definition of an "employee" (26 U.S. Code, 3121(d)). In the case of the Unemployment Insurance Code, the California Legislature copied the provisions of the FICA definition (with certain exceptions not relevant here) verbatim into section 621. In each case the purpose and the result were the same.

In 1969 the House of Representatives Committee on Ways and Means held hearings on proposed amendments to the FUTA. On October 2, Marvin Leffler, Chairman of the Board of the National Council of Salesmen's Organizations, Inc., appeared before the committee in support of the amendment extending the FICA definition in regard to salespersons to the FUTA. He suggested certain clarifications. (See 1969 House Ways and Means Committee Hearings on Federal Unemployment Compensation Statutes Amendments, pages 298 to 301.)

Congressional intent in enacting the FUTA definition is set forth in two committee reports, viz: House of Representatives Report No. 91-612, 91st Congress, First Session, issued on November 10, 1969 at pages 2, 8 to 10, and 39 to 40; and Senate Report No. 91-752, 91st Congress, Second Session, issued March 26, 1970, at pages 3, 9 to 10, and 43 to 44.

Both reports make clear the intent of Congress to extend the same coverage to salesmen under the FUTA, that they had been receiving under the FICA for nearly twenty years. Thus, the legislative and administrative history of that coverage under the FICA is the foundation for a proper interpretation of FUTA section 3306(i) and of Unemployment Insurance Code section 621.

Subsection (b) of code section 621 is taken verbatim from section 3121(d)(2) of the Internal Revenue Code. That provision had its origin in the Status Quo Resolution, 62 Stat. 438, which Congress enacted in 1948. The Status Quo Resolution established the usual common law rules as the federal standard of status determination retroactively to February 10, 1939.

The portion of subsection (c) of code section 621 pertaining to traveling and city salespersons is taken verbatim from a like portion of section 3121(d)(3) of the Internal Revenue Code. This provision had its origin in section 205(a) of the Social Security Act Amendments of 1950, 64 Stat. 536. This provision was applicable only to the FICA until 1972, when its application was extended to the FUTA as well by the Employment Security Amendments of 1970, 84 Stat. 696.

On February 27, 1948, when the Status Quo Resolution was being debated in the House of Representatives, Congressman Price of Illinois called attention to the fact that "there are many different arrangements between salesmen and the organizations for which they sell." He pointed out that many salesmen who were regular employees would be covered by the resolution, and that there were other salesmen who were truly independent contractors who would not be. Then he said that ". . . In between there is every gradation of dependence and independence. . . . There is no single clear-cut test that determines which are sheep and which are goats." (Congressional Record, Volume 94, part 3, page 1906, columns 1 and 2)

Following the passage of the Status Quo Resolution, Congress proceeded to hold hearings in regard to its effect on certain occupations such as salespersons. The House Ways and Means Committee and the Senate Finance Committee both heard from interested witnesses. (See 1949 Ways and Means Committee Hearings on Social Security Act Amendments, pages 1643 to 1652, 2204 to 2208, and 2393 to 2405; and 1950 Senate Finance Committee Hearings on Social Security Revision, pages 6, 840 to 841, 1405, 1708 to 1722, and 1734) Differing versions affecting salesmen passed each house. The present provision of law was worked out in conference.

It is explained in detail with examples at pages 104 to 106 of the Conference Committee Report issued on August 1, 1970 as House Report No. 2771, 81st Congress, Second Session.

This reflection of Congressional intent became the foundation for the promulgation of Regulations 127 by the United States Treasury Department on December 11, 1951. The provisions of those regulations pertaining to salespersons first appeared in various portions of section 408.204(d) of Regulations 127, as published in 16 Federal Register, pages 12460 and 12461. Currently, these regulations are to be found in Title 26, Code of Federal Regulations, section 31.3121(d)-1(d).

