

BUREAU OF LAW
MEMORANDUM

Unincorp. Bus. Tax Determination

A-2

Jordan, George J.
JUL 13 1964

TO: Deputy Commissioner Igoe

FROM: Mr. Kelliher

SUBJECT: GEORGE J. JORDAN

Article 16-A of the Tax Law
1952 Through 1958 Assessments

INCOME TAX UNIT
NEW YORK OFFICE
JUL 13 1964
DIRECTOR

(Determination dated 5/10/65)

The issue in this case is whether the taxpayer, who in the years in question was successively a salesman, a zone sales manager and a divisional manager, working under a contract for commissions and overriding commissions for a corporation which sold annuities, mutual funds, and life insurance is to be considered in the circumstances to be an employee of the corporation rather than an independent contractor conducting an unincorporated business.

In a practical sense the question insofar as it refers to his activities as a salesman is a policy question whether the ruling of June 19, 1959, governing salesmen of life insurance is to be extended to the taxpayer who also and primarily sold annuities and mutual funds.

If the ruling is so extended, the further question is whether he does not have to be considered an employee in his capacities as a zone sales manager and divisional manager also, where he had supervisory duties of other salesmen who sold for the corporation for commissions under contract with the corporation and who were not his employees.

The proposed determination holds that the taxpayer was not liable for unincorporated business tax either as a salesman or as a manager. I agree with the proposed determination.

The facts are these: for the years 1952 through 1956, the taxpayer did not file Forms 202 for unincorporated business tax but for each of these years Notices of Additional Assessment were computed; he did report and pay unincorporated business tax for the years 1957 and 1958 in the amounts of \$127 and \$152 and also made payments under the Notices of Additional Assessment. He filed applications for revision or refund, the timeliness of some of which are in issue, and he had a preliminary hearing in 1957. A recommendation in favor of the taxpayer except on the issue of timeliness as to some years was not carried through but the taxes were affirmed pending a determination after formal hearing.

In the years 1952 and 1953, the taxpayer worked as a salesman selling mutual funds, annuities and to a small extent, life

insurance for Investors Diversified Services, Inc., a foreign corporation, which acted as a selling and investment management agency for a syndicate of affiliated corporations and for an independent insurance company, and received its earnings from commissions on the sales and management services that it rendered for the other affiliated corporations and on the sale of insurance. It sold annuities for Investors Syndicate Title and Guarantee Company, Inc. and mutual funds for Investors Mutual Inc., Investors Stock Fund Ind. and three other "Investors" mutual funds companies. In the case of insurance, it sold policies of the Federal Life and Casualty Company, an insurance carrier which was not affiliated with the syndicate. The taxpayer was recruited and trained as a salesman by the corporation and was hired under a contract which denominated him an independent contractor. The contract, however, was terminable on fifteen days notice or, for cause, without notice. He was subject to supervision by the corporation in respect to the volume of sales produced, the ethical standards used in selling and the sound credit of the persons to whom he made sales. He was not permitted to engage in any outside business activities. As a salesman he used the offices which were maintained by the corporation through the zone manager, and he did not have an office of his own or any employees.

From 1954 through 1956 he served as a zone sales manager for the suburban New York City area and received overriding commissions on the sales of his staff of salesmen whom he supervised in addition to commissions on his own sales. In 1957 and 1958 he served as a divisional sales manager for the region of Long Island, New York City, and the counties contiguous to New York City, and was paid in the same way by commissions and overriding commissions. As a zone manager and divisional manager he supervised and reported to the corporation on the performance of the salesmen under him. As a manager he made the disbursements for the local office including the salaries of three office employees and he was fully reimbursed by an office expenses fee paid by the corporation on a monthly basis by invoices on the corporation.

The salesmen and the zone managers and division managers were regarded by the corporation as independent contractors and they were not covered for Social Security, Unemployment Insurance or Workmen's Compensation. Social Security payments on the salaries of the office employees were paid by the manager and were reimbursed by the office expense invoices.

The contention of the taxpayer is that the ruling of June 9, 1959, as to life insurance soliciting agents should apply to him and further that he is also to be considered an employee in his later capacities as a manager.

The ruling cited which deals with soliciting agents for life insurance companies provides that a soliciting salesman will not be subject to unincorporated business tax on commissions received

from his principal company regardless of the provision in the agreement denominating him independent contractor if he is a full-time salesman, forbidden to place insurance with another company without the consent of the principal company, and if he uses an office supplied by the company or its general agent, does not have his own stenographic assistance and is subject to both general and particular supervision by the company over his sales.

It would seem to be clear that if this ruling is extended to the taxpayer selling annuities and mutual funds and only incidentally insurance, the taxpayer would not be liable for unincorporated business taxes as to his "principal company." The position of the taxpayer here is stronger because he does not sell for any other company.

There would seem to be no sound reason for reading the ruling narrowly to apply only to salesmen of life insurance and not also to the taxpayer, whose earnings are altogether comparable and include the selling of life insurance. The policy has been to treat commission salesmen equally as a group. Consequently, the ruling of June, 1959, would seem to be applicable to the taxpayer by a legitimate extension.

