

BUREAU OF LAW

MEMORANDUM

Income Tax Determinations
Surrey, Allen
A-2

TO: **State Tax Commission**

FROM: **Martin Schapiro, Associate Attorney**

SUBJECT: **ALLEN SURREY**

**Articles 16 and 16-A of the Tax Law
For the Years 1952, 1953 and 1954**

A hearing has been held in the above matter. The minutes and exhibits are in the file.

Two questions are raised by the taxpayer's application for revision and refund: (1) Whether or not the taxpayer's income derived from his activities as a sales representative during the years involved was salary or business income taxable pursuant to Article 16-A of the Tax Law; and (2) if such income was salary, whether or not the activities of the taxpayer as an employee were so interconnected and related to the taxpayer's activities in his own business that the income derived from them became part of the unincorporated business income of the taxpayer. The record discloses that during the years involved the taxpayer and his wife were engaged in the retail business of selling standard machine tool parts. Primarily, the taxpayer sold such parts to contractors from inventory on hand. Occasionally such parts would be ordered upon request of the purchaser. During such years the taxpayer was hired by two tool manufacturing firms by oral contracts terminable at will. The first firm, Metropolitan Tool Works, was engaged in manufacturing tools for the United States Government and the taxpayer's duties were to review the invitations of bids offered by the Government, select such invitations which could be entertained by the firm and present such bids to the Federal Government. The second firm, S & L Tool Company, was engaged in accepting subcontracting work from prime contractors who had accepted bids from the Federal Government. The taxpayer's duties in connection therewith were to inform himself of such prime contractors and attempt to obtain from them orders for subcontracting work to be done by the firm. In both instances the taxpayer was paid a weekly stated salary from which social security and workmen's compensation insurance were deducted. Neither firm had any other sales representative than the officers or partners therein. The taxpayer, however, was free to do work for both companies and in his own business, simultaneously.

Since the taxpayer was primarily engaged in selling standard tools in his own business while engaged in obtaining orders for the manufacturing of tools in his work as a sales representative, none of the customers in his own business had any connection with or relation to the persons dealt with by the taxpayer as a sales representative for the two firms involved. I am therefore of the opinion that the activities of the taxpayer as a representative for tool manufacturing concerns is in no way connected with or related to his activities as a seller of retail tool parts.

The taxpayer was employed simultaneously for two firms without any arrangement as to the working time spent between both employers, the taxpayer could not be deemed an employee of either of the firms during the year 1952 (Feinburg v. Chapman, 274 App. Div. 715). Section 386 of the Tax Law was amended, however, by Chapter 723 of the Laws of 1953 applicable to returns for any taxable year commencing on or after January 1, 1953 by adding thereto the following phrase, "A person shall not be deemed to be engaged in an unincorporated business solely because of selling goods, wares and merchandise for more than one person, firm or corporation unless he maintains an office or employs one or more assistants or otherwise regularly carries on a business." (Emphasis supplied)

I am of the opinion that despite the fact that the taxpayer was simultaneously employed by two employers in 1953 and 1954, the taxpayer was an employee of both firms and not a salesman in his own independent business. The earnings of the taxpayer were not based upon any commission for contracts secured. The earnings were subject to ordinary withholding, social security and workmen's compensation taxes. Although the taxpayer had no definite hours of employment, his work as the sole representative for the firms was of such a nature as to exclude regular hours.

Accordingly, I am of the opinion that the taxpayer could not be deemed an employee for the year 1952, but was an employee during the years 1953 and 1954. I have, therefore, prepared a proposed determination embodying such opinion. Kindly return the file after disposition.

/s/

MARTIN SCHAPIRO

Associate Attorney

MS:ac
Enc.

January 29, 1969

Sent to Commission 2/14/69

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION OF

ALLEN SURREY

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 YEARS 1952, 1953 AND 1954;

Allen Surrey having duly filed applications 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 calendar years 1952, 1953 and 1954, said taxes having been assessed by the Income Tax Bureau on March 27, 1957 (Assessment Nos. B-258418, B-258419 and B-409892 for the years 1952, 1953 and 1954, respectively), and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York 13, New York on Tuesday, September 3, 1963 before Martin Schapiro, Hearing Officer for the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and testified, being represented by Louis H. Frishkoff, Certified Public Accountant, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the assessments of normal taxes under Article 16 of the Tax Law are not contested by the taxpayer and are in fact conceded by him; that the assessments of unincorporated business taxes for each of the years 1952, 1953 and 1954 are contested by the taxpayer on the ground that the income upon which taxes are based is salary income not subject to the unincorporated business tax.

(2) That during the years involved the taxpayer and his wife were partners engaged in the retail business of selling standard machine tool parts; that the partnership filed unincorporated business tax returns with respect to such activities.

(3) That during the years involved the taxpayer Allen Surrey was hired by two tool manufacturing firms under contracts terminable at will; that the first firm Metropolitan Tool Works was engaged in manufacturing tools for the United States Government, and the taxpayer's duties were to review the invitation of bids offered by the government, select such invitations which could be entertained by the firm and present such bids to the Federal Government; that the second firm S & L Tool Company was engaged in accepting subcontract work from prime contractors who had accepted bids from the Federal government; that the taxpayer's duties in connection therewith were to inform himself of such prime contractors and attempt to obtain from them orders for subcontracting work to be done by the firm.

(4) Both firms paid the taxpayer a stated weekly salary from which social security and workmen's compensation insurance were deducted; that none of the customers of the partnership consisting of the taxpayer and his wife had any connection or relationship to the persons dealt with by the taxpayer as a representative for the two firms involved; that the taxpayer was free to do work for both companies and his own business simultaneously; that there was no agreement with either of the firms with respect to a division of time of employment between the time of work between the firms.

(5) Section 386 of the Tax Law was amended by Chapter 723 of the Laws of 1953 applicable to returns for any taxable year commencing on or after January 1, 1953 by adding thereto the following sentence, "A person shall not be deemed to be engaged

in an unincorporated business solely because of selling goods, wares and merchandise for more than one person, firm or corporation unless he maintains an office or employs one or more assistants or otherwise regularly carries on a business."

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

DETERMINES

(A) That the assessments of normal income taxes in the amounts of \$78.52, \$80.14 and \$85.75 for the years 1952, 1953 and 1954 pursuant to Article 16 of the Tax Law which are based upon a disallowance of claimed business expenses by the Federal Bureau of Internal Revenue, are correct and are hereby affirmed.

(B) That in view of the fact that the taxpayer was engaged by two firms without any agreement as to the division of working time between such firms, the taxpayer could not during the year 1952 be deemed an employee of either firm; that the amount of the of the unincorporated business tax assessment (Assessment No. B-258418) in the sum of \$559.26 is correct and is hereby affirmed.

(C) That the income of the taxpayer upon which unincorporated business taxes were assessed during the years 1953 and 1954 is income earned by the taxpayer as an employee not connected with the taxpayer's business income; that, accordingly, the assessments of additional unincorporated business taxes in the amounts of \$320.92 and \$39.20 for the years 1953 and 1954 (Assessment Nos. B-258418 and B-409592, respectively) are hereby cancelled, and IT IS SO ORDERED.

Dated: Albany, New York this 18th day of February , 1969.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
President

/s/

A. BRUCE MANLEY
Commissioner

/s/

MILTON KOERNER
Commissioner