

*Unincorp. Bus. Tax
Determinations A-2
Auchincloss, Gordon*

Commissioners Murphy, Palestin & Macduff

Solomon Sies, Hearing Officer

GORDON AUCHINCLOSS

**Application for Revision or Refund of
Unincorporated Business Taxes under
Article 16-A of the Tax Law.**

**Assessment #AB-007792 - 1959
Assessment #AB-007793 - 1960**

**Petition for Redetermination of a Deficiency
or for Refund of Unincorporated Business Taxes
under Article 23 of the Tax Law for the Years
1961 and 1962**

File #2-8101542

A hearing with reference to the above matters was held before me at 80 Centre Street, New York, N.Y. on January 5, 1965. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issues involved herein are: (1) whether the business activities of the taxpayer as a radio and television writer, producer and director are subject to unincorporated business tax in accordance with the provisions of sections 386 and 703 of the Tax Law; and (2) whether certain income received by the taxpayer during the years in issue as a radio and television writer, producer and director reported as salary income, constitutes additional business income subject to unincorporated business tax.

During the years 1959 and 1960 and prior thereto, the taxpayer was engaged as a producer, director, and writer for radio, television and industrial communications which includes motion pictures, slide films, industrial shows and industrial exhibits. Some of the services rendered by the taxpayer consisted of consulting with certain principals from whom he received certain fees therefor. His activities were conducted from an office maintained by him at 40 East 59 Street, New York, N.Y. and in connection with said activities the taxpayer used the name of "Wilton Productions" and employed a full-time assistant primarily concerned with secretarial and bookkeeping operations and other part-time assistants from time to time.

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In 1954, the taxpayer had entered into a written agreement with CBS Radio, a package deal, for the purpose of putting on a daily radio program entitled "The Martha Wright Show". The taxpayer was unable to submit the original contract but did submit a copy of an agreement dated October 1, 1960, wherein he is referred to as "producer" and is required to furnish a script for each program and is required "to arrange for and assume the expense for the handling of all office and administrative details in connection with the production of the programs, including the handling of all normal listener mail". Compensation for the taxpayer's services was based on a participating fee for each commercial sponsor represented on the show with a minimum guarantee. The total sum was paid to the taxpayer and he in turn paid Miss Wright. Although the taxpayer claims there was a written agreement with Miss Wright he was unable to produce such agreement but instead submitted a letter from Miss Wright. The substance of the program was music--primarily from recordings. Miss Wright talked and sang her way from one record to another, weaving in commercials along the way. These connectives, including the commercial copy voiced by Miss Wright were written by the taxpayer. It would, therefore, appear that the taxpayer in connection with this program was a producer and director and also wrote the script for the commercials.

The taxpayer did not have any written agreement with Narwood Productions Inc. He submitted a letter from this firm (Taxpayer's Exhibit #12). This company was engaged in the creation and production of various radio programs for a variety of clients during the period from 1959 through 1960. It appears that the taxpayer became associated with Narwood Productions Inc. in 1959 as a producer, writer and director; that he served as a writer of these programs as well as a writer of other materials such as presentations, pamphlets and newsletters incidental to the business of said corporation; that the taxpayer wrote the continuity and commercials for all these shows (Taxpayer's Exhibit #2). The compensation paid to the taxpayer was based upon a percentage of profit. (Minutes of Hearing, pp 15 and 16). The taxpayer was asked to explain why he reported a portion of income from Narwood Productions Inc. as salary income and a portion as business income. His explanation was rather vague. He indicated that he wrote a script for a series of radio programs for the Coca-Cola Company called "The Hi-Fi Club" which was a package kit; that the method of compensation was partially salary and partially profit-sharing.

The income from the Coca-Cola Company in 1959 was pursuant to an agreement with McCann-Irickson Inc. as agent for the Coca-Cola Company wherein the taxpayer was engaged as a writer for spectacular television programs entitled "America Pauses". It appears that the taxpayer also wrote the commercials in connection with said programs.

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The taxpayer submitted two written agreements of employment with CBS Radio (as writer) for "Arthur Godfrey Time". He also submitted unsworn letters from various firms indicating that he was engaged to write for television, radio and industrial shows. Some of the services involved producing and directing and some involved writing of commercial material for promotion purposes of certain companies as well as research and background material. The taxpayer indicated that his activities with respect to salary income and to business income were essentially the same (Minutes of Hearing, p. 41).