Further, under the case law rule of control the taxpayer was subject to a definite degree of supervision in the respects previously stated and his contract was terminable on short notice.

The arguments the other way are that the degree of control is not patently inconsistent with a contractual relationship with a commission salesman as an independent contractor, and that basically persons are free to determine their relationship by contract in the absence of a supervening interest of the State imposing obligations on a status such as that of employment. Here it is extraordinary for government to disregard the relationship recited in the contract of the parties so that it can forego taxes in advance of any ruling that the relationship is one of employment for the social purposes in which the government has an interest; that is, of workmen's compensation, unemployment insurance, etc. However, it would seem that these salesmen should be held to be employees for those purposes if the issue were to be litigated. (Matter of Gordon, 1950, 300 N.Y. 652.)

As a zone manager and a divisional manager the taxpayer was likewise subject to control in that his contract is terminable practically at will. Further, he had supervisory duties over salesmen, and if he is held to be an employee of the corporation in his capacity as a salesman, it would be paradoxical for him to be held to be an independent contractor supervising other salesmen who are clearly not his employees and who equivalently are being deemed to be employees of the corporation. Supervision for a corporation

of its employees is not a function of an "independent contractor."

Considering his activities as a zone sales manager and divisional manager to be analogous to those of a general agent of a life insurance company, the determination of the question whether he is to be considered an independent contractor or an employee is discussed under Regulation, 20 N.Y.C.R.R. 281.3(b). There the test is whether the general agent has a marked degree of independence or whether he is accountable both as to methods and to results. Under that Regulation read as a whole it would seem that the office of the zone manager and the divisional manager here is clearly of the managerial type and that it was a company operation. Although the manager's office expenses were reimbursed rather than paid by the corporation in the first instance, they were reimbursed on so comprehensive and regular a basis that there can be little question that the reality is that the office was that of the corporation rather than his, and that the appearance of independence was contrived.

It is true that the contract of the parties, while not conclusive is to be given weight and that in the cases of "general agents" of insurance companies, which are roughly analogous, we generally have not held a general agent to be an employee and not liable except where the contract denominated him an employee. (Memorandum Clifton Baker, 1951, surveying rulings.)

But the realities of control of the kind characteristic of employment are the criterion of whether there is an employee status. (P. ex rel. Feinberg et al. v. Chapman, 274 A.D. 715.)

Unlike the insurance "general agents" held to be independent contractors, the taxpayer did not do any selling on his own, (Feinberg supra, and Matter of Wittich v. Bracone, 270 A.D. 774) or hire and fire "sub-agents" (Clancy D. Connell v. Commissioner, 267 A.D. 923).

Consequently, I believe that the conclusion of the determination that the taxpayer is not liable for unincorporated business taxes for any of the years under consideration is sound.))

May we have your comments. Kindly return the file which is being transmitted herewith.

J. J. [Signature] 6/16/64 *F. K. [Signature]*
Assistant Director

FB:mt:rlp
Enclosure
June 11, 1964

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION OF

GEORGE J. JORDAN

FOR REVISION OR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 16-A OF THE
TAX LAW FOR THE YEARS 1952 THROUGH AND
INCLUDING 1958

George J. Jordan, the taxpayer herein, having filed applications for revision or refund of unincorporated business taxes with respect to the years 1952 through and including 1958, and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York, on February 26, 1964 before Francis Boylan, Hearing Officer, and the taxpayer having been present in person and being further represented by Aaron Shapiro, C.P.A., and the record including the testimony taken at the formal hearing having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That on February 14, 1955 an assessment was issued (Assessment No. AA-823627) imposing unincorporated business taxes for the year 1952; that on November 4, 1955 the taxpayer filed an application for revision or refund of taxes imposed for such year; that on June 13, 1956 the Tax Commission denied the taxpayer's application and a timely demand for formal hearing was then made by the taxpayer; that, however, on June 11, 1958 the taxpayer withdrew his demand for hearing, and in November of 1959, more than three years subsequent to the date of the denial of the taxpayer's application for revision or refund, renewed his application for revision or refund.

(2) That on April 10, 1958 an assessment was issued (Assessment No. B-415464) imposing unincorporated business taxes for the year 1954; that the taxpayer filed an application for revision or refund on November 9, 1959, more than one year subsequent to the date of the issuance of the assessment.

(3) That on March 20, 1957 an assessment was issued (Assessment No. B-252411) assessing unincorporated business taxes for the year 1953; that on August 14, 1957 the taxpayer filed a timely application for revision or refund of taxes imposed for the year 1953; that on January 28, 1959 assessments were issued imposing unincorporated business taxes for the years 1955 and 1956 (Assessment Nos. B-537994 and B-537995 for each of the years, respectively) and applications for revision or refund of such assessments were filed by the taxpayer on November of 1959; that a denial of the applications for the years 1953, 1955 and 1956 was issued on March 14, 1960 and that the taxpayer on June 1, 1960 filed timely demands for formal hearings in connection therewith.

