

*Unincorp. Bus. Tax  
Determinations A-2  
Last, Abraham I.*

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION

OF

ABRAHAM I. LAST

FOR REVISION OR REFUND OF UNINCORPORATED  
BUSINESS TAXES UNDER ARTICLE 16-A OF THE  
TAX LAW FOR THE YEARS 1957, 1958 & 1959  
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Abraham I. Last, the taxpayer herein, having filed applications for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the years 1957, 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 15th day of October, 1964, at which hearing the taxpayer appeared personally, 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 personal income tax return for the year 1957 on which he reported on Schedule A commission income as a manufacturer's representative but did not file any unincorporated business tax return for said year; that on July 30, 1959, the Department of Taxation and Finance made an additional assessment (No. B-642368) against the taxpayer for the year 1957 holding that the business activities set forth in his return constituted the carrying on of an unincorporated business and the income derived therefrom was taxable under the provisions of Article 16-A of the Tax Law; that on April 18, 1961, the taxpayer filed an application for revision or refund (Form IT-113) with respect to the aforementioned assessment.

(2) That the taxpayer filed an unincorporated business tax return for the year 1958 on April 15, 1960, computing and paying the tax in the sum of \$87.03; that on March 6, 1961, the Department of

Taxation and Finance made an additional assessment (No. CCC-97831) imposing additional penalty and interest in the sum of \$14.36; that the taxpayer filed a personal income tax return for 1959 to which was attached Form IT-202 (unincorporated business tax return) and computed and paid the unincorporated business tax on said return amounting to \$157.89; that on April 18, 1961, the taxpayer filed timely applications for revision or refund of the taxes so paid for the years 1958 and 1959.

(3) That during the years 1958 and 1959, the taxpayer was a sales representative for about six hardware manufacturers covering the metropolitan New York, New Jersey territory on a straight commission basis; that he had no written contracts with the principals whom he represented; that he was not reimbursed for any expenses; that the principals fixed the territory the taxpayer was required to cover; that he was requested to call on certain accounts, render reports as to the results of such visits and to make regular calls on certain accounts furnished him.

(4) That the taxpayer did not maintain any office during the years in question; that he used his home solely for the purpose of storing samples required for the solicitation of customers; that the relationship between the taxpayer and the principals whom he represented was that of an employer-employee rather than that of an independent contractor.

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

**DETERMINES:**

(A) That upon the basis of Finding #1 above, the taxpayer failed to file his application for revision or refund with respect to the assessment for the year 1957 within the one-year statutory time period as required in accordance with Section 374 of the Tax Law; that, accordingly, the aforementioned assessment (No. E-642368) in the sum of \$36.45 together with interest and other statutory charges for the year 1957 is correct; that said assessment does not include any tax or other charge which could not have been lawfully demanded and that the taxpayer's application for revision or refund

with respect thereto be and the same is hereby denied.

(B) That the activities of the taxpayer as a sales representative during the years 1958 and 1959 did not constitute the carrying on of an unincorporated business in accordance with Section 386, article 16-A of the Tax Law; that, accordingly, the additional unincorporated business taxes for the years 1958 and 1959 were not due and not lawfully demanded; that the taxpayer is entitled to a refund of said taxes in the sums of \$87.03 and \$157.89 for the years 1958 and 1959, respectively, less the amount due on the assessment for the year 1957.

AND IT IS SO ORDERED.

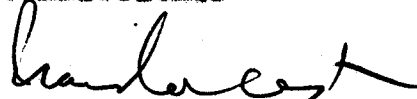
DATED: Albany, New York, on the 11th day of May, 1965.

