

BUREAU OF LAW

MEMORANDUM

*Unincorp. Bus. Tax Determin.**Adler, Ernest**A-2*

TO: Commissioners Murphy, Palestin & Macduff

FROM: Solomon Sies, Hearing Officer

SUBJECT: ERNEST ADLER

Petition for Redetermination of a Deficiency
or for Refund of Unincorporated Business Taxes
under Article 23 of the Tax Law for the Year
1961.

File #1-6416255

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y. on September 23, 1965. The appearances and the evidence produced were as shown in the stenographic minutes and the exhibits submitted herewith.

The issue involved herein is whether the activities of the taxpayer, a hair stylist, maintaining an office in his home in connection with some of his activities, constituted the carrying on of an unincorporated business in accordance with subdivision 3, §703, Article 23 of the Tax Law.

The taxpayer filed a personal income tax return for the year 1961 in which he reported net business income in the sum of \$23,039.96. Attached to his return the taxpayer submitted withholding statements from five principals showing total income in the sum of \$10,671.50. The taxpayer listed his activities on the return as "fashion consultant". He did not appear at the hearing but was represented by an attorney who testified in connection therewith. The attorney stated that the taxpayer is considered a fashion consultant although actually he was a hair dresser or hair stylist designing hair-dos and wigs for the performers on television programs and stage productions. Some of his work was performed at home where he maintained an office and claimed rental therefor. No satisfactory explanation was given for the deduction of withholding taxes on a portion of income included in gross receipts from business although the services rendered were the same in both instances.

The taxpayer claims an exemption from unincorporated business tax on the ground that he is engaged in the practice of a profession and upon the further ground that he was an employee of the various principals whom he represented and was under their direction and control.

The attorney did not appear to be too familiar with the operations of the taxpayer and his testimony appears to be vague and indefinite. He was unable to submit information as to whether or not the taxpayer had entered into written agreements of employment with the various principals whom he represented. He was unable to state whether or not the taxpayer performed services simultaneously for the

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RE: ERNEST ADLER

various principals whom he represented. He was unable to present sufficient facts which would warrant a finding that the taxpayer was an employee of the various principals whom he represented rather than an independent contractor. It is to be noted that the taxpayer reported gross receipts from business or profession in the sum of \$53,433.65 and deducted business expenses in the sum of \$30,394.69. Although the attorney indicated at the hearing that he would submit additional information together with an affidavit from the taxpayer, he has failed to do so. On February 10, 1966, a letter was sent to the representative advising him that unless he furnished the additional information requested, a decision would be made in this matter upon the record as it is presently constituted. He has failed to respond to said letter up to the present time.

It has been held that the term "professional" as used in subdivision (c), §703 of the Tax Law exempting income of professional services from unincorporated business tax, implies knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study. People ex rel. Moffett v. Bates, 276 App. Div. 38, affirmed 301 N.Y. 797, certiorari denied, 340 U.S. 865; People ex rel. Lower v. State Tax Commission, 282 N.Y. 407 affirmed 257 App. Div. 1064, reargument denied 257 App. Div. 1064.

I am of the opinion that the activities of the taxpayer as a hair dresser or hair stylist and designer of wigs did not constitute the practice of a profession exempt from unincorporated business tax in accordance with the intent and meaning of subdivision (c), §703, Article 23 of the Tax Law. I am of the further opinion that the activities of the taxpayer on behalf of the various principals whom he represented constituted that of an independent contractor and not that of an employer-employee relationship.

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

MAR 10 1966

COMMISSION SIES

Hearing Officer

/s/

MARTIN SCHAPIRO

Approved

/s/

SAUL HECKELMAN

Approved.

SS/te

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

ERNEST ADLER

File #1-6416293

FOR A REDETERMINATION OF A DEFICIENCY OR
FOR REFUND OF UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW FOR
THE YEAR 1961.