It is to be noted that the taxpayer is not contesting the 1959 assessment of additional normal tax based upon Federal audit disallowing \$1,150.00 of the amount claimed for travel and entertainment expenses.

In the case of "The Youngs", determination of State Tax Commission dated December 15, 1954, it was held that income from the writing of radio show scripts was exempt from unincorporated business tax on the ground that such activities constitute the practice of an exempt profession.

In the case of Murray Burnett, hearing determination dated November 15, 1955, it was held that a writer-director of radio shows was exempt from unincorporated business tax.

In the instant case, however, the taxpayer's activities as a writer of commercials for commercial advertising purposes is no different from that of the commercial artist in accordance with the Court decisions in the cases of Matter of Wilson 282 App. Div. 1099 and Matter of White, 11 A.D. 2d 854, Appeal Denied 9 N.Y. 2d 995. Another element in the instant case is the fact that the taxpayer's function as a writer for radio, television and industrial shows was inseparable and indivisible from his function as a writer for commercial advertising purposes in connection with said shows.

In the case of Matter of Salter v. Murphy, 11 A.D. 2d 262, the Court held that the State Tax Commission properly sustained assessments of unincorporated business taxes under article 16-A of the Tax Law on the earnings of a group, of which petitioner was a member, who were bound under an agreement which provided for the production of a radio and television show; that there was substantial evidence that the agreement created a partnership under subdivision 11 of section 350 of the Tax Law; that while the services of a professional man such as petitioner, who is a musical director and orchestra leader, may not be taxed under article 16-A, petitioner may be so taxed for his income which is derived from nonprofessional activities. At page 265, the Court stated:

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"This agreement, and all that was done pursuant to it, certainly provides multiple indications of a joint venture. Petitioner's argument that the mode of payment was only a fee-paying arrangement might be acceptable, especially when coupled with the facts that he had no right to contract with others and most 'outside' obligations were lodged with Cowan, Inc. But the parties to the contract all had the right of 'general supervision', the right to substitute their services without sacrificing all their income, and the right to settle disputes by a majority vote. An agreement mixed as this one is provides a factual question for the commission's determination. There is much more here indicative of a business situation than there was in Matter of Veorhees (308 N.Y. 184)".

I am of the opinion that, despite the contention of the taxpayer at the hearing that more than 80% of his activities were actually performed as a writer and that his activities as producer and director were merely incidental to his script writing, the taxpayer's activities were intertwined as producer, director and writer; that his writing consisted primarily of commercial material; that the writing of commercials for commercial advertising purposes was inseparable and indivisible from the functions performed by him solely as a script writer for television, radio and industrial productions; that with respect to the salary income reported by the taxpayer, he has failed to establish that the principals whom he represented exercised sufficient supervision, direction or control to constitute an employer - employee relationship and that taxpayer was therefore an independent contractor rather than an employee of such principals; that the salary income reported by him during the years in issue was closely connected and integrated with the business income reported by him so as to constitute additional business income; that the activities of the taxpayer constituted the carrying on of an unincorporated business in accordance with sections 386 and 703 of the Tax Law.

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.

August 1, 1966

SOLOMON SIES
Hearing Officer

/s/

MARTIN SCHAPIRO

Approved

/s/

SAUL HECKELMAN

Approved

To Martin Schapiro, Esq.
Law Bureau

Returned with thanks --

7/3/69

From Edward Rook

Mr. Rook:

Mr. Schapiro brought these papers down for your perusal and suggested that if you need copies to be retained here, we could have them xeroxed. The attachments must be returned to him.

6/25/69

To Mr. Newman *LM* Grace
Mr. Boylan *AB*
Mr. Wright *WJW*

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

GORDON AUCHINCLOSS

FOR A REDETERMINATION OF A DEFICIENCY
OR FOR RETURN OF UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW
FOR THE YEARS 1961 and 1962.

