

BUREAU OF LAW

MEMORANDUM

Unincorp. Bus. Pkt.
Determinations A-Z
Schwartz, Solomon & Hilda

TO: Commissioners Murphy, Palestin and Macduff

FROM: Francis X. Boylan, Hearing Officer

SUBJECT: Solomon & Hilda Schwartz, application for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the years 1956 and 1957

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N. Y. on May 14, 1964. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The taxpayer conducted an unincorporated business as the Majestic Fluorescent and Electrical Products Company, selling lighting fixtures and component parts and maintaining a store on York Avenue in Manhattan, New York, N. Y. In his application for revision or refund he took the position that commissions received on sales of other electrical parts, which he sold on a straight commission for manufacturers, were reported by him as unincorporated business income erroneously, since he did not handle that merchandise, which was consigned directly to the customers. The commissions, he maintained, were compensation received as an employee of the manufacturers. The proposed determination holds that the commissions were received by him as an independent contractor and were subject to unincorporated business tax.

As Majestic Fluorescent and Electrical Products Company the taxpayer sold lighting fixtures and component parts, operating as a principal, and buying and selling from his store. By 1956 and 1957, the years under consideration, he also had become a manufacturer's representative for sales, selling other electrical parts for about five manufacturers or suppliers, operating on straight commission and representing them in his own name, as Solomon Schwartz, in an area centering around New York, N. Y., and including in some cases portions of New Jersey, Pennsylvania and Connecticut. This merchandise was consigned directly to the customers and was shipped by the manufacturer without being warehoused, stored or handled by the taxpayer at his New York store or anywhere. He had no employees in either capacity. He was not covered as an employee for any purpose by any of the manufacturers, some of whom were in New York. He had no fixed hours and apparently no supervision at all.

Tax Law section 386 states in part that the words unincorporated business mean any unincorporated business conducted by an individual

and so mean to indicate a business conducted by the individual himself, and not as an employee of another. The section further expressly provides that an individual is not to be deemed to be engaged in an unincorporated business with respect to compensation for services rendered by him as an employee unless such compensation "constitutes receipts of a business regularly carried on by such individual"; that is to say, that receipts received by the individual formally as wages or commission as an employee, may under the circumstances be held to be receipts received by the payee for services rendered or sales made in a separate unincorporated business that he conducts. The section further provides in part that a person is not to be deemed to be engaged in an unincorporated business "solely because of selling goods, wares and merchandise for more than one person, firm or corporation unless he maintains an office or employs one or more assistants or otherwise regularly carries on a business".

Unless the commissions received by the taxpayer are compensation from employment, the question whether the unincorporated business conducted by the taxpayer as Majestic Fluorescent and Electrical Products Company extends also to the work as a commission salesman is not critical and need not be determined, since income from two unincorporated businesses, or from one, is equally subject to unincorporated business tax (NYCRR 280.3). Income from straight commissions without incidental salary or drawings is at least equally compatible with the status of an independent contractor, as it is with an employment relationship. Nothing in the taxpayer's understanding with the manufacturers he represented as a commission salesman or in his relationship with them indicates that he was an employee rather than a self-employed salesman. Neither, he acknowledges, did he regard himself as being their employee, but he apparently relies rather on a reading of a certain further provision of Tax Law, section 386 and related regulatory materials to conclude that he is to be considered an employee. Since we are to conclude that the compensation received by the taxpayer as commissions was not to be regarded as compensation of an employee, the language of the portion of section 386 that exempts such compensation, unless it constitutes a receipt of the separate unincorporated business, is not pertinent here. Probably, even if the commissions did constitute compensation as an employee, we would hold that the unincorporated business would extend to such compensation as an employee, since both areas were in the field of electrical equipment and were closely integrated, notwithstanding that he operated as a principal as Majestic Fluorescent and Electrical Products Company and as an agent in selling electrical parts other than lighting fixtures.

The further provision of Tax Law section 386 that a person is not to be regarded as self-employed solely because he sells for more than one principal unless he maintains an office or employs assistants or otherwise regularly carries on a business,

does not help the taxpayer. This piece of statutory guidance does not apply here because the taxpayer as Majestic clearly did otherwise regularly carry on a business. Further, he did maintain an "office", that is, his store as Majestic, and this provision of the statute giving evidentiary guidance does not seem to import that he need maintain a separate office related entirely or principally to the merchandise sold as a salesman.

Question 25 under Regulation 281.3 similarly states that a person selling goods, wares and merchandise for more than one person, firm or corporation is to be held not to be an independent contractor provided he does not maintain an office or employ one or more assistants, or otherwise regularly carry on a business. But taxpayer, as we have said, does otherwise regularly carry on a business, and has an office.

Question 26 under Regulation 281.3 states that a selling agent who maintains an office and has assistants or salesmen is an independent agent and not an employee. The conclusion urged in behalf of the taxpayer that if he does not maintain an office or does not employ any assistants or has neither office nor assistants he must be held to be an employee does not necessarily follow as a corollary. (Compare Q 25)

Question 28, which indicates that a salesman employed on a commission basis is not to be held to be carrying on an unincorporated business if he maintains no office or place of business and employs no salesman, is not applicable here, either, since the taxpayer clearly does maintain a place of business, and he does not operate solely on commissions (NYCRR 281.2, Questions 25, 26, 28).

