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MEMORANDUM

Income Tax Determinations
Miller, Edward M. A-2

TO: Commissioners Murphy, Palestin and Macduff

FROM: Vincent P. Molineaux, Hearing Officer

SUBJECT: Edward M. Miller, Application for Revision
or Refund of Personal Income Taxes Under
Article 16, and Unincorporated Business
Taxes Under Article 16-A, of the Tax Law
for the Year 1959

A hearing with reference to the above matter was held before me at 50 Centre Street, New York, New York on June 12, 1964. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issue raised herein is whether certain income received by the taxpayer, a salesman of corrugated shipping containers, fibreboard boxes and folding cartons, reported as salary income, constitutes receipts derived from an unincorporated business pursuant to section 136 of the Tax Law.

The facts herein more fully set forth in the proposed determination disclose that during 1959 taxpayer represented two corporations, Hoerner Boxes, Inc. and Gaylord Container Corp. Taxpayer's compensation was determined on a commission basis. Hoerner Boxes, Inc. deducted Social Security and Federal withholding tax from taxpayer's commissions. Taxpayer's contract with Hoerner Boxes, Inc. outlined taxpayer's duties, territory, compensation and specified that taxpayer participate in profit sharing and the retirement fund. Gaylord Container Corp. did not deduct any Federal withholding, Social Security or State income tax from taxpayer's commissions. Taxpayer did not have a drawing account with either corporation.

Gaylord Container Corp. maintained an office at 475 Lexington Avenue, New York, New York. Taxpayer was not required to spend any specific period of time at this office; taxpayer was not required to maintain a sales quota, nor did Gaylord Container Corp. exercise control or supervision over taxpayer's time. Taxpayer did not attend any sales or other group meetings for Gaylord Container Corp., but would go to the office at Lexington Avenue to confer with the sales manager and receive instructions from him.

Taxpayer maintained an office at 50 East 42 Street, New York and paid the rent, telephone, secretarial service and other operating expenses for this office. Hoerner Box, Inc. did not maintain an office in New York City and all of their business in New York City was transacted at the office maintained by taxpayer at 50 East 42 Street. On the door of this office appeared taxpayer's name and also the names of Hoerner Boxes, Inc. and Gaylord Container Corp.

Taxpayer alleged that he would attend as an employee of Hoerner Boxes, Inc., the New York meetings of the Fiber Box Association of which Hoerner Boxes, Inc. was a member. Taxpayer testified that the Chicago meetings of the Fiber Box Association would be attended by a Chicago employee of Hoerner Boxes, Inc. Taxpayer was also required to attend the annual sales meeting in Keokuk, Iowa and a so-called manager's meeting in Minneapolis, Minnesota. All expenses incurred in connection with taxpayer's attendance at these meetings were paid by Hoerner Boxes, Inc. With the exception of such occasional required attendance, the principal did not exercise control or supervision of the taxpayer's time.

Taxpayer paid rent, telephone, secretarial service, personal traveling and entertainment expenses incurred in connection with his selling activities out of the commissions received from his principals and did not receive any reimbursement from his principals for these expenses.

Taxpayer testified that the shipping customers of Gaylord Container Corp. were primarily located in an area different than that of the Hoerner Boxes, Inc. shipping area. Taxpayer testified that his activity was to sell the large companies or users of boxes whose purchasing headquarters were in New York area but whose plants using the boxes were located elsewhere.

I am of the opinion that since the taxpayer paid the rent, telephone, stenographic salary and other operating expenses for the office situated at 50 East 42 Street, New York, New York and incurred traveling and entertainment expenses which were not reimbursed by his principals, his activities as a salesman during the year in question constituted the carrying on of his own unincorporated business and that his entire income is subject to the unincorporated business tax. I have, therefore, prepared a proposed determination denying the taxpayer's application for revision or refund for 1959.

For the reasons stated, I recommend that the decision of the Tax Commission in this matter be substantially in the form submitted herewith.

/s/

VINCENT P. MOLINEAUX

Hearing Officer

Enc.

