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MEMORANDUM

*Income Tax Determin.**A-2**Wittrup, Jack S.*

TO: **Commissioners Murphy, Palestin and Maccaff**

FROM: **Vincent F. Molinsux, Hearing Officer**

SUBJECT: **Jack S. Wittrup,
Application for revision or refund of
Personal Income Tax under Article 16,
and Unincorporated Business Tax under
Article 16-A, of the Tax Law for the
year 1956**

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, New York on June 16, 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 during the year in question and reported as salary income constitutes receipts derived from an unincorporated business pursuant to section 106 of the Tax Law.

Taxpayer reported \$19,470 unincorporated business income as an artist and alleged that during 1956 he also received compensation as an employee in the amount of \$15,800.03 from Illustrators Studio Corp. The taxpayer's alleged compensation as an employee was not fixed by a written contract. The Illustrators Studio Corp. deducted withholding tax, Social Security and other payroll taxes from taxpayer's alleged management salary. Taxpayer testified that in addition to rendering management services for the corporation, he engaged in some selling activities for the corporation but that the commissions for these accounts went to the salesman with the exception of the commission on one account which is included in the amount claimed as salary income. During 1956 taxpayer was President, Treasurer, Manager and sole stockholder of Illustrators Studio Corp.; that the office of the corporation did the hiring and firing and fixed the salaries for the employees of the corporation; that during the year in question there were approximately 25 to 30 employees of the corporation under taxpayer's supervision; that the corporation did not have an assistant manager; that during the year in question Illustrators Studio Corp. had gross sales of approximately one-half million dollars.

Taxpayer also alleged that during the five day normal work week approximately three-fourths of his time was spent managing the studio and that he made up the working time as an artist at his home on weekends and nights.

The compensation of all artists in the studio (including taxpayer) was computed on a percentage of gross basis after allowance for deduction of direct expenses incurred in the production of a work of art. The artists associated with the

corporation were paid their full distribution share without deduction for Federal withholding, Social Security or State income taxes.

The preliminary hearing officer was of the opinion that inasmuch as the corporation provided a complete studio for artists at the corporate offices, the art work at home by taxpayer must be considered as done for his personal convenience and that his alleged salary income constituted receipts from his activity as a commercial artist.

I am of the opinion that for the year in question, taxpayer was engaged in his own unincorporated business as a commercial artist; that the studio maintained by taxpayer was for his own use in connection with his commercial art work; that the compensation reported as salary income from Illustrators Studio Corp. was compensation earned as an officer, general manager and nominal salesman for said corporation and was not income connected with taxpayer's unincorporated business as a commercial artist. I have, therefore, prepared a proposed determination granting the taxpayer's application for revision or refund for 1956 of the additional assessment for unincorporated business tax.

For the reasons stated above, 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

VPM:bdg

Encs.

March 21, 1966

/s/

M. SCHAPIRO

APPROVED

/s/

S. HECKELMAN

APPROVED

**STATE OF NEW YORK
STATE TAX COMMISSION**

IN THE MATTER OF THE APPLICATION OF

JACK S. WITTRUP

**FOR REVISION OR REFUND OF PERSONAL INCOME TAX
UNDER ARTICLE 16, AND UNINCORPORATED BUSINESS
TAX UNDER ARTICLE 16-A, OF THE TAX LAW FOR THE
YEAR 1936**

Jack S. Wittrup 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 1936, 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 F. Holincour, 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 and an unincorporated business tax return for the calendar year 1936; that an assessment was thereafter issued on August 17, 1939 (Assessment No. E-64879) for additional unincorporated business tax in the amount of \$391.28 on the ground that certain income reported by taxpayer as salary income constituted receipts connected with an unincorporated business pursuant to the provisions of Article 16-A of the Tax Law.

(2) That during the year involved taxpayer reported income in his unincorporated business as an artist; that he was one of many artists producing art work for Illustrators Studio Corp.; that pay of artists was computed on a percentage of gross basis after allowance for deduction of direct expenses incurred in the production of a piece of art; that artists associated with the corporation were paid their full distribution share without deduction of Federal withholding, Social Security or State income taxes.

(3) That during 1936 taxpayer also reported compensation as an employee in the amount of \$15,888.03 received from Illustrators Studio Corp. of which he was president, treasurer, manager and sole stockholder; that this compensation was not fixed by a written contract; that Illustrators Studio Corp. deducted Federal withholding tax, Social Security and other payroll taxes from taxpayer's management salary; that in addition to rendering management services for Illustrators Studio Corp., taxpayer also engaged in some selling activities for the corporation; that the commissions for these accounts went to the salesman with the exception of the commission on one account which is included in the amount reported as salary income; that taxpayer did the hiring and firing and fixed the salaries for the employees of the corporation; that during the year in question there were approximately 15 to 30 employees of the corporation under taxpayer's supervision; that the corporation did not have an assistant manager; that during 1936 Illustrators Studio Corp. had gross sales of approximately one-half million dollars.

(4) That Illustrators Studio Corp. provided a complete studio for artists at the corporate offices; that taxpayer maintained his own art studio at his home; that during the five day normal work week approximately three-fourths of taxpayer's time was spent managing the studio; that taxpayer made up the working time as an artist at his home on weekends and nights.

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

DIRECTIONS;

(A) That during the year 1936 the taxpayer's compensation reported as salary income was income earned as an employee and was not income earned in connection with taxpayer's activity as an artist; that, therefore, such income is not subject to the unincorporated business tax imposed under Article 16-A of the Tax Law.

(B) That, accordingly, Assessment No. B-62899 for unincorporated business tax on said earnings was improper and should be cancelled; and is hereby cancelled in full.

Dated: Albany, New York this 31st day of March, 1966.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

/s/

IRA J. PALESTIN

COMMISSIONER