The record clearly indicates that the commission income was received by the taxpayer as an independent contractor, that is, as a self-employed salesman. This income was subject to unincorporated business tax in common with his unincorporated business receipts from Majestic, and this is so even if the endeavors as a commission salesman were to be regarded as being a separate venture from his business as Majestic (see NYCRR 280.3).

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

/s/ FRANCIS X. BOYLAN
Hearing Officer

FXB:ca
Enc.

/s/ M. SCHAPIRO
Approved

/s/ S. HECKELMAN
Approved

January 13, 1966

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

SOLOMON AND HILDA SCHWARTZ

**for revision or refund of unincorporated
business taxes under Article 16-A of Tax
Law, for the years 1956 and 1957**

The State Tax Commission having assessed additional unincorporated business taxes on the income of Solomon Schwartz, a joint taxpayer with Hilda Schwartz, his wife, for the year 1956 by assessments B-692307 dated November 17, 1959 and B-840493 dated March 3, 1961, and for the year 1957 by additional assessment B-692308 dated November 17, 1959, such assessments having been made under Article 16-A of Tax Law, and the taxpayer having filed applications for revision or refund related to such additional assessments, and such applications having been denied; and a hearing having been held on May 14, 1964 at the offices of the New York State Department of Taxation and Finance, 80 Centre Street, New York, New York, before Francis K. Boylan, hearing officer, and the taxpayer having appeared in person and Leo B. Kemp of New York, New York a Certified Public Accountant, having been present; and the record having been duly examined and considered,

The State Tax Commission hereby finds that:

(1) By notices of additional assessment, the Department of Taxation and Finance assessed additional unincorporated business tax on the income of the taxpayer for the years 1956 and 1957 including in the total income from such unincorporated

business, certain commissions earned by the taxpayer, which in the year 1956 amounted to about \$6,539, and in 1957 to about \$5,134; and as to the year 1958, by a further notice of additional assessment, it assessed further additional unincorporated business tax in the amount of \$24.24 by reason of certain expenses being disallowed consequent upon their having been disallowed by the federal government and, similarly by reason of disallowed expenses, also assessed additional normal income taxes for that year in the amount of \$32.71; and the taxpayer, by his applications for revision or refund, has objected that such commissions were not properly includible as income from the unincorporated business but rather constituted compensation as an employee.

(2) In the years under consideration, 1956 and 1957, the taxpayer doing business as Majestic Fluorescent and Electrical Products Company at a store on York Avenue, in Manhattan, New York, New York, was engaged as a jobber or wholesaler, selling lighting fixtures and components thereof, operating as a principal buying such products and selling them to his customers. He had no employees.

(3) In the same years under his own name as Solomon Schwartz, he also sold on straight commission as a sales representative of a number of manufacturers and suppliers of electrical products, various electrical parts other than those for lighting fixtures; and about twenty-five percent of his customers for the latter dealt with him for the products that he sold on commission also. As a commission salesman the taxpayer initially had an agreement by letter with each manufacturer he represented, whereunder he was apportioned a specified geographical territory in which he was to function as a sales representative. None of the

manufacturers, some of whom were located within this State, covered him as an employee for workmen's compensation or unemployment insurance benefits; he was unsupervised, and had no regular or fixed hours given over to such sales on commission. The merchandise that the taxpayer sold on commission was consigned directly from the manufacturer to the customer and the taxpayer did not store or handle it.

(4) The earnings of the taxpayer that were received as commissions on sales of electrical equipment of the said various manufacturers or other suppliers of such products were so earned by him, it is found, as an independent contractor and not as an employee of any manufacturer or supplier paying such commissions.

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

DETERMINES:

(A) That the amounts earned by the taxpayer Solomon Schwartz as commissions on sales effected by him as a salesman for manufacturers of electrical equipment were earned by him in the conducting of an unincorporated business as a self-employed person and pursuant to provision of Tax Law Section 386 were subject to unincorporated business tax in common with his earnings derived from profits on sales of the lighting fixtures and parts and other products bought and sold by him as a principal doing business as Majestic Fluorescent and Electrical Products Company.

(B) That the additional assessments, B-692307 dated November 17, 1959, and B-840493 dated March 3, 1961, assessing unincorporated business taxes for the year 1956 in the amounts of \$71.91 and \$24.24 respectively, said latter assessment also

assessing additional normal tax for the said year in the amount of \$32.71, and the additional assessment E-692308 dated November 17, 1959 assessing unincorporated business taxes for the year 1957 in the amount of \$13.80, were lawful and correct and are affirmed; and the taxpayer's related applications for revision or refund are denied.

Dated: Albany, New York, this 28th day of JANUARY , 1966 .

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

JOSEPH H. MURPHY
President

/s/

IRA J. PALESTIN

IRA J. PALESTIN
Commissioner

/s/

JAMES R. MACDUFF

JAMES R. MACDUFF
Commissioner