

Wigodner, Samuel

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

SAMUEL WIGODNER

FOR REVISION OR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 16-A OF THE
TAX LAW FOR THE YEARS 1949, 1950, 1951
AND 1952.

Samuel Wigodner, the taxpayer herein, having filed applications for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the years 1949, 1950, 1951 and 1952 and a hearing notice having been mailed to the taxpayer on January 13, 1963 scheduling a hearing at 80 Centre Street, New York City, N.Y. for February 4, 1963 at 10:30 o'clock A. M. before Solomon Gies, Hearing Officer of the Department of Taxation and Finance, and the taxpayer having defaulted in appearance thereof and the matter, as presently constituted, having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed personal income tax returns for the years 1949, 1950, 1951 and 1952 reporting compensation received from three (3) firms located in New York City during the year 1949 and from four (4) firms located in New York City during the years 1950, 1951 and 1952; that based upon field audit, the Department of Taxation and Finance made assessments against the taxpayer for the years 1949, 1950, 1951 and 1952 (Assessment Nos. FA-95103, FA-95104, FA-95105 and FA-95106, respectively) holding that the activities of the taxpayer during the aforementioned years constituted the carrying on of an unincorporated business subject to tax under the provisions of Article 16-A of the Tax Law and permitted an allocation of 25% of

total business income attributable to sources within the State of New York but disallowed a portion of business expenses for lack of substantiation.

(2) That the taxpayer was a sales representative for various firms, whom he represented, receiving commission on a straight commission basis; that each of the principals deducted Federal withholding taxes from the commissions paid the taxpayer; that the taxpayer on his sales trips would exhibit lines of the various principals he represented, which were non-competitive, to the same customers; that the taxpayer was not reimbursed by the principals for any of his travelling expenses.

(3) That the taxpayer deducted on his returns expenses of show room assistants for each of the years involved herein; that the showroom assistants consisted of models; that the models would try on samples in order to show the merchandise to the prospective buyers at the showroom of one of the principals, Sidney Heller & Co.; that in addition, the assistants would help contact the buyers when they were in New York for the purpose of making arrangements for the taxpayer so that he could show the line to said prospective buyers; that although the assistants were regularly employed by the principal, Sidney Heller & Co., each salesman was charged with his proportionate share of the charge of the service paid by the principal; that the taxpayer did not maintain any office.

(4) That the taxpayer was not subject to the direction or control of the companies whom he represented as to the manner in which he was to make such sales; that the relationship of the taxpayer and the principals, whom he represented, was that of an independent contractor and not that of an employer-employee.

(5) That the taxpayer, as an independent contractor consuming a portion of his sales outside of the State of New York was entitled to an allocation of income to the extent of 27% thereof attributable to the State of New York; that the taxpayer was entitled to an allocation for the year 1949 of \$9,018.43; for the year 1950, of \$13,392.21; for the year 1951 of \$14,613.25 and for the year 1952 of

of \$14,370.07.

(6) That since three-fourths (3/4) of the taxpayer's business income was attributable to sources outside the State of New York, he was not entitled to a deduction for travelling expenses in connection with said income; that the taxpayer has failed to substantiate business expenses in the amount of \$1,250.00 for each of the years 1949, 1950, 1951 and 1952; that the taxpayer was entitled to deduct 25% of his expenses attributable to income within the State of New York; that the amount of such expenses to which the taxpayer was entitled to deduct was \$1,646.89 for the year 1949; for the year 1950, \$1,802.05; for the year 1951, \$2,945.05 and for the year 1952, \$1,994.70.

Based upon the foregoing findings, the State Tax Commission hereby

DETERMINES:

(A) That the occupational activities of the taxpayer, described herein, for the years 1949, 1950, 1951 and 1952 constituted the carrying on of an unincorporated business within the intent and meaning of Section 306, Article 16-A of the Tax Law, then in effect, prior to its amendment by Chapter 723 of the Laws of 1953 effective as of January 1, 1953.

(B) That the taxpayer's business income during the years heretofore mentioned was attributable to sources both within and without the State of New York; that 25% of his total business income for the aforementioned years was attributable to the State of New York.

(C) That 25% of the taxpayer's business expenses exclusive of travelling expenses was attributable to the State of New York for each of the years 1949, 1950, 1951 and 1952; that the taxpayer failed to substantiate a portion of business expenses for the years 1949, 1950, 1951 and 1952 to the extent of \$1,250.00 for each of said years; that the taxpayer is only entitled to deduct the business expenses as set forth in Finding No. (6) above.