Gordon Auchincloss, 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 years 1961 and 1962 (File No. 2-8101542) and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, N.Y. on the 5th day of January, 1965, before Solomon Sles, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and was represented by Gerald Berg, CPA, testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Gordon and Jane Auchincloss filed a New York State combined income tax return for the year 1961 (Form IT-208) in which the taxpayer Gordon Auchincloss reported salary income from Narwood Productions Inc., Columbia Broadcasting System, Inc., Henry Jaffe Enterprises, Inc., and National Broadcasting Company, Inc., totalling \$23,450.00, as "television and radio writer, producer and director", that the taxpayer Gordon Auchincloss reported on Form IT-202 (New York State Unincorporated Business Tax Return) gross income from business as "television and radio writer, producer and director" in the sum of \$33,033.00, net profit from said business in the sum of \$13,257.30 and computed and paid unincorporated business tax in the sum of \$203.02; that Gordon and Jane Auchincloss filed a New York State combined income

tax return for the year 1962 in which the taxpayer Gordon Auchincloss reported salary income from Henry Jaffe Enterprises, Inc., Ellsworth Productions, Inc., Columbia Broadcasting System, Inc., Narweed Productions, Inc. and National Broadcasting Company totalling \$23,575.00 as "writer, director and producer", that the taxpayer Gordon Auchincloss reported on Form IT-202 gross income from business as "television and radio writer, director and producer" in the sum of \$26,334.00, business expenses in the sum of \$14,754.53, net profit from said business in the sum of \$11,579.47 and computed and paid unincorporated business tax in the sum of \$141.08; that on April 20, 1964, the Department of Taxation and Finance issued a statement of audit changes holding the salary income reported by the taxpayer Gordon Auchincloss to be subject to unincorporated business tax on the ground that said salary income is related to and integrated with the business income reported by him and constituted additional unincorporated business income and imposed additional unincorporated business tax in the sum of \$824.92 for the year 1961 and \$865.00 for the year 1962 and accordingly issued a notice of deficiency therefor.

(2) That during the years 1961 and 1962 and prior thereto, the taxpayer was engaged as producer, writer and director for radio, television and industrial shows and industrial exhibits; that some of the services rendered by the taxpayer consisted of consultations with certain principals from whom he received certain fees therefor; that the taxpayer's activities were conducted from an office maintained by him at 40 East 49th Street, New York, N.Y.; that he deducted on his returns the rental expense of said office; that in connection with said activities, the taxpayer employed a full-time assistant primarily concerned with secretarial and bookkeeping operations and other part-time assistants from time to time; that in connection with said activities, the taxpayer used the trade name of "Wilton Productions"; that more than 80% of the gross income of the taxpayer during the years in issue was derived from the personal services actually rendered by him and that capital was not a material income-producing factor.

(3) That in 1959, the taxpayer became associated with Narwood Productions, Inc., a domestic corporation having its principal place of business at 40 West 49th Street, New York, N.Y. and engaged in the creation, production and direction of various radio and television programs for a variety of clients; that the taxpayer entered into an oral agreement with said corporation whereby he was to render his services as a producer, writer and director on a profit-sharing basis and later on a salary basis (Minutes of Hearing, pp. 14 & 16); that in 1961, the taxpayer became an officer of Narwood Productions Inc. and owner of 1/3 of the shares of stock of said corporation; that some of the services performed by the taxpayer on behalf of Narwood Productions Inc., during the years in issue consisted of writing scripts for programs in which the aforementioned principal was interested, including the commercials as well as other materials, such as presentations, pamphlets and newsletters incidental to the business of said corporation, that the taxpayer wrote the continuities and commercials for all televised shows and prepared the presentation material and the magazine and direct mail advertising on behalf of the principal, Narwood Productions Inc. (Taxpayer's Exhibit #2).

(4) That the taxpayer has failed to establish with respect to the income reported by him as "salaries" that the principals whom he represented exercised sufficient supervision, direction and control so as to constitute an employer-employee relationship; that the taxpayer was an independent contractor and not an employee of such principals; that the salary income reported by the taxpayer on his income tax returns for the years in issue was integrated and connected with the business income reported by him on said returns and in furtherance of his business activities so as to constitute additional business income.

(5) That the writing of scripts by the taxpayer was inter-related and connected with his writing of commercials and other material for advertising purposes so as to be indivisible and inseparable therefrom; that the writing of commercials and other material for advertising purposes does not constitute the practice of a recognized profession, for income tax purposes; that the activities of the taxpayer

during the years in issue constituted the carrying on of an unincorporated business; that such unincorporated business was carried on solely within the State of New York.

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

DECIDES:

(A) That the activities of the taxpayer during the years 1961 and 1962 did not constitute the practice of a recognized profession except from unincorporated business tax but did constitute the carrying on of an unincorporated business within the intent and meaning of section 703 (c) of the Tax Law.

