

BUREAU OF LAW

MEMORANDUM

*Unincorporated Business Tax
Determinations A-Z
Hersberg & Schipper*

TO: Commissioners Murphy, Palestin & Macduff

FROM: Solomon Sies, Hearing Officer

SUBJECT: HENRY HERZBERG & ARNOLD SCHIPPER
individually and as co-partners d/b/a
the firm name and style of:
HERZBERG & SCHIPPER

1958 Assessment #AB-013068

1959 Assessment #AB-013069

Article 16-A

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y. on January 6, 1965. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issue involved herein is whether the activities of Henry Hersberg and Arnold Schipper, during the years in issue, constituted the carrying on of an unincorporated business subject to unincorporated business tax in accordance with the provisions of Section 386, Article 16-A of the Tax Law.

Prior to 1958, Henry Hersberg and Arnold Schipper were separately engaged as salesmen on a commission basis. Both of the aforementioned individuals represented H & H Stationery Co. Inc. and others in the sale of office supplies on a commission basis. In 1958, Schipper and Hersberg entered into an oral arrangement whereby they agreed to pool or share the salaries, fees, commissions or other compensation which they received from H & H Stationery Co. Inc. and also share equally the expenses in connection with said income.

Hersberg and Schipper filed with the U.S. Internal Revenue Bureau partnership returns for the years 1958 and 1959, showing their combined income and expenses and their distributive share derived therefrom. Neither Hersberg nor Schipper filed New York State unincorporated business tax returns for the years 1958 and 1959. Accordingly, the Income Tax Bureau issued assessments of unincorporated business taxes against Henry Hersberg and Arnold Schipper, individually and as co-partners doing business under the name and style of Hersberg and Schipper. It is to be noted that the corporation did not deduct withholding or Social Security taxes from the income of either one of the aforementioned individuals and that the principal, H & H Stationery Co. Inc. regarded them as independent salesmen and not as employees.

TO: Commissioners Murphy, Palestin & Macduff
RE: HENRY HERSBERG & ARNOLD SCHIPPER d/b/a
HERZBERG & SCHIPPER

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The taxpayer, Arnold Schipper, contends that the accountant erroneously filed partnership returns for him and Hersberg; that these returns were filed primarily for the purpose of showing the sharing of expenses.

I am of the opinion that the taxpayers, Arnold Schipper and Henry Hersberg, by sharing income and expenses, were in effect engaged in a joint venture and were therefore carrying on an unincorporated business subject to unincorporated business tax in accordance with Section 386, Article 16-A 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.

OCT 5 - 1965

SOLOMON SIES

Hearing Officer

/s/ MARTIN SCHAPIRO
Approved

/s/ E. H. BEST
Approved

ss/te

BUREAU OF LAW

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OCT 5 - 1965

SOLOMON SIES

Hearing Officer

/s/ MARTIN SCHAPIRO
Approved

/s/ E. H. BEST
Approved

SS/te (10/25/65)

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATIONS

OF

HENRY HERSBERG & ARNOLD SCHIPPER,
individually and as co-partners d/b/a the
firm name and style of:

HERSBERG & SCHIPPER

FOR REVISION OR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 16-A OF THE
TAX LAW FOR THE YEARS 1958 AND 1959.

Arnold Schipper, individually and as a co-partner doing business under the firm name and style of Hersberg & Schipper, having filed applications for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the years 1958 and 1959 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, N.Y., on the 6th day of January, 1965, at which hearing the taxpayer Arnold Schipper appeared personally and was represented by Martin L. Futterman, CPA, testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Henry Hersberg and Arnold Schipper, for the years 1958 and 1959, filed U.S. partnership returns of income (Internal Revenue Service Form 1065) under the name of Hersberg & Schipper, indicating that they were engaged in the business of wholesale stationery; that neither Hersberg nor Schipper filed New York State partnership or unincorporated business tax returns for the years 1958 and 1959; that, accordingly, on July 5, 1962, the Department of Taxation and Finance made assessments of unincorporated business tax under Article 16-A of the Tax Law against Henry Hersberg and Arnold Schipper, individually and as co-partners doing business under the firm name and style of Hersberg and Schipper, for the years 1958 and

1979 (Assessment Nos. AB-013068 and AB-013069, respectively).

(2) That prior to 1958, Henry Hersberg and Arnold Schipper were separately engaged as salesmen of stationery and office supplies on a commission basis on behalf of H & H Stationery Co. Inc. and others; that in 1958 Arnold Schipper and Henry Hersberg entered into an oral arrangement whereby they agreed to pool or share their fees and commissions equally and also agreed to equally share the expenses incurred by them in connection with said income.

(3) That Henry Hersberg and Arnold Schipper covered the same or similar territory; that they would travel sometimes in one car and sometimes in separate cars (Minutes of Hearing, page 9); that the customers Arnold Schipper solicited were mostly church organizations and other associations; that the customers Henry Hersberg solicited were mostly factories and offices; that the expenses were split 50-50 (Minutes of Hearing, page 12); that the taxpayer Arnold Schipper testified, "I told him that we should put all the customers together and whatever you make on commission and I make, we will split. And that we will also split our expenses" (Minutes of Hearing, page 11); that neither Henry Hersberg nor Arnold Schipper were reimbursed for expenses by any of the principals whom they represented; that the taxpayer Arnold Schipper testified that Henry Hersberg "was given, by the company, in his books half of his commission and half of mine and vice versa. In many cases he made customers on his own or there was a difference in percentage. Sometimes I got 60 per cent and he got 40 or vice versa. We weren't actual partners, just on split commission. We went together just for comfort and split the commission. Not to be alone on the road." (Minutes of Hearing, page 12); that the principal, H & H Stationery Co. Inc. did not deduct withholding taxes or pay Social Security on behalf of Henry Hersberg or Arnold Schipper nor in any wise treat or regard them as employees but as independent salesmen (Minutes of Hearing, page 12).

(4) That during the years 1958 and 1979, Henry Hersberg and Arnold Schipper held themselves out as co-partners; that they shared equally commission income and expenses in connection with said income.

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

DETERMINE:

(A) That the activities of Henry Hersberg and Arnold Schipper, during the years 1958 and 1959, constituted the carrying on of an unincorporated business subject to unincorporated business tax in accordance with the intent and meaning of Section 304, Article 16-A of the Tax Law.

(B) That, accordingly, the assessments for the years 1958 and 1959 (Assessment AB-013068 and AB-013069, respectively) are correct; that said assessments do not include any tax or other charges which could not have been lawfully demanded and that the applications of Arnold Schipper, individually and as a co-partner doing business under the firm name and style of Hersberg & Schipper, for revision or refund of unincorporated business taxes on the aforementioned assessments be and the same are hereby denied.

DATED: Albany, New York, on the 19th day of November, 1965

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

IRA J. PALESTIN

Commissioner

/s/

JAMES R. MACDUFF

Commissioner