

BUREAU OF LAW

MEMORANDUM

A-2

*Determinations**Rosenbaum, Irving I.*

TO: Commissioners Murphy, Palestin and Macduff

FROM: Vincent P. Molineaux, Hearing Officer

SUBJECT: Irving I. Rosenbaum, Applications for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the years 1958 and 1959

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N. Y. on November 8, 1964. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issue raised herein is whether certain income received by the taxpayer during the years in question and reported as salary income constituted receipts derived from an unincorporated business pursuant to section 386 of the Tax Law.

Taxpayer alleged that during 1958 and 1959 he received compensation as an employee from certain specified corporations. The facts herein more fully set forth in the proposed determination disclose that during 1958 and 1959, the taxpayer was paid a fixed monthly fee by Charles F. Noyes Co. Inc. and Rialto Outfitters, Inc. Taxpayer was paid an annual fee, payable semi-annually, by W-R Realty Corp. During 1958, taxpayer received the sum of \$782.30 from Ruthra Realty Corporation which he also alleged was compensation earned as an employee. In 1959, taxpayer also received a broker's commission of \$20,000 from W-R Realty Corp. for services rendered in connection with the sale of the leasehold at 475 10th Avenue, New York, N. Y.

During the years 1958 and 1959, taxpayer was also engaged in his own business as a real estate consultant, appraiser and broker at 501 5th Avenue, New York, N. Y. Taxpayer, in addition to employing secretarial assistance, employed an assistant who acted under taxpayer's direction in the operation of his business.

Taxpayer did not file unincorporated business tax returns for 1958 and 1959. The taxpayer filed personal income tax returns for 1958 and 1959. Taxpayer set forth on his 1959 personal income tax return total compensation as an officer, director or employee in the amount of \$24,283.03. Taxpayer also reported consultant's compensation in the amount of \$31,062.25. The assessments for unincorporated business taxes for 1958 and 1959 were based upon taxpayer's compensation as a real estate consultant and

also included therein was certain income reported as salary income by the taxpayer. The taxpayer did not object to the assessments in regard to the compensation earned as a consultant but is of the opinion that compensation earned from the above specified corporations for the years in question was salary income and therefore was not subject to the unincorporated business tax.

The agreements which taxpayer had with Charles F. Noyes Co. Inc., Rialto Outfitters, Inc. and W-R Realty Corp. were all for the same type of services. Taxpayer testified that he did not actually manage the property of the various corporations and that his duties consisted of guiding and directing personnel within the various organizations in the management of properties. This guidance was conducted in taxpayer's office, at the scene of properties for which taxpayer's services were required or in the office of W-R Realty Corp.

Taxpayer's principals did not deduct any Federal withholding tax, F.I.C.A. or State income tax from taxpayer's earnings. W-R Realty Corp. was the only principal who maintained an office which taxpayer was authorized to use in rendering his services. This office was located at 10th Avenue and 36th Street in the City of New York and taxpayer only visited this office on an average of three or four times a month. Taxpayer was not required to spend any specified period of time at this office but was subject to call whenever W-R Realty Corp. required his services. Taxpayer incurred telephone, secretarial and other expenses in connection with his services which were not reimbursed by his principals. There was no division of time by the taxpayer's principals with respect to taxpayer's services and the amount of time taxpayer spent at his office on the requirements of his principals was determined by the particular need of the principal at the time taxpayer's services were required. Taxpayer's assistant had the authority to act for taxpayer in the fulfillment of taxpayer's arrangements with his principals.

I am of the opinion that the income received by taxpayer and reported as salary income for the years 1958 and 1959 was not salary income but was income connected with the carrying on of taxpayer's unincorporated business as a real estate consultant, appraiser and broker and is subject to the unincorporated business tax imposed under section 386 of the Tax Law.

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

/s/ VINCENT P. MOLINEAUX
Hearing Officer

February 24, 1966
RJT:jcc:ca
Enc.

/s/ MARTIN SCHAPIRO (MARCH 9, 1966)
Approved
/s/ SAUL HECKELMAN
Approved

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATIONS
OF
IRVING I. ROSENBAUM
FOR REVISION OR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 18-A OF THE
TAX LAW FOR THE YEARS 1958 AND 1959

Irving I. Rosenbaum having duly filed applications for revision or refund of unincorporated business taxes assessed under Article 18-A of the Tax Law for the calendar years 1958 and 1959, and a hearing having been held in connection therewith at the office of the State Tax Commission, 88 Centre Street, New York, N. Y. before Vincent P. Molineaux, Hearing Officer of the Department of Taxation and Finance, 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 personal income tax returns having been filed for the calendar years 1958 and 1959 and no unincorporated business tax returns having been filed for such years, assessments were thereafter issued on April 13, 1961 (Assessment Nos. B-847872 and B-847873 for the years 1958 and 1959, respectively) on the ground that the activities of the taxpayer during the years 1958 and 1959 constituted the carrying on of an unincorporated business subject to the provisions of Article 18-A of the Tax Law.

(2) That during the years involved and prior thereto, the taxpayer was engaged in his own business as a real estate consultant, appraiser and broker with his office situated at 581 5th Avenue, New York, N. Y.; that taxpayer in addition to employing secretarial

assistance, employed an assistant who acted under taxpayer's direction in the operation of his own unincorporated business.

(3) That during the years involved, taxpayer was paid a fixed monthly amount by Charles F. Hoyes Co. Inc. and Rialto Outfitters, Inc.; that taxpayer was paid an annual amount, payable semi-annually, by W-R Realty Corp.; that during 1958, taxpayer received the sum of \$782.38 from Ruthra Realty Corporation; that during 1959, taxpayer received a broker's commission of \$29,000 from W-R Realty Corp. for services rendered in connection with the sale of the leasehold at 475 18th Avenue, New York, N. Y.

(4) That the aforementioned corporations did not deduct any Federal withholding tax, F.I.C.A. or State income tax from taxpayer's earnings; that taxpayer's duties consisted of guiding and directing personnel within the aforementioned corporations in the management of properties; that this guidance was conducted in taxpayer's office, at the scene of properties for which taxpayer's services were required or in the office of W-R Realty Corp.; that W-R Realty Corp. was the only principal which maintained an office which taxpayer was authorized to use in rendering his services; that this office was located at 18th Avenue and 18th Street in the City of New York and taxpayer only visited this office on an average of three or four times a month; that taxpayer was not required to spend any specified period of time in this office but was subject to call whenever W-R Realty Corp. required his services; that taxpayer incurred telephone, secretarial and other expenses in connection with his services which were not reimbursed by his principals; that there was no division of time by taxpayer's principals with respect to taxpayer's services and the amount of time taxpayer spent at his office on the requirements of his principals was determined by the particular need of the principal at the time taxpayer's services were required; that taxpayer, in

his own unincorporated business employed an assistant who had the authority to act for taxpayer in the fulfillment of taxpayer's arrangements with the aforementioned principals.

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

DETERMINES:

(A) That during the years 1958 and 1959 the taxpayer's income from the aforementioned corporations was income derived from taxpayer's own unincorporated business and was not income earned as an employee and is therefore subject to the unincorporated business tax imposed under Article 16-A of the Tax Law.

(B) That, accordingly, the unincorporated business tax assessments issued for the calendar years 1958 and 1959 are affirmed; that such assessments are correct and do not include any other taxes or charges which are not lawfully due and owing, and the applications for revision or refund are hereby denied.

DATED: Albany, New York this 17th day of March , 1966.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
President

/s/

IRA J. PALESTIN
Commissioner

/s/

JAMES R. MACDUFF
Commissioner