The most detailed administrative interpretations of the FICA provisions pertaining to traveling and city salesmen are to be found in two Internal Revenue Rulings. They are Employment Tax Mimeograph Coll. No. 6583, 1951-3 Int. Rev. Bul. 5, 1951-1 Cum. Bul. 97, issued on December 28, 1950; and Revenue Ruling 55-31, 1955-3 Int. Rev. Bul. 72, 1955-1 Cum. Bul. 476, issued on December 28, 1950. Because of their importance, these two rulings are quoted and set forth in full as follows:

"TRAVELING OR CITY SALESMEN

[§ 9434] Status after 1950 of traveling or city salesmen for federal employment tax purposes.

EmT-Mimeograph Coll. No. 6583. December 28, 1950. [Reprinted from a prior report.]

Collectors of Internal Revenue and Others Concerned:

1. The purpose of this mimeograph is to outline the changes, relating to the status of traveling or city salesmen, effected in the Federal Insurance Contributions Act (Subchapter A, Chapter 9, Internal Revenue Code) by the Social Security Act Amendments of 1950.

2. Effective with respect to services performed after 1950, Section 1426(d) of the Federal Insurance Contributions Act is amended to read, in part, as follows:

'EMPLOYEE.--The term "employee" means--

* * *

'(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

'(3) any individual * * * who performs services for remuneration for any person--

* * *

'(D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;
if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed.'

3. To determine the status of a traveling or city salesman with respect to services performed after December 31, 1950, it will first be ascertained whether the individual, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. If such is found to be the case, the individual will be an employee for purposes of the taxes imposed by the Federal Insurance Contributions Act, for purposes of the tax imposed by the Federal Unemployment Tax Act, and also for purposes of collection of income tax at source on wages.

4. If, under the usual common law rules applicable in determining the employer-employee relationship, a traveling or city salesman is determined not to be an employee, then the statutory test provided in Section 1426(d)(3)(D) of the Federal Insurance Contributions Act (quoted above in paragraph 2) will be applicable in determining whether such salesman is an employee for purposes of that Act. In the event the salesman is found, by the application of such statutory test, to be an employee, then he will be so considered only for purposes of the Federal Insurance Contributions Act.

5. A traveling or city salesman found to be an employee by the application of the statutory test provided in Section 1426(d)(3)(D) will not be considered to have the status of an employee for purposes of the tax imposed by the Federal Unemployment Tax Act or for purposes of collection of income tax at source on wages inasmuch as such statutory test was not made applicable for the two latter purposes by the Social Security Act Amendments of 1950. Determinations relative to the status of traveling or city salesmen for purposes of the tax imposed by the Federal Unemployment Tax Act and for purposes of collection of income tax at source on wages will continue to be based on the application solely of the usual common law rules.

6. An individual who performs services after 1950 as a traveling or city salesman, other than as an agent-driver or commission-driver, and who is not an employee under the usual common law rules, will be considered an employee of his principal (for purposes of the Federal Insurance Contributions Act only) if all of the following conditions exist:

(a) if his services are performed on a full-time basis for his principal, except for side-line sales activities performed on behalf of some other person;

(b) if his services consist of soliciting orders on behalf of, and transmitting such orders to, his principal;

(c) if the customers solicited by him are wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments;

(d) if the orders solicited by him from such customers are for merchandise for resale or for supplies for use in the business operations of the customers;

(e) if the arrangement under which he agrees to perform such services contemplates that substantially all of the services are to be performed by him personally;

(f) if he has no substantial investment in facilities used in connection with the performance of the services, other than in facilities for transportation; and

(g) if his services are part of a continuing relationship with his principal and not in the nature of a single transaction.

7. The following examples, in each of which it has been established from facts not stated herein that the salesman is not an employee under the usual common law rules, illustrate the application of the foregoing tests:

Example 1. Salesman A's principal business activity is the solicitation of orders from retail pharmacies on a continuing full-time basis on behalf of the X wholesale drug company. A does, however, occasionally solicit orders for drugs on behalf of the Y and Z companies. A's contract of service with the X company contempates [sic] that substantially all of the services to which the arrangement relates are to be performed by him personally and he has no investment in facilities other than in an automobile. A meets all the conditions set forth in Tests (a) to (g), inclusive, and is, therefore, an employee of the X company for purposes of the Federal Insurance Contributions Act, as amended, with respect to services performed after 1950. A is not an employee of either the Y or Z company.

