

BUREAU OF LAW

MEMORANDUM

*Unincorp. Bus. Tax
Determinations A-Z
Minsky, Leo P.*

TO: Commissioners Murphy, Palestin & Macduff
FROM: Solomon Sies, Hearing Officer
SUBJECT: LEO P. MINSKY

1951 Assessment No. AA-915592
1952 Assessment No. AA-915593
1953 Assessment No. AA-950312
1956 Assessment No. B-770479
1957 Assessment No. B-813144

Article 16-A

A hearing with reference to the above matter was held before me at 80 Centre Street, New York City, N.Y. on May 24, 1964. 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 the taxpayer, a full-time life insurance soliciting agent, representing New England Mutual Life Insurance Company and about 14 additional life insurance companies, constituted the carrying on of an unincorporated business in accordance with Section 386, Article 16-A of the Tax Law.

On December 31, 1946, the taxpayer entered into a written "agent's persistency contract" with Wheeler H. King, general agent of the New England Mutual Life Insurance Company of Boston, Massachusetts to solicit and procure applications for policies for the aforementioned life insurance company. The contract provided that the agent (taxpayer) "shall be free to determine for himself the time, place and manner for solicitation of applications for policies, but without interfering with such freedom, shall conform to the rules of the company and of the general agent in the conduct of business. Nothing contained in this agreement shall be construed to create the relationship of employer and employee."

The taxpayer had an internal bookkeeping arrangement with the general agent whereby in lieu of occupying space in the general agent's office, the latter rented separate space for the taxpayer at 25 West 43rd Street in New York City. The taxpayer testified (Minutes of Hearing, Page 21) that "we had an agreement wherein he (the general agent) got 10% of the first premiums, plus one percent of the renewal premiums in the New England Mutual, which were credited against the expense items

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that were charged to me on the internal account, such as, the rent, the girls, telephones." The 10% commission on the first premiums and 1% of the renewals were held in escrow to pay the operational items of the office occupied by the taxpayer (Minutes of Hearing, Page 25). In the event that the office expenses exceeded the amount held in escrow, the taxpayer was required to reimburse the general agent.

The taxpayer was permitted to solicit life insurance through other life insurance companies where the New England Mutual Life Insurance Company would not accept such insurance or where the insured requested coverage with another life insurance company or where for special reasons, policies were better fitted to the clients' needs in other companies (Minutes of Hearing, Page 15). None of the insurance companies deducted withholding taxes and only New England Mutual Insurance Company deducted social security taxes on the commissions paid to the taxpayer.

In 1955, the taxpayer decided to refurbish the office to suit his requirements. He installed a central air-conditioning plant, re-built and repainted the offices, furnished drapes, venetian blinds and fluorescent lighting. The taxpayer incurred the entire expense of the aforementioned improvements and deducted on his return for 1956 the sum of \$1,848.51 "Amortization of leasehold." The improvements were depreciated over a five-year period. The taxpayer also deducted \$250.00 rent for a portion of his home which he maintained as a studio office to maintain his books and records in connection with both the business for New England Mutual Life Insurance Company and the business for the other insurance companies.

During the years in question the taxpayer earned commissions from about 14 other life insurance companies. In 1951 such commissions amounted to \$12,072.32; in 1952, \$16,293.56; in 1953, \$15,360.43; in 1956, \$20,994.07 and in 1957, \$30,647.02. The activities of the taxpayer in connection with this income were conducted from the office leased for him by the general agent of New England Mutual Life Insurance Company.

The taxpayer also deducted depreciation on furniture and fixtures as business expenses during the years in question; that the total business expenses deducted by the taxpayer for which he was not reimbursed was as follows: \$30,322.25 for 1951; \$31,769.03 for 1952; \$34,100.53, for 1953; \$47,331.13 for 1956 and \$53,208.64 for 1957.

The taxpayer testified at the hearing that the deductions

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claimed on his returns as salaries were actually bonuses of three months' pay to the secretarial help. The taxpayer also split his commissions with other insurance agents as reflected in the deductions claimed by him for "commissions paid" which amounted to \$1,978.94 in 1951; \$1,673.46 in 1952; \$2,817.13 in 1953, \$2,387.31 in 1956 and \$9,264.53 in 1957.

The capital expenditures of the taxpayer in making the improvements to his office, equipping same with special machines and other equipment to suit his purposes and the arrangement with the general agent of New England Mutual Life Insurance Company to pay for the rent, salary and telephone expenses of the office leased for him by the general agent indicate that the taxpayer should be considered an entrepreneur taxable on all of his commission net income in accordance with the Commission's Amended Ruling pertaining to life insurance soliciting agents dated July 25, 1960. The assessments of unincorporated business tax should, therefore, be sustained.

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

MAR 3 1965

/s/ SOLOMON SIES
Hearing Officer

SS/kk

/s/

M. SCHAPIRO

Approved

/s/

E. H. BEST

Approved

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATIONS

OF

LEO P. NIRSKEY

FOR REVISION OR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 16-A OF THE
TAX LAW FOR THE YEARS 1951, 1952, 1953,
1956 AND 1957.

