

*Unincorp. Bus. Tax
Determinations A-2
Reiss, Lester*

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATIONS OF

LESTER REISS

FOR REVISION OR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 16-A OF THE
TAX LAW FOR THE YEARS 1957 AND 1958

Lester Reiss having duly filed applications for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law, paid by him for the calendar years 1957 and 1958, and a hearing having been held in connection therewith on August 6, 1964 at the office of the State Tax Commission, Department of Taxation and Finance Building, Albany, New York, before Martin Schapiro, Hearing Officer of the said Department, at which hearing the taxpayer appeared in person and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer, Lester Reiss, filed unincorporated business tax returns for the calendar years 1957 and 1958 stating therein that he was in his own business as a manufacturers' representative and listing his business address as his place of residence; that the taxpayer listed as deductions from income, office rent for the use of one room in his home, and other expenses including advertising, telephone, telephone answering service, and storage space; that within two years from the filing of the return, the taxpayer filed an application for refund of unincorporated business taxes paid by him on the ground that his activities did not constitute the carrying on of an unincorporated business.

(2) That during the years 1977 and 1978, the taxpayer was a salesman on a commission basis for three different firms: (A) Genco Surgical Manufacturing Corporation located in Buffalo, New York, a corporation for whom the taxpayer sold hospital equipment to surgical suppliers in the New York City area and from whom two-thirds to three-fourths of the taxpayer's income was derived, (B) the Times Facsimile Corporation located in New York City for whom the taxpayer sold electronic items to Government and industry and from approximately one-fourth of the taxpayer's income was derived, and (C) the Kelly Manufacturing Company located in New Hampshire for whom the taxpayer sold medical supplies (crutches) outside of the New York City area and from whom less than five per cent of the taxpayer's income was derived.

(3) That the taxpayer was required to instruct customers in the use of the equipment, to occasionally make repairs, and to suggest designs and changes in equipment; that the taxpayer, however, was not under any strict supervision of any of the firms, which were merely concerned with results rather than the amount of hours actually spent by the taxpayer; that no deductions from gross commissions were made by the firms who did not consider the taxpayer as an employee; that although Times Facsimile Corporation had an office in New York City, the taxpayer was not required to report to such office; that none of the firms reimbursed the taxpayer for any of the expenses incurred by him except in connection with the taxpayer's occasional required appearances at national and local meetings.

(4) That the one room in the taxpayer's home was actually the office of the taxpayer as designated by him on his return; that the taxpayer maintained his books and records

there, had a telephone answering service and received and made calls concerning his sales activities; that in addition thereto, the taxpayer maintained a storage room at a different address than his home where merchandise samples were kept and equipment necessary for repairs were placed.

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

RECOMMENDS:

(A) That the taxpayer was not an employee of any of the principals and that his activities constituted the carrying on of an unincorporated business.

(B) That, accordingly, unincorporated business taxes for 1957 and 1958 were properly paid, and the taxpayer is not entitled to any refund.

DATED: Albany, New York, on the *26th* day of *April*, 195*8*.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

IRA J. PALESTIN

Commissioner

/s/

JAMES R. MACDUFF

Commissioner

BUREAU OF LAW

MEMORANDUM

TO: Commissioners Murphy, Palestin and Macduff

FROM: Mr. Schapiro, Hearing Officer

SUBJECT: Lester Reiss applications for revision
or refund of unincorporated business
taxes for the years 1957 and 1958

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N. Y., on August 6, 1964. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issue raised herein is whether or not the taxpayer's activities as a salesman for three firms during the years involved constituted the carrying on of an unincorporated business. The facts herein disclose that during 1957 and 1958, the taxpayer was a salesman for three different firms as follows: (1) Gomco Surgical Manufacturing Corporation located in Buffalo, New York, a corporation for whom the taxpayer sold hospital equipment to surgical suppliers in the New York City area and from whom $\frac{2}{3}$ to $\frac{3}{4}$ of the taxpayer's income was derived, (2) the Times Facsimile Corporation located in New York City for whom the taxpayer sold electronic items to Government and industry and from whom approximately $\frac{1}{4}$ of the taxpayer's income was derived, and (3) the Kelly Manufacturing Company located in New Hampshire for whom the taxpayer sold medical supplies (crutches) outside of the New York City area and from whom less than 5 per cent of the taxpayer's income was derived.

The taxpayer's income was in the form of commissions made by him on sales made by the three concerns. The taxpayer was not considered or treated as an employee by either of the firms. Although the taxpayer was required, in addition to selling the equipment, to instruct in the use of the equipment and occasionally make repairs and to suggest designs and changes in the equipment, the taxpayer was not under any strict supervision of either of the firms who were concerned with results rather than the amount of hours actually spent. On the returns of income for the years 1957 and 1958, the taxpayer listed certain expenses which were deducted from the taxpayer's income including office rent representing $\frac{1}{4}$ of the amount paid by the taxpayer as rent for his apartment, storage space, telephone, telephone answering service and automobile expenses. Such expenses were not reimbursed the taxpayer by any of the principals except in connection with the taxpayer's bi-monthly appearance at national and local meetings. Although one of the principals

had an office in New York City, the taxpayer was not required to report out of such office and all calls concerning the taxpayer's work were received by the taxpayer at his home. The books and records of the taxpayer were kept at his home. In addition, the taxpayer maintained a storage room at a different address where merchandise samples were kept and where equipment necessary for repair were placed.

I am of the opinion that the taxpayer was an independent contractor and not an employee of the firms whom he represented. None of the firms considered the taxpayer as an employee. The taxpayer was with the exception of reimbursement for expenses incurred in going to meetings, not reimbursed for any of his expenses. The taxpayer was not under any direct supervision of any of his principals who were interested solely in the results. Moreover, I find that the taxpayer maintained his business office at his home, which was not merely a repository of the taxpayer's books and records, but from which the taxpayer received incoming calls concerning his selling activities and from which office the taxpayer generally conducted his business operations. I have, therefore, prepared a proposed determination sustaining the assessments on the ground that the income of the taxpayer was not income received as an employee but was derived from his activities as a salesman in his own unincorporated business.

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

Hearing Officer

MS:ca

Ene.

April 14, 1965

Approved

Approved