Example 2. Salesman B's principal business activity is the solicitation of orders from retail hardware stores on behalf of the R tool company and the S cooking utensil company. B regularly solicits orders on behalf of both companies. B does not meet Test (a) since he is not performing services on a full-time basis primarily for any one principal and, consequently, he is not an employee of either the R or S company for purposes of the Act, as amended.

Example 3. Salesman C's principal business activity is the house-to-house solicitation of orders on behalf of the T company. C occasionally solicits orders on behalf of the same company from retail stores and restaurants. C does not meet Test (c) since he is primarily engaged in soliciting orders

on a full-time basis from householders rather than from wholesalers, retailers, et al., and he is not, therefore, an employee of the T company for purposes of the Act, as amended.

8. The Social Security Act Amendments of 1950 amend Chapter 1 of the Internal Revenue Code by the addition of Subchapter E, Tax on Self-Employment Income, which imposes a tax on the self-employment income of every individual for each taxable year beginning after December 31, 1950. Thus, it may be stated generally if a traveling or city salesman is not an employee for purposes of the Federal Insurance Contributions Act, as amended, the provisions of Subchapter E, Chapter 1, of the Code (Tax on Self-Employment Income) will be considered to be applicable. Determinations whether tax liability is incurred in particular cases under Subchapter E, Chapter 1, of the Code should be made with due regard to the applicable income tax provisions of the Code since an individual's status as a self-employed individual is initially dependent upon whether he is engaged in a trade or business. Doubtful cases should be submitted to the Bureau for specific rulings.

9. The provisions of this mimeograph are not to be used in determining the status of full-time life insurance salesmen with respect to which Section 1426(d)(3)(B) of the Federal Insurance Contributions Act, as amended by the Social Security Act Amendments of 1950, is applicable. See EmT-Mimeograph Coll. No. 6571 [Fed. § 9432, ante].

10, Correspondence relating to this mimeograph should refer to the number thereof and the symbols EmT:RR."

"TRAVELING OR CITY SALESMEN

[§9635] Status of traveling or city salesmen for federal employment tax purposes.

Rev.Rul. 55-31, I. R. B. 1955-3, 72.

See Fed. § 5554.

1. Mimeograph 6583 [Fed. § 9434], C. B. 1951-1, 97, in part, outlines the general application of the provisions of the Federal Insurance Contributions Act (subchapter A, chapter 9, of the Internal Revenue Code of 1939) in the cases of traveling or city salesmen.

2. Paragraph 6 of Mimeograph 6583 sets forth the conditions under which a traveling or city salesman (other than an agent-driver or commission driver) who is not an employee under the usual common-law rules, is considered an employee under section 1426(d)(3)(D) of the Act, with respect to services performed after 1950.

3. The purpose of this Revenue Ruling is to supplement paragraph 6 of the Mimeograph by providing a definition or general interpretation of certain terms appearing therein, and by giving examples of factual situations for purposes of section 1426(d)(3)(D) of the Act:

(a) Full-time basis.--A traveling or city salesman whose entire or principal business activity is the solicitation of orders primarily for one principal from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. Generally, a traveling or city salesman will be presumed to meet the 'principal business activity' test in any calendar quarter in which he devotes 80 percent or more of his working time and attention to the solicitation of orders for one principal from wholesalers and/or the other customers specified for merchandise for resale or supplies of the requisite character.

(b) Wholesalers.--Those who buy merchandise or commodities in comparatively large quantities and sell such merchandise or commodities to jobbers, retailers, etc., as distinguished from the ultimate consumers, in smaller quantities for the purpose of resale. Wholesalers do not process the merchandise in any way that would cause it to lose its identity. It is the character of their selling, not their buying, which characterizes these as wholesalers.

(c) Retailers.--Those who sell merchandise or commodities to the ultimate consumers, usually in small parcels or quantities. For purposes of this definition, a merchant will not lose his classification as a retailer merely because he may perform a service function, or a processing or manufacturing operation, with respect to the merchandise or commodity which he sells. The distinguishing feature of a retailer is the fact that he sells to the ultimate consumers.