(4) That on April 15, 1958 the taxpayer filed an unincorporated business tax return reporting unincorporated business tax income for the year 1957 and paid the unincorporated business tax thereon; that on April 15, 1959 the taxpayer filed an unincorporated business tax return reporting unincorporated business tax income for the year 1958 and paid the unincorporated business tax thereon; that on November 9, 1959 the taxpayer filed timely applications for refund of such taxes paid; that on May 20, 1960 the taxpayer's applications for refund for such years were denied; that on June 1, 1960 the taxpayer filed timely demands for formal hearing with respect to such years.

(5) That the taxpayer's earnings in the year 1953 were derived entirely from his commissions as a salesman selling mutual funds, annuities, and life insurance for Investors Diversified

Services, Inc., a sales corporation engaged in making sales of annuities, mutual funds and insurance, the annuities being placed with Investors Syndicate Title and Guarantee Company, and the mutual funds with Investors Mutual Inc., Investors Stock Fund, Inc. and three other affiliated mutual funds corporations, and the insurance being placed with Federal Life and Casualty Company, an independent unaffiliated insurance carrier.

(6) That in the years 1955 and 1956 he served as a zone sales manager for suburban New York City, receiving commissions on his own sales and overriding commissions on the sales of salesmen whom he supervised; and in 1957 and 1958 he served as a divisional sales manager supervising a larger area consisting of Long Island, New York City and contiguous counties and being remunerated similarly by commissions and overriding commissions.

(7) That the taxpayer at all times during the years 1953 and 1955 through 1958 worked full time in behalf of Investors Diversified Services, Inc. and was required to do so.

(8) That as a salesman he did not maintain an office of his own, using the office provided by the corporation at Hempstead, New York, the expenses of which were paid out in the first instance by the manager and fully reimbursed on a regular basis by monthly invoices; that as a salesman he was recruited and trained by the corporation, was not permitted to engage in other business activity and was supervised by the corporation in respect to production of sales, the ethical standards of salesmanship used and the financial responsibility of the persons to whom he made sales.

(9) That as a sales manager and later as a divisional sales manager at Mount Vernon, New York, he used an office maintained in the corporation's name, the costs of which, including salaries for three office workers, were met by him in the first instance but were fully reimbursed to him monthly by invoices

on the said corporation; that he supervised and reported to the corporation upon the sales made by salesmen under him who operated under contracts between the corporation and themselves, and not between them and him.

(10) That the taxpayer both as a salesman and as a manager was engaged under a contract which recited that he was not an employee but an independent contractor; but said contract provided for termination of the contract upon 15 days notice, or, for cause, without any notice.

(11) That the taxpayer was not regarded by the corporation that he represented as its employee for purposes of Social Security, Unemployment Insurance or Workman's Compensation, and he was not covered.

(12) That the taxpayer both as a salesman and as a zone sales manager and later as a divisional sales manager was under such a degree of control by the Investors Diversified Services, Inc., as it is found, that he may be deemed to be its employee rather than an independent contractor for the purposes of determining his responsibility under Article 16-A imposing unincorporated business taxes on persons who are themselves engaged in conducting an unincorporated business.

Upon the foregoing facts and findings and all the evidence presented herein, the State Tax Commission hereby

DETERMINES:

(A) That since the taxpayer had withdrawn his demand for formal hearing with respect to the assessment issued for the year 1952, the taxpayer's renewal of his application for revision or refund made in November of 1959 (see finding of fact No. 1) was neither a timely application for revision or refund nor a timely demand for hearing in accordance with section 374 of the Tax Law; that accordingly the assessment imposing unincorporated business taxes for the year 1952 is hereby affirmed.

(B) That the taxpayer's application as to the year 1954 dated November 6, 1959, (see finding of fact No. 2) was not made within two years of the return or payment thereof or within one year of the related Notice of Additional Assessment dated April 10, 1958, as required under Tax Law section 374, and is denied as untimely made.

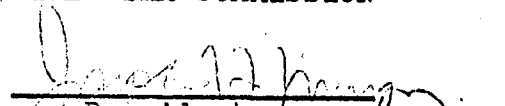
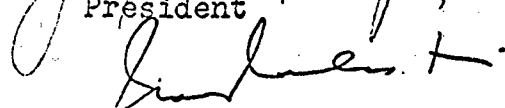
(C) That the taxpayer who rendered services for Investors Diversified Services, Inc., as a salesman during the year 1953, as a salesman and zone sales manager during the years 1955 and 1956 and as a salesman and division manager in 1957 and 1958 was not conducting a business within the intent and meaning of the provisions of section 386 of the Tax Law and his total earnings in the said years were not subject to unincorporated business taxes under said section of the Tax Law; that accordingly the additional assessments assessing such unincorporated business taxes on said earnings for the years 1953, 1955 and 1956 were improper and are hereby cancelled.

(D) That, accordingly, the additional assessments assessing unincorporated business taxes on said earnings for the years 1953, 1955 and 1956 were improper and may be cancelled; and they hereby are cancelled in full.

(E) That, accordingly, the taxpayer is further entitled to a refund of unincorporated business taxes paid for the years 1957 and 1958, and it is so ORDERED.

DATED: Albany, New York, on the 10th day of May, 1965.

STATE TAX COMMISSION


President

Commissioner

Commissioner