STATE TAX COMMISSION

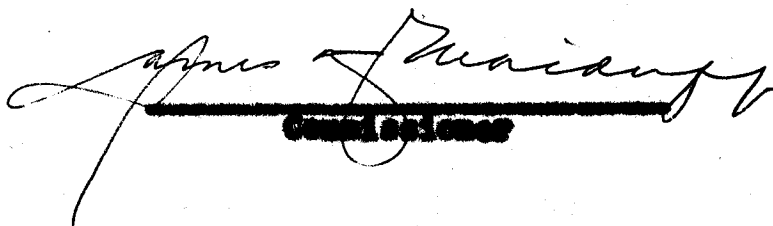
/s/

JOSEPH H. MURPHY

Commissioner



Commissioner



Commissioner

## BUREAU OF LAW

## MEMORANDUM

TO: Commissioners Murphy, Palestin & Macduff  
FROM: Solomon Sies, Hearing Officer  
SUBJECT: ABRAHAM I. LAST

1957 Assessment #B-642368  
1958 Assessment #CCC-97831  
1959 Application for Refund

Application for revision or refund of  
Unincorporated Business Taxes under  
Article 16-A, of the Tax Law for the  
years 1957, 1958 and 1959.

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N. Y., on October 15, 1964. The appearances and the evidence produced were as shown in the stenographic minutes and the exhibits submitted herewith.

The issues involved herein are: (1) whether the taxpayer filed a timely application for revision or refund with respect to the year 1957; and (2) whether the activities of the taxpayer as a sales representative for several different hardware manufacturers constituted the carrying on of an unincorporated business in accordance with Section 386 of the Tax Law.

The assessment for the year 1957 was mailed to the taxpayer on July 30, 1959. The application for revision (Form IT-113) was not filed until April 18, 1961. Since the taxpayer's application for revision or refund for the year 1957 was not filed within one year from the date of the making of the assessment, namely, on or before July 30, 1960 in accordance with Section 374 of the Tax Law, the aforementioned application for revision should be denied.

During the years 1958 and 1959 the taxpayer was a sales representative for about six to eight hardware manufacturers handling carpenters' levels, masons' tools, snow shovels, etc. He had no written contracts with the firms he represented. He was engaged on a straight commission basis. He was not reimbursed for any of the expenses incurred. None of the principals deducted withholding or social security taxes from the commission paid to him. The taxpayer covered the metropolitan New York and New Jersey territory. The principals fixed the territory the taxpayer was required to cover, requested him to call on certain accounts, render reports as to the results of such visits and to make regular calls on certain accounts furnished him.

The taxpayer testified that in 1948 he had a certificate of doing business under the name of Eastern Sales Company with an address at 277 Broadway, New York City; that when he first went into business he was advised that for personal reasons it would be best for

TO:

Commissioners Murphy, Palestin & Macduff

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RE:

ABRAHAM I. LAST

him to use a trade name; that after a few years he found that the trade name served him no useful purpose and he, therefore, abandoned the use of it; that he never maintained an office at the aforementioned address; that he merely had a telephone answering service there for which he paid \$7.00 a month; that he did not have any printed stationery; that he did not use a calling card with the name Eastern Sales Company except for the first year (Minutes of Hearing, Pages 10, 11 & 12).

It was on the basis of the fact that the taxpayer had once used a trade name that the Income Tax Bureau decided that he was carrying on an unincorporated business. The reason for the use of an answering service was that the taxpayer lived in Plainview, N.Y. and was unable to get the customers to call him all the way out on Long Island. He testified that he did not receive any mail at the 277 Broadway address; that he contracted no business at said address and that he had no desk or any office there.

In addition, the taxpayer deducted on his returns for the years in question depreciation of work room and residence, \$94.51, per year. Actually, this represents less than \$8.00 a month and in fact is the charge for storage of the taxpayer's samples which he was required to carry with him because the use of a catalog proved unsatisfactory (Minutes of Hearing, Page 17).

I am of the opinion that in the instant case the taxpayer did not maintain an office and that he was an employee rather than an independent contractor.

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

APR 7 - 1965

/s/

SOLOMON SILS

Hearing Officer

April 12, 1965

/s/

M. SCHAPIRO

Approved

/s/

F. KELLNER

Approved