(d) Contractors.--Those who, for a fixed price, undertake the performance of work on an independent basis usually on a large scale, whether for the public, a company, or an individual, such as, construction contractors and certain service organizations. These include, among others, electrical, plumbing, painting, building, highway, window washing, wall cleaning and delivery service contractors.

(e) Operators of hotels, restaurants or other similar establishments.--The phrase 'other similar establishments' refers solely to establishments similar to hotels and restaurants and usually is limited to establishments whose primary function is the furnishing of food and/or lodging.

(f) Merchandise for resale.--Goods, wares, and commodities, which ordinarily are the objects of trade and commerce, whether at wholesale or retail, and which are purchased for the purpose of selling to others in substantially the same form as acquired. This term includes tangible materials which do not lose their identity between the time of purchase and the time of sale while in the hands of the vendor.

(g) Supplies for use in the customer's business operations.--Means principally articles consumed in conducting or promoting the customers' businesses. Generally the term 'supplies' includes all tangible items which are not 'merchandise for resale' or capital items. Services, such as radio time, advertising space, etc., are intangible items and not within the definition. However, calendars, advertising novelties, etc., used by the advertiser in his business constitute 'supplies.'

4. The following types of customers usually are not included in those designated in section 1426(d)(3)(D) of the Act: manufacturers, schools, hospitals, churches, and institutions, municipalities and State and Federal governments. However, an entity which is not included in the type of customers specifically designated may, through a unit of its organization, carry on a clearly identifiable and separate business which is in the included category. For example, where an entity, such as a college, university or other school, is engaged principally in activities not in connection with retail distribution of commodities, but through a unit of its organization, such as a bookstore, carries on a clearly identifiable and separate business, such separate unit, as such, is a 'retailer' within the meaning of section 1426(d)(3)(D), supra.

5. The following examples, in each of which it has been established that the salesman is not an 'employee' under the usual common law rules, illustrate the application of the above terms in determining the status of traveling or city salesmen under the statutory test provided in section 1426(d)(3)(D) of the Act. (In each such case the salesman solicits orders regularly and exclusively for one principal, transmits the orders to such principal, operates under an arrangement whereby substantially all of the services are performed by him personally, and has no substantial investment in facilities (other than transportation facilities) used in the performance of his services.)

Example 1. The salesman performs sales services for a company engaged in publishing catalogs and plans for home designs. He solicits orders for the catalogs exclusively from lumber dealers. The catalogs are purchased by the lumber dealers either for resale purposes or for free distribution to their customers. The lumber dealers are 'wholesalers' or 'retailers' within the meaning of those terms as used in section 1426(d)(3)(D) of the Act. The catalogs for resale constitute 'merchandise for resale' and those purchased for free distribution constitute 'supplies for use in the customers' business operations.' The salesman meets the statutory test provided in such section 1426(d)(3)(D) and is an employee of the company for purposes of the taxes imposed by the Act.

Example 2. The employer is a wholesale distributor of automotive parts and rubberseal compound to be inserted in automobile or truck tire tubes. The salesman spends all of his working time in soliciting orders for the distributor's products from retail automobile dealers, operators of gasoline service stations and repair shops, and automobile fleet owners. Some of the dealers have shops at which only ordinary repair work incident to the sale of automobiles is performed. The operators of the other repair shops are engaged primarily in repairing automobiles and tires and sell no automotive parts other than those installed by them and no rubberseal compound except that inserted in their customers' tire tubes.

The automotive parts and rubberseal compound constitute 'merchandise for resale' or 'supplies for use in the customers' business operations' within the meaning of section 1426(d)(3)(D) of the Act. The operators of gasoline service stations and the retail automobile dealers

(including dealers who in conjunction with their salesrooms operate repair shops at which only ordinary repair work incident to the sale of automobiles is performed) are 'retailers' within the meaning of such section. The operator of an automotive repair shop or garage who conducts a retail unit separate from his regular business, or separately identified, likewise is with respect to such unit a 'retailer.' However, generally the operator of a repair shop or garage who has no such unit is not a 'retailer' or other customer of the type specified in section 1426(d)(3)(D). The automobile or truck fleet owners who operate delivery service businesses and contract with merchants to deliver packages or the owners of trucks used in fulfilling hauling contracts are 'contractors' within the meaning of section 1426(d)(3)(D). However, the owner of a fleet of taxicabs or limousines used for transporting passengers or the owner of automobiles or trucks rented for driving by the renters thereof is not deemed to be a 'contractor.'