Dated: March 28, 1966

/s/

M. SCHAPIRO

Approved

/s/

S. HECKELMAN

Approved

**STATE OF NEW YORK
STATE TAX COMMISSION**

IN THE MATTER OF THE APPLICATION

OF

EDWARD M. MILLER

**FOR REVISION OR REFUND OF PERSONAL
INCOME TAXES UNDER ARTICLE 16, AND
UNINCORPORATED BUSINESS TAXES UNDER
ARTICLE 16-A, OF THE TAX LAW FOR THE
YEAR 1959**

Edward M. Miller having duly filed an application for revision or refund of unincorporated business tax assessed under Article 16-A of the Tax Law for the calendar year 1959, and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York, before Vincent P. Malinskas, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared in person and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That taxpayer filed a personal income tax return but did not file an unincorporated business tax return for the calendar year 1959; that an assessment was thereafter issued on January 23, 1962 (Assessment No. NY-946398) for unincorporated business tax in the amount of \$1,349.78 on the ground that the activities of the taxpayer during 1959 constituted the carrying on of an unincorporated business subject to the provisions of Article 16-A of the Tax Law.

(2) That during 1959 taxpayer represented two corporations, Hoerner Bence, Inc. and Gaylord Container Corp.; that taxpayer's compensation was determined on a commission basis; that Hoerner Bence, Inc. deducted Social Security and Federal withholding tax from taxpayer's commissions; that taxpayer's contract with Hoerner

Bones, Inc. outlined taxpayer's duties, territory, compensation and specified that taxpayer participate in profit sharing and the retirement fund; that Gaylord Container Corp. did not deduct any Federal withholding, Social Security or State income tax from taxpayer's commissions; that taxpayer did not have a checking account with either corporation.

(3) That Gaylord Container Corp. maintained an office at 475 Lexington Avenue, New York, New York; that taxpayer was not required to spend any specific period of time at this office; that taxpayer was not required to maintain a sales quota, nor did Gaylord Container Corp. exercise control or supervision over taxpayer's time; that taxpayer did not attend any sales or other group meetings for Gaylord Container Corp., but would go to the office at Lexington Avenue to confer with the sales manager and receive instructions from him.

(4) That Hoenner Bones, Inc. did not maintain an office in New York City and all of their business in New York City was transacted at the office maintained by taxpayer at 30 East 42 Street; that on the door of this office appeared taxpayer's name and also the names of Hoenner Bones, Inc. and Gaylord Container Corp. Taxpayer paid the rent, telephone, accounting and other expenses of the office.

(5) That taxpayer would attend the New York meetings of the Fiber Box Association of which Hoenner Bones, Inc. was a member; that taxpayer would also attend the annual sales meeting in Escondido, Iowa and a so-called manager's meeting in Minneapolis, Minnesota; that all expenses incurred in connection with taxpayer's attendance at these meetings were paid by Hoenner Bones, Inc.; that with the exception of such occasional required attendance, the principal did not exercise control or supervision of the taxpayer's time.

(6) That taxpayer paid rent, telephone, secretarial service, personal traveling and entertainment expenses incurred in connection with his selling activities out of the commissions received from his principals and did not receive any reimbursement from his principals for these expenses.

(7) That the shipping customers of Gaylord Container Corp. were primarily located in an area different than that of the Heerner Bros., Inc. shipping area; that taxpayer's activity was to sell the large companies or users of bums whose purchasing headquarters were in the New York area but whose plants using the bums were located elsewhere.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby,

DETERMINES:

(A) That during the year 1959, the taxpayer's income from the aforementioned corporations was income derived from taxpayer's own unincorporated business and was not income earned as an employee and is therefore subject to the unincorporated business tax imposed under Article 16-A of the Tax Law.

(B) That, accordingly, the unincorporated business tax assessment issued for the calendar year 1959 is affirmed; that such assessment is correct and does not include any other taxes or charges which are not lawfully due or owing.

Dated: Albany, New York this 31st day of March, 1960

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

CHAIRMAN

/s/

IRA J. PALESTIN

COMMISSIONER

SECRETARY