Ernest Adler, the taxpayer herein, having filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the year 1961, and a hearing having been held at the office of the State Tax Commission at 80 Centre Street, New York, N.Y., on the 23rd day of September, 1965, before Solomon Dies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer did not appear but was represented by Albert A. Rottig, Esq., testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed a New York State income tax resident return for the year 1961 in which he reported total income from Line 9 of his Federal income tax return in the sum of \$23,036.28; that the taxpayer indicated in Schedule A of his return profit from business in the sum of \$23,039.96 and total receipts from such business in the sum of \$53,433.65; that attached to said return of taxpayer were five withholding tax statements from Robert Lawrence Productions, Inc., National Broadcasting Company, Inc., Columbia Broadcasting System, Inc., Audio Productions Inc., and Marilyn Productions, Inc., showing total wages paid in the aggregate of \$10,671.70; that the aforementioned salary income was included in the business income reported by the taxpayer; that the taxpayer on said return reported his occupation as that of "fashion consultant"; that the taxpayer did not file any unincorporated business tax return for the year 1961; that on August 17, 1964, the Department of Taxation and Finance issued a statement of audit changes making an adjustment in the personal income of the taxpayer to include an addi-

tional income the sum of \$2,157.36 to conform with the audit of his Federal return resulting in additional personal income tax in the sum of \$215.74 which has been paid and is not being contested; that in addition, it was held that the business activities of the taxpayer constituted the carrying on of an unincorporated business and the income derived therefrom was subject to unincorporated business tax computed in the sum of \$600.68 together with interest totalling \$923.00 and a notice of deficiency issued accordingly therefor; that on his Federal income tax return, the taxpayer reported wages in the sum of \$1868.84 which he included in Schedule C (business income).

(2) That although it is contended that the taxpayer is considered to be a "fashion consultant", that "the great bulk of his work was actually fixing hair for television personalities. In the industry, the term 'Fashion Consultant' is given to such persons" (Minutes of Hearing, pp. 6 & 7); that the taxpayer "actually started new hairstyles and designs and he has been in this particular business for at least 20-25 years" (Minutes of Hearing, p. 7); that the taxpayer at no time designed fashions or clothes; that he also designed wigs which is part of the hair styles on television (Minutes of Hearing, p. 8); that the taxpayer performed part of his work at home and claimed a rental of a portion of his apartment as a business expense; that "actually his home was his principal office" (Minutes of Hearing, p. 8); that the taxpayer reported total receipts from business or profession in the sum of \$53,433.65 and deducted business expenses in the sum of \$30,394.69; that no satisfactory explanation was given for the deduction of withholding taxes on a portion of income included in gross receipts from business, although the services rendered were the same in both instances; that although the representative for the taxpayer contends that the taxpayer was an employee of the various principals whom he represented he has failed to submit sufficient evidence which would warrant a finding that the taxpayer was in fact an "employee" and not an independent contractor; that although the representative for the taxpayer indicated at the hearing that he would submit additional information together with an affidavit from the taxpayer, he has failed to do so; that although the representative for the taxpayer was requested by letter dated February 10, 1966, to submit such additional information within ten (10) days thereof, he

has failed to do so.

(3) That the taxpayer's services as a hair stylist and designer of wigs for performers on behalf of various principals in connection with television and stage productions were performed as an independent contractor rather than as an employee of any such principal.

(4) That the hair styling activities of the taxpayer were fully described in Finding (2) above did not constitute an occupation or vocation in which a professed knowledge of some field or department of science was used and that accordingly such activities did not constitute the practice of a profession within the meaning of subdivision (c), §703, Article 23 of the Tax Law; that the occupational activities of the taxpayer constituted the carrying on of an unincorporated business in accordance with the provisions of subdivisions (a) and (b) of §703, Article 23 of the Tax Law.

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

REDETERMINES AND DECIDES:

That the occupational activities of the taxpayer as more fully set forth in Finding Nos. (2), (3) and (4) above constituted the carrying on of an unincorporated business within the intent and meaning of §703, Article 23 of the Tax Law; that the statement of audit changes and notice of deficiency are correct; that the same do not include any tax or other charge which could not have been lawfully demanded and that the taxpayer's petition for redetermination or for refund of unincorporated business taxes under Article 23 of the Tax Law be and the same is hereby dismissed.

DATE: Albany, N.Y., on the 24th day of March, 1966.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

IRA J. PALESTIN

Commissioner

Commissioner