Inasmuch as the salesman solicits orders from some customers who are not retailers, contractors or others of the types specified in section 1426(d)(3)(D), it is clear that his 'entire business activity' is not the solicitation of orders from the requisite types of customers. Then it is necessary to determine whether his 'principal business activity' is the solicitation of orders for one principal from the requisite types of customers. The salesman estimates that he devotes 80 percent of his working time to soliciting orders for the distributor from the requisite types of customers in each calendar quarter and that these activities are the principal source of his income. It is concluded that the salesman meets the statutory test provided in section 1426(d)(3)(D), supra, and is an employee of the distributor for purposes of the taxes imposed by the Act.

Example 3. The salesman performs sales services for a company which is engaged in the sale of new and used trucks and trailers. He solicits orders exclusively from trucking firms who purchase the vehicles for use in fulfilling hauling contracts. Although the trucking firms are 'contractors' within the meaning of section 1426(d)(3)(D) of the Act, the trucks and trailers purchased by them are capital investments of the customers and are not 'merchandise for resale' or 'supplies for use in the customers' business operations.' Accordingly, the salesman does not meet all the requirements of the statutory test contemplated by section 1426 (d)(3)(D), supra, and is not an employee of the company for purposes of the Act.

Example 4. The salesman solicits orders on behalf of a company which is engaged in the manufacture of novelty jewelry. The orders for such jewelry are solicited from college bookstores, jewelry stores, newsstands, drug stores, curio shops, automobile dealers, and military supply stores, including Army and Air Force post exchanges and Navy ship service stores. The products are purchased for resale by all of the customers other than the automobile dealers. Those purchased by the automobile dealers are for free distribution to their customers for advertising purposes. The college bookstores, as separate units of the college, are 'retailers' within the meaning of section 1426(d)(3)(D) of the Act. The military supply stores, including Army and Air Force post exchanges and Navy ship service stores, and the operators of jewelry stores, newsstands, drug stores, curio shops and automobile dealers also are 'retailers' within the meaning of such section. The novelty jewelry purchased for resale constitutes 'merchandise for resale' and that purchased for free distribution constitutes 'supplies for use in the customers' business operations' within the meaning of section 1426(d)(3)(D), supra. Since the salesman's entire business activity is the solicitation of orders for one principal for the requisite types of items from customers specified in section 1426(d)(3)(D) and he meets other conditions in such section, he is an employee for purposes of the Act.

Example 5. The salesman performs sales services for a company which is in the business of selling and servicing sound and projection equipment. He calls principally on schools to interest them in better teaching methods by the use of audio-visual equipment and to sell such equipment. He also solicits orders from churches. Since he solicits orders principally or exclusively from schools and churches which, as such, are not the types of customers designated in section 1426(d)(3)(D) of the Act, he is not an employee of the company for purposes of the taxes imposed by the Act.

Example 6. The salesman performs sales services for a firm which is engaged in selling advertising on menus, folders, etc. He solicits orders for the advertising from wholesalers, retailers, contractors, and operators of restaurants, hotels, motels and similar establishments. The solicitation of orders for advertising for inclusion on menus, folders, etc., which are not made available to the advertiser involved, but are furnished to other customers of the salesman or his principal for use or distribution, does not constitute the solicitation of orders of the type contemplated by section 1426(d)(3)(D) of the Act.

However, the solicitation or orders for advertising on menus, folders, or advertising specialities from wholesalers, retailers, contractors, or from operators of hotels, motels, restaurants or other similar establishments, which are used by such customers for use in their business operations (including good will novelties distributed by or on behalf of the advertiser) constitute the solicitation of orders for 'supplies for use in the customers' business operations.'

