

BUREAU OF LAW

MEMORANDUM

*Unincorp. Bus. Tax
Determinations A-2
Hedden, Walter P.*

TO: Commissioners Murphy, Palestin & Macduff
FROM: Solomon Sies, Hearing Officer
SUBJECT: WALTER P. HEDDEN
1959 Application for Revision or Refund
Articles 16 and 16-A

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y. on December 11, 1963. 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 activities of the taxpayer as a transportation economist and consultant constitute the practice of a recognized profession so as to exempt the income derived therefrom from the imposition of unincorporated business tax in accordance with Section 386, Article 16-A of the Tax Law; and (2) whether the taxpayer, a non-resident, is entitled to an allocation of business income for services rendered outside the state; and (3) whether the taxpayer is entitled to an allocation of business income for services performed at home.

The taxpayer received a Bachelor of Arts Degree from Williams College in 1920. He received a Master of Arts Degree from Columbia University in 1922. He was an instructor in economics of food marketing at the university extension of Columbia University. He taught graduate studies in the field of food distribution, elements of supply and demand and price-making. He is a member of the American Statistical Association and has presented technical papers and made addresses before the Metropolitan section of the American Society of Civil Engineers and has delivered lectures at Cornell, Columbia and George Washington University on technical subjects relating to transportation and economics. The taxpayer had been formerly employed for over thirty (30) years by the Port of New York Authority as Director of Port Development. He retired on a pension from the Port of New York Authority in 1953 and has been self-employed as a transportation economist and consultant since.

During the year 1959, the taxpayer was engaged as a transportation economist and consultant in connection with various port developments and transportation projects. He maintained a regular place of business at 608 Fifth Avenue, New York City, N.Y. where he employed a secretary. The taxpayer was engaged as a consultant by engineering firms and governmental agencies in connection with transportation and port development projects to study the feasibility of such projects and to submit reports in connection therewith. In most instances he would enter into written agreements pursuant to which he was furnished a field

TO: Commissioners Murphy, Palestin & Macduff

Page 2

RE: WALTER P. HEDDEN

office at the site of the project and was reimbursed in part for living and traveling expenses. He spent 19 days in England and France; 22 days in Turkey and 23 days in Trinidad. In addition, he also spent 31 days in Jacksonville, Florida and 13 days in New Jersey and Washington, D.C. The taxpayer spent 15 days in his home in Connecticut preparing reports in connection with various projects in which he was involved. Although the taxpayer contends that he used his home as an office, no evidence was submitted which would warrant a finding that his home was used as a regular place of business. He had no business telephone listing at his home; he had no stationery and he did not employ any help there. It appears that his home was merely used for convenience.

More than 80% of the gross income of the taxpayer is derived from personal services actually rendered by him and capital is not an income-producing factor.

On his return the taxpayer indicated total days worked in the year 1959 as 242 of which 123 days were worked outside of the State of New York. The taxpayer reported his income using an allocation of a non-resident employee.

Although the taxpayer filed an unincorporated business tax return for the year 1959, his representative contended that he was engaged in the practice of a recognized profession exempt from the imposition of unincorporated business tax in accordance with Section 386 of the Tax Law.

I am of the opinion that the taxpayer's activities as a transportation economist and consultant did not constitute the practice of a recognized profession on the basis of the decision in the case of Matter of Backman, 279 App. Div. 1115, 112 N.Y.S. 2d 365, affirmed 305 N.Y. 839, 114 N.E. 2d 39, where it was held that the activities of a university professor of economics as an economic consultant in private industry were carried on in the field of business and commerce and did not constitute the practice of some separate profession and that the income received from such activities was subject to the tax imposed under Article 16-A of the Tax Law upon net income of such unincorporated business.

The term "business carried on without the State" is not defined in either Article 16 or Article 16-A of the Tax Law. However, the term "business carried on within the state" is defined in Article 45 of the Personal Income Tax Regulations as a business carried on by a non-resident when he "occupies, has, maintains or operates desk room, an office, a shop, a store, a warehouse, a factory, agency or other place outside the State of New York where his affairs are systematically and regularly carried

RE: WALTER P. HEDDEN

on except from his office within the State of New York" (underscoring supplied).

Article 455 of the Personal Income Tax Regulations provides that the entire net income of a non-resident from a business, trade or profession carried on within the state as defined in Article 415 above is income from a source within the state of New York and taxable as such even though the non-resident performs services without the state.

Article 456 of the Personal Income Tax Regulations provides that no part of net income of a non-resident from a business, trade, profession or occupation carried on without the state of New York (as "business carried on" is defined in Article 415) and not carried on as so defined in this state is taxable. This is so, even though the non-resident or his representative may enter the state for the purpose of buying, selling, financing or performing any other duty in connection with the business; and even though sales may be made to or services performed for, or on behalf of, persons or corporations located within the State.

