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MEMORANDUM

Income Tax Determinations
Meelhan, John F. A-2

TO: State Tax Commission

FROM: Francis V. Dow, Hearing Officer

SUBJECT: In the Matter of the Application of
JOHN F. MEELHAN 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 1957

A hearing with reference to the above matter was scheduled before me at 80 Centre Street, New York, New York on November 17, 1966 and on December 18, 1967. The taxpayer defaulted on both occasions.

The issue involved herein is whether the taxpayer's income from sales promotion received from Buffalo Tank Corp. is subject to unincorporated business tax.

At the preliminary hearing the taxpayer's representative agreed to the assessment issued herein to the extent that it assessed additional normal tax based on the disallowance of legal fees of \$2,250 and travel and entertainment expenses of \$1,250. The taxpayer contested the assessment (Assessment No. B-833094) of unincorporated business tax, penalty and interest in the sum of \$1,226.66.

The taxpayer filed an income tax return but did not file an unincorporated business tax return for 1957. On his income tax return the taxpayer reported compensation from Buffalo Tank Corp. in the amount of \$35,258.97 for the tax year. He also reported salaries of \$3,900 from Chick's Vending Corp. and \$300 from Harwood Steel Corp. The taxpayer is a salesman for Buffalo Tank Corp. taking orders for storage tanks which orders are sent directly to the corporation. All adjustments on the orders are made by the corporation on which orders, the taxpayer receives a commission. The taxpayer occupies desk space at the premises rented by the Harwood Steel Corporation in which the taxpayer is an investor. The taxpayer was listed in the building directory at the office address of Harwood Steel Corp.

No deductions for income tax or social security contributions were taken from the taxpayer's earnings from the Buffalo Tank Corp. He had no written contract of employment with it. He was not a member of the pension and medical plans provided by the corporation. It does not appear that the taxpayer was supervised with respect to hours or activities.

On his income tax return the taxpayer claimed deductions for business expenses, which included rent of \$250, telephone of \$466.83, professional services of \$200, stationery, postage stamps and supplies of \$444.03 and promotion expenses totaling \$7,455.54 for the following organizations: Buffalo Tank Corp., Chick's Vending Corp., Norwood Steel Corp., Football Hall of Fame and Touchdown Club. He was reimbursed from the Buffalo Tank Corp. at the rate of \$250 a month or \$3,000 for his expenses. The rent expense was for space used in the taxpayer's home. The unincorporated business tax assessment was issued based upon the taxpayer's income from Buffalo Tank Corp., but not on his income from Chick's Vending Corp. and Norwood Steel Corp. However, taxpayer was allowed to deduct promotional expenses incurred for Chick's Vending Corp. and Norwood Steel Corp. although his income from these companies was not held to be subject to the unincorporated business tax.

It is my opinion that the taxpayer is engaged in an unincorporated business subject to the unincorporated business tax. In the case of Britton v. Murphy, 32 A D 2d 987 which involved a salesman for 11 principals it was found that the taxpayer had an office in his home. Other elements found in that case are similar to the facts in this case and support the conclusion that the taxpayer in the instant matter is carrying on a business.

A finding that the taxpayer is not an employee but an independent contractor is sufficient to subject him in the first instance to unincorporated business taxes. See Buchanan v. Rosellini, 17 A D 2d 15 and Wittich v. Brown, 270 App. Div. 774 1st D 2d N.Y. 720.

For the reasons stated above, I recommend that the determination of the State Tax Commission denying the taxpayer's application in the above matter be substantially in the form submitted herewith.

/s/

FRANCIS V. DOW

HEARING OFFICER

FVD:ac
Enc.

February 5, 1968

2-9-68

**STATE OF NEW YORK
STATE TAX COMMISSION**

IN THE MATTER OF THE APPLICATION

OF

JOHN F. MURPHY

**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 1957**

The taxpayer having filed an 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 1957 and hearings having been scheduled in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on November 17, 1966 and on December 18, 1967 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance and the taxpayer having defaulted in appearance on both scheduled hearings and the matter having been reviewed and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed a resident tax return for the year 1957 in which he reported salary income of \$3,900 from Chick's Vending Corp. and \$300 from Norwood Steel Corp. and income from his sales promotion business of \$29,207.39; that the taxpayer claimed deductions for legal fees in the amount of \$2,600 and travel and entertainment expenses of \$1,250 and business deductions of \$5,971.98.

(2) That an assessment was issued for the year 1957 (Assessment No. 2-833094) which assessed additional tax, penalty and interest in the sum of \$1,226.86 on the basis that the taxpayer's sales promotion activities constituted the carrying on of an unincorporated business, the income of which is subject to the unincorporated business tax and disallowed the deduction claimed for

legal fees to the extent of \$2,250 and travel and entertainment expenses to the extent of \$1,250 in conformity with the results of audit of the taxpayer's Federal tax return; that the taxpayer's representative agreed to the assessment of additional normal tax based on the disallowance of the deductions claimed for legal fees and travel and entertainment expenses.

(3) That the taxpayer received \$35,258.97 from the Buffalo Tank Corp.; that the taxpayer is a salesman for the corporation taking orders for storage tanks; that orders obtained by the taxpayer are sent directly to the corporation; that all adjustments on the orders are made by the corporation; that the taxpayer receives commissions on the orders obtained by him for the Buffalo Tank Corp.

(4) That the taxpayer occupies desk space at the premises rented by Norwood Steel Corp. in which company the taxpayer is an investor; that the taxpayer was listed in the building directory at the office address of Norwood Steel Corp.

(5) That no deductions for income tax or social security contributions were withheld from the compensation received by the taxpayer from the Buffalo Tank Corp.; that the taxpayer had no written contract of employment with the Buffalo Tank Corp. and was not a member of the pension and medical plans which the company provided for its employees; that the taxpayer was not supervised with respect to his working hours or activities in behalf of the Buffalo Tank Corp.

(6) That on his tax return the taxpayer claimed deductions for business expenses which included rent of \$250, telephone of \$466.83, professional services of \$200, stationery, postage stamps and supplies of \$444.03 and promotion expenses in behalf of Buffalo Tank Corp., Chick's Vending Corp., Norwood Steel

Corp., Football Hall of Fame and Touchdown Club which totaled \$7,455.54; that the taxpayer was reimbursed for his expenses by the Buffalo Tank Corp. at the rate of \$250 or \$3,000 for the year 1957; that the rent expense claimed by the taxpayer was for space used in the taxpayer's home.

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

DEFINDINGS:

(A) That the sales promotion activities of the taxpayer in behalf of the Buffalo Tank Corp. were carried on by him as an independent contractor and not as an employee and constituted the carrying on of an unincorporated business the income of which is subject to the unincorporated business tax within the intent and meaning of section 386 of the Tax Law.

(B) That accordingly the assessment of additional tax for the year 1957 (Assessment No. B-833094) does not include any tax or other charge which could not have been lawfully demanded and that the taxpayer's application for revision or refund of personal income taxes and unincorporated business taxes be and the same is hereby denied.

DATED: Albany, New York on this 13th day of February , 1968.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

COMMISSIONER