Although all of the customers are of the types specified in section 1426(d)(3)(D) of the Act, none of the orders are for 'merchandise for resale' by the customers from whom such orders are solicited and only part of the orders are for 'supplies for use in the customers' business operations.' The salesman estimates that he devotes 60 percent of his time during each calendar quarter to soliciting orders for the firm from customers for advertising for inclusion on menus, folders, etc., which are not made available to the advertiser involved and, therefore, are not 'supplies for use in the customers' business operations.' It is concluded that the salesman does not meet all the requirements of the statutory test contemplated by section 1426(d)(3)(D), supra, and is not an employee of the firm for purposes of the taxes imposed by the Act."

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Effective July 8, 1972 the Director adopted sections 621(b)-1 and 621(c)-1, Title 22, California Administrative Code, to implement section 621 of the Unemployment Insurance Code. It should be noted that these provisions are practically verbatim with certain portions of Title 26, Code of Federal Regulations, section 31.3121(d)-1. This again emphasizes the link between the two federal laws and section 621 of the Unemployment Insurance Code.

We quote from page 3 of Senate Report No. 91-752 which accompanied the Employment Security Amendments of 1970. This report is also to be found republished in West's U. S. Code Congressional and Administrative News, 91st Congress, 2nd Session, page 3608, in part, as follows:

"III. SUMMARY OF THE PRINCIPAL FEATURES OF THE BILL

"A. Changes in Coverage

"Approximately 58.0 million jobs are now protected by the unemployment compensation system, including those covered under State laws and those covered under Federal programs (i.e., Federal employees, members of the Armed Forces, and railroad workers). In addition, there are 16.6 million jobs which remain unprotected. Of these uncovered jobs, the committee bill would extend coverage to up to 4.4 million.

"The workers affected by the proposed changes in the unemployment compensation program are:

"1. Workers affected by changed definition of 'employee.' - The definition of 'employee' which is now used for old-age, survivors, disability, and health insurance purposes would be adopted with a modification. Those who would be affected by this change are individuals who are not employees under common law rules, such as agent-drivers and outside salesmen. The concept of 'employee' as adopted by this bill differs from that used for the old-age, survivors, disability, and health insurance program in that it does not apply to full-time life insurance salesmen and individuals who work in their homes on materials furnished by another (if they are not employees under common-law rules). Approximately 200,000 additional jobs would be covered under this provision, effective January 1, 1972."

The regulations adopted by the Director are quite extensive and we will set forth only that portion of the regulations pertinent to this case. Generally, the regulations define the employer-employee relationship under the common law and set forth certain classes of employees under section 621 of the Unemployment Insurance Code, namely agent-driver, commission-driver, traveling or city salesman. The regulations also set forth that, although an individual falls within one of the enumerated occupational groups, certain conditions must exist in order for such an individual to be considered an employee under the statute. It is with these latter conditions that we are concerned in this case.

Section 621(c)-1(c)(1)(B) and section 621(c)-1(c)(3), Title 22, California Administrative Code, provide as follows:

> "(c) Additional Conditions. (1) The fact that an individual falls within one of the enumerated occupational groups, however, does not make such individual an employee under this section unless all of the following conditions exist:
>
> * * *
>
> "(B) Such individual has no substantial investment in the facilities used in connection with the performance of such services (other than in facilities for transportation).
>
> * * *
>
> "(3) 'Facilities', as used in this section and subdivision (c) of section 621 of the code, include equipment and premises available for the work or enterprise as distinguished from education, training, and experience, but do not include such tools, instruments, equipment, or clothing, as are commonly or frequently provided by employees. An investment in an automobile by an individual which is used primarily for his own transportation in connection with the performance of services for another person has no significance, since such investment is comparable to outlays for transportation by an individual performing similar services who does not own an automobile. Moreover, the investment in facilities for the transportation of the goods or commodities to which the services relate is to be excluded in determining the investment in a particular case. If an individual has a substantial investment in facilities of the requisite character, he is not an employee within the meaning of this section, since a substantial investment of the requisite character standing alone is sufficient to exclude the individual from the employee concept under this paragraph."