(D) That, accordingly, the assessments (Assessment Nos. FA-95103, FA-95104, FA-95105 and FA-95106 for the years 1949, 1950,

1951 and 1952, respectively) are correct; that said assessments do not include any tax or other charge which could not have been lawfully demanded and that the taxpayer's applications for revision or refund with respect to said assessments be and the same are hereby denied.

DATED: Albany, New York on the 26th day of April, 1965.
STATE TAX COMMISSION

/s/

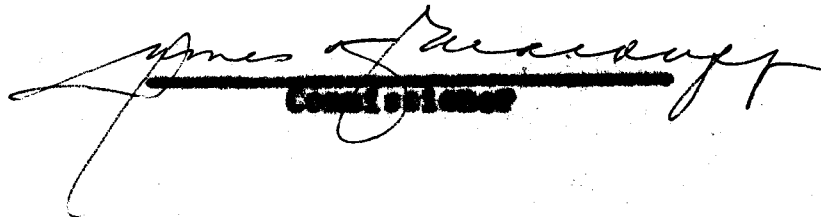
JOSEPH H. MURPHY

Commissioner

/s/

IRA J. PALESTIN

Commissioner


Commissioner

BUREAU OF LAW

MEMORANDUM

TO: Commissioners Murphy, Palestin & Macduff
FROM: Solomon Sies, Hearing Officer
SUBJECT: SAMUEL WIGODNER

1949 Assessment No. AB-FA-95103
1950 Assessment No. AB-FA-95104
1951 Assessment No. AB-FA-95105
1952 Assessment No. AB-FA-95106

Article 16-A

A hearing with reference to the above matter was scheduled before me at 80 Centre Street, New York, N.Y. for February 4, 1965. The taxpayer defaulted in appearance at such a hearing.

The issues involved herein are: (1) whether the activities of the taxpayer, as a sales representative for several principals during the years in question, constituted the carrying on of an unincorporated business; (2) whether the taxpayer, as an independent contractor, maintaining no office within the state, is entitled to an allocation of income on sales consummated outside the state and (3) whether a portion of total deductions for business expenses was properly disallowed for lack of substantiation.

The taxpayer was a sales representative, for three principals in 1949 and four principals during each of the other years involved, in the sale of ladies' sportswear on a straight commission basis. Each of the principals deducted Federal withholding taxes. The taxpayer on his sales trips would exhibit the lines of the various principals whom he represented, which were non-competitive, to the same customers. The taxpayer was not reimbursed by any of the principals for any of his expenses.

The Income Tax Bureau on field audit, permitted an allocation of 75% of income on sales consummated outside the state of New York and 25% of gross income attributable to New York on sales consummated in New York. Where business is carried on both within and without the state of New York, only that part of the net income which is derived from business carried on within the state is subject to business tax (Manual of Policy--Business Tax Article, Page 1--5/15/59).

Section 386 of the Tax Law was amended, effective as of January 1, 1953, so as to provide that "a person shall not be deemed to be engaged in an unincorporated business solely because of selling

TO: Commissioners Murphy, Palestin & Macduff
RE: SAMUEL WIGODNER

Page 2

goods, wares and merchandise for more than one firm, person or corporation unless he maintains an office or employs one or more assistants or else regularly carries on a business." The Income Tax Bureau, therefore, determined that the taxpayer was liable for unincorporated business taxes for the years in question but not for subsequent years.

The file indicates that the taxpayer was not subject to the direction or control of the companies whose products he sold as to the manner in which he was to make such sales. The taxpayer salesman was, therefore, not an employee of the several firms whom he represented on a commission basis but was an independent contractor carrying on an unincorporated business and thus subject to the payment of unincorporated business tax under Article 16-A, Section 386 of the Tax Law then in effect (See Peo. ex rel. Feinberg v. Chapman, 274 App. Div. 715 and Matter of Sullivan Co., Inc. 289 N.Y. 110, 112.).

The business expenses deducted by the taxpayer on his income tax return for the year 1952 in the sum of \$9,590.61 were estimated. For the year 1952, on field audit, the Income Tax Bureau disallowed the sum of \$1,750.00 of such expenses as unsubstantiated and imposed an additional normal tax in the sum of \$110.25. In addition, a disallowance of \$1,250.00 expenses for unincorporated business tax was made for all of the years in question. No deduction was allowed for travelling expenses as these expenditures were deemed wholly attributable to earnings outside the state of New York.

I am of the opinion, therefore, that the assessments should be sustained.

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

MAR 26 1965

SOLOMON SIEG

Hearing Officer

Approved

Approved

April 14, 1965