The instant case is to be distinguished from the cases of People v. Travis, 231 N.Y. 339, 132 N.E. 109; People ex rel. Monje v. State Tax Commission, 218 App. Div. 1, 217 N.Y.S. 669 and Thompson v. Mealey, 291 N.Y. 230, 48 N.E. 2d 499, reversing 264 App. Div. 437.

The cases of Travis and Monje (supra) were decided under Section 351 of the Tax Law. In the Travis case, the taxpayer was a non-resident doing business in New York City employing salesmen to take orders in foreign countries which orders were consummated there. In the Monje case, the taxpayer was a non-resident maintaining a principal office in New York City for the purchase and sale of furs. He also maintained another office in another State. In addition, the taxpayer in this case sold furs through agents in Europe and the sales were consummated there. In both cases the Court held that the income derived from sales consummated in Europe did not constitute income derived from business carried on within the State of New York.

In the Mealey case (supra) decided under Section 386-g of the Tax Law, it was held that the office maintained outside the State by a sales representative acting as the taxpayer's agent constituted a place of business outside the State maintained in the taxpayer's behalf to an extent sufficient to permit allocation of net business income for business tax purposes. Further, Department Counsel in an opinion dated September 18, 1950, held that the regular and systematic occupation of a taxpayer of space in a factory or plant of an independent contractor outside the State constituted the carrying on a business outside the State and, therefore, would authorize an allocation of part of the taxpayer's net business income outside the state for business tax purposes, even though the taxpayer did not pay rent, as such, for the use of the space.

TO: Commissioners Murphy, Palestin & Macduff

Page 4

RE: WALTER P. HEDDEN

Manual of Policy, Income Tax Bureau, Article 457, Page 1 (8-25-58) states that the allocation of a non-resident who is in business or a partnership having a non-resident member wishing to allocate net business income both within and without New York State shall only be permitted such allocation if bona fide places of business are maintained by the entity both within and without the State.

In the instant case, the services rendered by the taxpayer in foreign countries were part of a contract or agreement which required him to make studies in the field and submit reports. The agreement was indivisible so that it cannot be determined as to what portion of the agreed fees represented services performed in the foreign countries and what portion represented services performed in the taxpayer's office in New York City. The business of the taxpayer was carried on solely within the State of New York, in accordance with Section 386-g of the Tax Law as amended by Chapter 97 of the Laws of 1951 and Articles 415 and 455 of the Personal Income Tax Regulations.

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

MAR 5 - 1965

Hearing Officer

Approved

Approved

SS/kk
Encls.

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

WALTER P. REDDEN

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 1959.

The taxpayer, Walter P. Redden, 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 1959 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York City, N. Y. on the 11th day of December, 1963 before Solomon Siso, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer was represented by Jerome S. Rosenberg, Esq., 511 Fifth Avenue, New York City, N.Y. and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed a New York State non-resident return and unincorporated business tax return (Form IT-202) for the year 1959, wherein he set forth that he was engaged in business as a transportation economist and consultant at 608 Fifth Avenue, New York City, N.Y.; that on Schedule A of his personal income tax return the taxpayer set forth total income of \$22,443.32 and claimed an allocation for days worked both within and without the State of New York; that he claimed that the total number of days worked in the year 1959 was 242

and that the total number of days worked outside of the State of New York was 123; that the days worked in the State of New York was 119; that the taxpayer allocated his income to the State of New York on the basis of $\frac{119}{242} \times \$22,443.32$ or the sum of \$11,036.18 as taxable income from sources within the State of New York; that the taxpayer computed the normal tax due in the sum of \$378.53; that the taxpayer on his unincorporated business tax return for the year 1959 set forth total net income from business in the sum of \$17,324.26; that he used the same method of allocation as was used by him on his personal income tax return for apportioning part of his business income to sources within and without the State of New York and computed the unincorporated business taxes due in the sum of \$140.76 and requested a refund in the sum of \$1,480.71; that on July 27, 1960, the Department of Taxation and Finance on Form 111 (Explanation of Refund Adjustment) recomputed the normal tax due from the taxpayer in the sum of \$1,409.33 and unincorporated business tax in the sum of \$477.97 disallowing any allocation on the ground that since no place of business was maintained by the taxpayer outside of the State of New York his entire income from his business was subject to New York State taxes and issued a refund in the sum of \$132.70.

(2) That during the year 1959 the taxpayer was engaged in business as a Transportation Economist and Consultant; that he maintained an office for the regular transaction of his business in the City and State of New York where he employed a secretary.

(3) That the taxpayer received a Bachelor of Arts Degree from Williams College in 1920; that he received a Master of Arts Degree from Columbia University in 1922; that he was an instructor in economics of food marketing at the university extension of Columbia University; that he taught graduate

studies in the field of food distribution, elements of supply and demand and price-making; that he is a member of the American Statistical Association and has presented technical papers and made addresses before the Metropolitan section of the American Society of Civil Engineers and has delivered lectures at Cornell, Columbia and George Washington, University on technical subjects relating to transportation and economics; that the taxpayer had been formerly employed for over thirty (30) years by the Port of New York Authority as Director of Port Development.