The Department's appeal of that portion of the referee's decision with respect to Ellsworth Molter is taken on the ground that the referee erred in finding that Molter had a "substantial investment in the facilities used in connection with the performance of such services" by reason of the use of a bedroom in his apartment as an office, and therefore Molter may not be considered as an employee under section 621 of the code.

The position of the petitioner consists of three contentions as follows:

1. Section 621 of the Unemployment Insurance Code is unconstitutional;

2. That the regulations adopted to implement the statute are unconstitutional; and

3. That even if they are held to be constitutional, ". . . these people involved in these proceedings certainly fall within the terms and the exceptions of the statute . . . ."

To declare an act adopted by the Legislature of the State of California to be unconstitutional is an exercise of judicial power. Such a declaration is beyond the proper scope of administrative adjudication. We have not been vested by law with judicial powers nor can we lawfully be vested with such powers, and therefore, we do not have the jurisdiction to declare an act of the Legislature to be unconstitutional (Appeals Board Decision No. P-T-31; Davis' - Administrative Law Treatise, Vol. 3, page 74, section 20.04).

Section 11374 of the Government Code of the State of California provides as follows:

> "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.
>
> "Any existing rules or regulations conflicting with this section are hereby repealed."

The petitioner argues that section 621(c)-1(c)(3) of Title 22, California Administrative Code, is invalid by reason of the fact that it excludes from the definition of "facilities" the education, training and experience of the salesman. The petitioner argues that the good-will engendered by salesmen over years of experience is the most valuable asset of the salesman and should be included as an investment in facilities.

The section of the regulations to which the petitioner refers is taken verbatim from section 31.3121(d)-1(d)(4)(iii) of Title 26 of the Code of Federal Regulations. This regulation was first adopted in 1951 and remains in effect to this date.

In view of the long standing of the regulation in the Code of Federal Regulations, which is identical with the Department's regulations under consideration, and recognizing the expressed purpose of the law to broaden unemployment insurance coverage, we hold that the pertinent part of the regulation is valid, not in conflict with the statute, and in fact effectuates the purpose of the statutory provision.

The final issue to be considered is whether Ellsworth Molter had a "substantial investment in facilities used in connection with the performance of such services." The investment which Molter had was the use of one bedroom in his apartment as an office which consisted of a desk, file cabinets and a typewriter of an estimated value of $1,000 to $1,500.

We have already pointed out that the definition of an employee with which we are here concerned has been taken from the Federal Insurance Contributions Act. It is to be noted that the definition in FICA is identical with that found in the Social Security Act 42 USC 410(j)(3)(D).

We quote from the Social Security Handbook, DHEW Publication No. (SSA) 73-10135 February 1974, section 825, in part, as follows:

> "825. Workers in the Four Occupational Groups set out in §§ 826-829 are employees under the social security law even if they do not meet the common-law test if:
>
> * * *
>
> "B. The worker has no substantial investment in facilities other than transportation facilities used in performing the work; and
>
> * * *

"Facilities include such items as office furniture and fixtures, premises, and machinery. A salesman maintaining an office in his own home may not have a substantial investment; but a salesman maintaining an office outside his home frequently does have a substantial investment in facilities.

"Facilities do not include education, training, experience, tools, instruments, or clothing commonly or frequently provided by employees or a vehicle used for the worker's own transportation, or for carrying the goods or commodities he sells, or for supplying laundry or dry cleaning service."

In this case the claimant's office is in his apartment, in one bedroom thereof, and consists of a desk, file cabinets and a typewriter. In our opinion this is practically a minimum office setup. We do not consider it to be a substantial investment in the facilities used in connection with the performance of services by Mr. Molter and therefore we hold that he is an employee under section 621 of the Unemployment Insurance Code.

DECISION

That part of the decision from which the Department has appealed is modified. The claim for refund with respect to Ellsworth Molter is denied. The remainder of the decision of the referee shall stand.

Sacramento, California, October 19, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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