(B) That, with respect to the salary income reported by the taxpayer on his returns for the years in issue, the taxpayer was not an employee of the principals whom he represented but was an independent contractor as set forth in Finding (4) above; that the salary income reported by the taxpayer for the years in issue was related, connected and integrated with his business income and in furtherance of said business activities so as to constitute additional business income subject to unincorporated business taxes in accordance with the provisions of section 703 of the Tax Law.

(C) That, accordingly, the statements of audit charges and notice of deficiency imposing additional unincorporated business tax together with penalty and interest against the taxpayer 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 of a deficiency or for refund filed with respect thereto be and the same is hereby dismissed.

DATED: Albany, New York, on the 10th day of August, 1966.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
President

/s/

IRA J. PALESTIN
Commissioner

/s/

JAMES R. MACDUFF
Commissioner

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

GORDON AUCHINCLOSS

FOR REVISION OR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 16-A OF THE
TAX LAW FOR THE YEAR 1959 AND UNDER
ARTICLE 23 OF THE TAX LAW FOR THE YEAR
1960.

Gordon Auchincloss, having filed applications for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the year 1959 and under Article 23 of the Tax Law for the year 1960 and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, N.Y. on the 5th day of January, 1965, before Solomon Sles, Hearing Officer of the Department of Taxation and Finance at which hearing the taxpayer appeared personally and was represented by Gerald Berg, C.P.A., testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer Gordon Auchincloss filed a personal income tax return for the year 1959 in which he reported salary income as television writer, producer and director received from Coca-Cola in the sum of \$17,100.00 and from Harwood Productions Inc. in the sum of \$15,541.82; that attached to said return was a Form IT-202 (Unincorporated Business Tax Return) in which the taxpayer reported gross income for said year in the sum of \$76,707.23 from business as television and radio writer, producer and director doing business as Wilton Productions and maintaining an office at 40 West 49th Street, New York City; that the business income included the sum of \$9,070.78 received from Harwood Productions Inc.; that the taxpayer deducted

business expenses of \$71,945.32 so that the net income from business amounted to \$4,781.91; that in view of the statutory exemption of \$5,000.00, the taxpayer reported no unincorporated business tax due for said year; that on April 27, 1962, the Department of Taxation and Finance made an additional assessment against the taxpayer for the year 1959 (Assessment AB-007792) based on Federal audit of his 1959 return to include the sum of \$1,150.00 disallowed for travel and entertainment expenses and imposed additional normal tax in the sum of \$115.00; that the taxpayer is not contesting that portion of the assessment of additional normal tax, which he has already paid; that, in addition, the salary income reported in the sum of \$32,641.82 was held subject to unincorporated business tax on the ground that it is related to and integrated with the business income reported; that accordingly unincorporated business tax was imposed in the sum of \$1,107.95.

(2) That Gordon Auchincloss and Jane Auchincloss filed a New York State combined income tax return (Form IT-208) for the year 1960; that the taxpayer Gordon Auchincloss reported salary income as television and radio writer, producer and director from Karwood Productions, Inc., Kate Smith Productions Inc. and Columbia Broadcasting Inc. in the sums of \$41,696.91, \$9,600.00 and \$1,500.00 respectively; that the taxpayer Gordon Auchincloss filed an unincorporated business tax return (Form IT-202) for the year 1960 in which he reported gross income from business as television and radio writer, producer and director in the sum of \$29,900.00; that the total business expenses deducted by him on said return amounted to \$29,496.12 or a net income from aforementioned business in the sum of \$403.88; that in view of the statutory exemption the taxpayer Gordon Auchincloss did not pay any unincorporated business tax for said year; that on April 27, 1962, the Department of Taxation and Finance made an additional assessment against the taxpayer for the year 1960

(Assessment #A8-007793) so as to include the salary income of \$52,796.91 subject to unincorporated business tax on the ground that it is related to and integrated with the business income reported and recaptured unincorporated business tax due in the sum of \$1,728.11.

(3) That during the years 1959 and 1960 and prior thereto, the taxpayer was engaged as a producer, writer and director for radio, television and industrial communications which includes motion pictures, slide films, industrial shows and industrial exhibits; that some of the services rendered by the taxpayer consisted of consultations with certain principals from whom he received certain fees therefor; that the taxpayer's activities were conducted from an office maintained by him at 40 West 49 Street, New York, N.Y.; that he deducted on his returns the rental expense of said office; that in connection with said activities, the taxpayer employed a full time assistant primarily concerned with secretarial and bookkeeping operations and other part time assistants from time to time; that in connection with said activities, the taxpayer used the trade name of "Wilton Productions"; that more than 80% of the gross income of the taxpayer during the years in issue was derived from the personal services actually rendered by him and that capital was not a material income-producing factor.