(b) That during the year 1950 the taxpayer entered into a contract with Delow, Cather & Co., Consulting Engineers of Chicago, Ill., as transportation and economic consultant making a traffic and revenue study for a projected English Channel Tunnel to run from England to France; that in connection therewith he spent 19 days in England and France; that he also entered into a contract with Technical Studies, Inc., of New York to cover a supplemental report to be made by him on the ability of English road system to handle the traffic anticipated to be generated by the aforementioned tunnel project; that in connection with the aforementioned agreement the taxpayer received from Delow, Cather & Co. the sum of \$5,444.00 and the sum of \$760.00 from Technical Studies, Inc.; that in connection with such activities, the taxpayer was furnished with an office by the English and French Governments; that during the same year the taxpayer entered into a contract with Reynolds, Smith & Hills, Consulting Engineers of Jacksonville, Florida, as economic and transportation consultant in connection with the Duval County Port and Industrial Authority Development plan for a new industrial port area on the Saint John's River to submit an economic feasibility report in connection therewith; that the taxpayer received for his services in connection therewith the sum of \$10,192.00; that the taxpayer spent 31 days in Florida in connection with the aforementioned activities and was

furnished a field office by the contractor in Jacksonville, Florida; that the taxpayer entered into a contract with U. S. International Cooperation Administration to make a study of the economic, operational and administrative port problems of the Turkish ports and submit reports; that he spent 22 days in Turkey in connection therewith; that the taxpayer contends that he spent ten (10) days at his home in Connecticut in preparing subsequent reports in connection with such activities; that the taxpayer was furnished with an office by the Republic of Turkey; that the taxpayer entered into a contract with the United Nations for a Trinidad-Tobago study covering a master plan for the improvement and development of the Trinidad ports with recommendations in the administrative structure and economic analysis of the benefits to be achieved therefrom for which he received \$2,000.00; that he spent 23 days in Trinidad and five (5) days at his home in Connecticut in preparing a report in connection with this activity; that the taxpayer was furnished with an office by the Trinidad Government; that the taxpayer was engaged by the Port of New York Authority whereby he attended conferences and consulted with the Executive Director and staff on problems related to planning and policy making decisions; that he attended conferences in Washington, D.C., New Jersey and New York; that 13 days were spent by him outside of the State of New York in connection therewith; that the taxpayer received from the Port of New York Authority for such services the sum of \$4,999.75 for said activities; that in addition thereto, the taxpayer entered into a contract with Rochester-Monroe County Port Authority for advice on economics and port management problems on a retainer basis; that the taxpayer received extra compensation from the Ford Foundation in connection with the International Institute of Education for a project in Delai, India which was performed in 1957 and 1958 and for which the taxpayer submitted additional reports in 1959.

(5) That the taxpayer now contends that his activities

as a transportation economist and consultant constitutes the practice of a recognized profession so as to exempt his income from unincorporated business tax; that although the taxpayer contends that he used his home as an office where he prepared reports in connection with his activities on various occasions the taxpayer did not maintain an office or occupy, have, maintain or operate any desk room, an office, a shop, a store, a warehouse, a factor, agency or other place outside of the State of New York where his affairs in connection with the activities heretofore described were systematically and regularly carried on; that the taxpayer did not maintain a regular place of business at his residence in Connecticut where his activities were systematically and regularly carried on; that the business of the taxpayer during the year 1959 was not carried on both within and without the State of New York but was carried on solely within the State of New York as the term "business carried on" is defined in Article 415 of the Personal Income Tax Regulations.

(6) That more than 80% of the gross income of the taxpayer is derived from personal services actually rendered by him and capital is not an income producing factor.

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

DEFINITIONS:

(A) That during the year 1959 the taxpayer's activities as a transportation and economic consultant, more fully described in finding (4) above, did not constitute the practice of a recognized profession exempt from the imposition of unincorporated business taxes in accordance with Section 386 of the Tax Law; that the taxpayer's activities during the year 1959 constituted the carrying on of an unincorporated business within the State of New York and his income derived therefrom was subject to the imposition of unincorporated business tax in accordance with the intent and meaning of Section 386, Article 16-A of the Tax Law.

(B) That the taxpayer was not entitled to an allocation

of income for business alleged to have been carried on both within and without the State of New York within the intent and meaning of Section 386-g of the Tax Law as amended by Chapter 97 of the Laws of 1951, then in effect and Articles 415 and 455 of the Personal Income Tax Regulations.

(C) That, accordingly, no recomputation, revision, resettlement or refund of the taxes for the year 1959 can be made and that the application for revision or refund filed by the taxpayer with respect thereto be and the same is hereby denied.

DATED: Albany, New York on the 25th day of October , 1965 .

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

Commissioner

/s/

IRA J. PALESTIN

Commissioner

/s/

JAMES R. MACDUFF

Commissioner