The taxpayer, Leo P. Nirskey, having filed applications for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the years 1951, 1952, 1953, 1956 and 1957 and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York City, N.Y. on the 20th day of May, 1954 before Solomon Sles, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and was represented by Elias Goldin of the accounting firm of Elias Goldin & Company, New York City and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed personal income tax returns for the years 1951, 1952, 1953, 1956 and 1957 but did not file any unincorporated business tax returns for said years; that the taxpayer on Schedule A of said returns reported commission income as a life insurance soliciting agent received from Wheeler H. King, general agent for New England Mutual Life Insurance Company and about 14 other life insurance companies; that the Department of Taxation and Finance made additional assessments for the years 1951, 1952, 1953, 1956 and 1957 (Assessment Nos. AA-915592, AA-915593, AA-950312, B-770479 and B-813144, respectively) holding the total net income reported as being subject to unincorporated

business tax; that the assessment (Assessment No. AA-915793) for the year 1958 also included additional normal tax based upon the disallowance of entertainment and travelling expenses; that the taxpayer is not contesting the additional normal tax contained in said assessment.

(2) That on December 31, 1946, the taxpayer entered into a written "agent's persistency contract" with Charles F. King, general agent of the New England Mutual Life Insurance Company of Boston, Massachusetts to solicit and procure applications for policies for the aforementioned life insurance company; that the contract provided that the agent (taxpayer) "shall be free to determine for himself the time, place and manner for solicitation of applications for policies, but without interfering with such freedom, shall conform to the rules of the company and of the general agent in the conduct of business. Nothing contained in this agreement shall be construed to create the relationship of employer and employee."; that the taxpayer was permitted to solicit life insurance through other life insurance companies where the New England Mutual Life Insurance Company would not accept such insurance or where the insured requested coverage with another life insurance company or where for special reasons, policies were better fitted to the clients' needs in other companies (Minutes of Hearing, Page 15).

(3) That the taxpayer had an internal bookkeeping arrangement with the general agent whereby in lieu of occupying space in the general agent's office, the latter rented separate space for the taxpayer at 25 West 43rd Street in New York City; that the taxpayer testified (Minutes of Hearing, Page 21) that "we had an agreement wherein he (the general agent) got 10% of the first premiums, plus one percent of the renewal premiums in the New England Mutual, which were credited against the expense items that were charged to me on the internal account, such as,

the rent, the girls, telephones"; that the 10% commission on the first premiums and 1% of the renewals were held in escrow to pay the operational items of the office occupied by the taxpayer (Minutes of Hearing, Page 25); that in the event that the office expenses exceeded the amount held in escrow, the taxpayer was required to reimburse the general agent.

(4) That in 1955, the taxpayer decided to refurbish the office to suit his requirements; that he installed a central air-conditioning plant, rebuilt and repainted the offices, furnished drapes, venetian blinds and fluorescent lighting; that the taxpayer incurred the entire expenses of the aforementioned improvements and deducted on his return for 1956 the sum of \$1,848.51 "Amortization of leasehold"; that the improvements were depreciated over a five-year period; that the taxpayer also deducted \$270.00 rent for a portion of his home which he used as a studio office to maintain his books and records in connection with both the business for New England Mutual Life Insurance Company and the business for the other insurance companies.

(5) That during the years in question the taxpayer earned commissions from about 14 other life insurance companies; that in 1951 such commissions amounted to \$12,072.32; in 1952, \$16,293.96; in 1953, \$15,360.43; in 1956, \$20,994.07 and in 1957, \$30,647.02; that the activities of the taxpayer in connection with this income were conducted from the office leased for him by the general agent of New England Mutual Life Insurance Company.

(6) That the taxpayer also deducted depreciation on furniture and fixtures as business expenses during the years in question; that the total business expenses deducted by the taxpayer for which he was not reimbursed was as follows: \$30,322.25 for 1951; \$31,769.03 for 1952; \$34,100.53 for 1953; \$47,331.13 for 1956 and \$53,208.64 for 1957.

(7) That the taxpayer testified that the deductions claimed on his returns as salaries were actually bonuses of

three months' pay to the secretarial help (Minutes of Hearing, Page 19); that the taxpayer also split his commissions with other insurance agents as reflected in the deductions claimed by him for "commissions paid" which amounted to \$1,978.94 in 1951; \$1,673.16 in 1952; \$2,817.13 in 1953; \$2,367.31 in 1956 and \$2,264.53 in 1957.

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

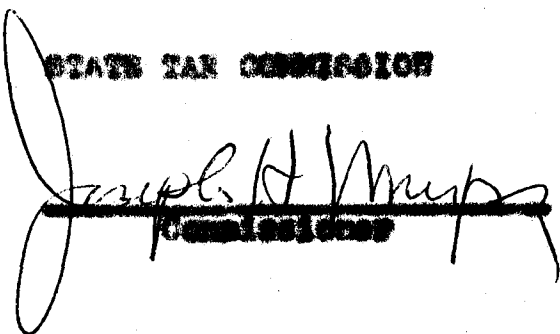
DETERMINES:

(A) That during the years 1951, 1952, 1953, 1956 and 1957 the activities of the taxpayer as a life insurance soliciting agent constituted that of an independent contractor and not that of an employer-employee relationship and that the income derived therefrom was subject to unincorporated business tax in accordance with Section 306, Article 16-A of the Tax Law.

(B) That, accordingly, the additional assessments for unincorporated business taxes for the years 1951, 1952, 1953, 1956 and 1957 (Assessment Nos. AA-915592, AA-915593, AA-950312, B-970479 and B-813144, respectively) are correct; that said assessments 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 with respect to said assessments be and the same are hereby denied.

DATED: Albany, New York on the 20th day of August, 1965.

STATE TAX COMMISSION


Commissioner

Commissioner

/s/

JAMES R. MACDUFF

Commissioner