(4) That during the years 1959 and 1960, the taxpayer pursuant to an agreement with the Columbia Broadcasting System, originally entered into in 1954 with modifications which was in effect during the years 1959 and 1960 whereby the taxpayer was designated as "producer" in connection with the production, rehearsal and broadcast of a radio program entitled "The Martha Wright Show"; that the taxpayer was required to "furnish a script for each program and shall arrange for and assume the expense for the handling of office and administrative details in connection with the production of the program, including the handling of all normal listener mail"; that the compensation for the taxpayer's services was based on a participating fee for each commercial sponsor represented on the show, with a minimum guarantee;

that this was a package deal; that a total sum was paid to the taxpayer who in turn paid Miss Wright for her services pursuant to an agreement with her; that the substance of the program was music, primarily from recordings; that Miss Wright talked and sang her way from one record to another, weaving in commercials along the way; that these connectives including the commercial copy voiced by Miss Wright, were written by the taxpayer.

(5) That in 1959, the taxpayer became associated with Harwood Productions Inc., a domestic corporation having its principal place of business at 42 West 49 Street, New York, N.Y. and engaged in the creation, production and direction of various radio and television programs for a variety of clients; that the taxpayer entered into an oral agreement with said corporation whereby he was to render his services as a producer, writer and director on a profit-sharing basis and later on a salary basis (Minutes of Hearing, pp 14 & 16); that in 1961, the taxpayer became an officer of Harwood Productions Inc. and owner of one-third (1/3) of the shares of stock of said corporation; that some of the services performed by the taxpayer on behalf of Harwood Productions Inc., during the years in issue consisted of writing scripts for programs in which the aforementioned principal was interested including the commercials as well as other material, such as presentations, pamphlets and newsletters incidental to the business of said corporation; that the taxpayer wrote the continuities and commercials for all televised shows and prepared the presentation material and the magazine and direct mail advertising on behalf of the principal, Harwood Productions Inc. (Taxpayer's Exhibit #2).

(6) That the functions of the taxpayer as a writer of scripts for radio and television programs were interrelated and connected with his functions as a writer of commercials for advertising purposes and/or direct mail advertising for the principals whom he represented and that said functions were indivisible and inseparable; that the writing of commercials and other material for advertising purposes does not constitute the practice of a recognized profession, for income tax purposes.

(7) That the taxpayer has failed to establish with respect to the income reported by him as salaries that the principals whom he represented exercised sufficient supervision, direction and control so as to constitute an employer-employee relationship; that the taxpayer was an independent contractor and not an employee of such principals; that the salary income reported by the taxpayer on his income tax returns for the years in issue was integrated and connected with the business income reported by him on said returns and in furtherance thereof and constituted additional business income subject to unincorporated business tax; that the activities of the taxpayer during the years in issue constituted the carrying on of an unincorporated business; that such unincorporated business was carried on solely within the State of New York.

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

DETERMINES:

(A) That the activities of the taxpayer during the years 1959 and 1960 as more fully described and set forth in Findings (3), (4), (5) and (6) above did not constitute the practice of a recognized profession so as to exempt the income derived therefrom from unincorporated business tax but did constitute the carrying on of an unincorporated business subject to unincorporated business tax within the intent and meaning of Section 386, Article 16-A and Section 703, Article 23 of the Tax Law.

(B) That, with respect to the salary income reported by the taxpayer on his returns for the years in issue, the taxpayer was not an employee of the principals whom he represented but was an independent contractor as set forth in Finding (7) above; that the salary income reported by the taxpayer for the years in issue were related, connected and integrated with his business income so as to constitute additional business income subject to unincorporated business tax in accordance with the provisions of Sections 386 and 703 of the Tax Law.

(C) That, accordingly, the assessments of additional unincorporated business tax made against the taxpayer (Assessment Nos. AB-007792 and AB-007793, respectively) for the years 1959 and 1960 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 applications for revision or refund filed with respect thereto be and the same are hereby denied.

DATED: Albany, New York, on the 10th day of August, 1966.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

IRA J. PALESTIN

Commissioner

/s/

JAMES R. MACDUFF

Commissioner