

*Unincorp. Bus. Not Determined.*  
*Tirman, Joseph* A-2

**Commissioners Murphy, Salentin & Macniff**

**Solomon Sies, Hearing Officer**

**JOSEPH TIRMAN**

**1959 Assessment No. B-002295**

**Article 16-A**

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y. on November 9, 1964. The appearances and the evidence produced were as shown in the stenographic minutes and the exhibits submitted herewith.

The issue involved herein is whether the activities of the taxpayer, a sales representative for several handbag manufacturers, constituted the carrying on of an unincorporated business in accordance with §306, Article 16-A of the Tax Law.

The taxpayer has been a sales representative of ladies' handbags for the past twenty-five (25) years. During the year 1957, he represented five (5) manufacturers of handbags on a straight commission basis, handling non-competitive lines. He had no written contracts of employment with any of the principals. He was not reimbursed for any of his expenses by any of his principals. None of the principals deducted withholding or social security taxes. The taxpayer's territory covered the New England and eastern states. He testified that he spent twenty (2) weeks on the road soliciting the same customers (primarily, department and chain stores) for each of the principals whose products he sold. When the taxpayer was not on the road, he was required to service customers at the show rooms of the various principals in New York City.

The taxpayer reported on Schedule A of his income tax return gross commissions in the sum of \$31,358.92 and itemized his business expenses in the sum of \$15,382.82. The taxpayer used part of his home in Elmont, New York, for the storing of his samples and maintaining records at home and making telephone calls and deducted rental of his home in the sum of \$300.00 for the year in issue. It is to be noted that the Income Tax Bureau issued an additional assessment of unincorporated business tax against the taxpayer for the year 1956. It is to be further noted that the taxpayer has failed to establish that there was any agreement between the various principals as to the division of his time and efforts; that there was very little restriction or control exercised by the various principals as to direction and control of the methods of the taxpayer's operations.

To: Commissioners Murphy, Palestin & Macduff  
Re: JOSEPH TIRMAN

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Determination of whether a taxpayer has a relationship of an employee or independent contractor is primarily a question of fact. The important element in determining such relationship is the degree of control exercised by the principal over the agent's activities. Where the will of the principal is represented only in the result and not in the means by which it is accomplished and the principal exercises no control over the agency or manner or means of accomplishing the desired result, the agent is an independent contractor. (Rev. ex rel. Fainberg v. Chasman, 274 App. Div. 715). In the absence of control over the manner in which the agent's activities are conducted, there can be no finding of employment. (Matter of Sullivan Co., Eng. 289 N. Y. 110, 112)

Section 136 was amended in 1953 to provide that "a person shall not 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 an unincorporated business." In the instant case, the 1953 amendment to §136 does not apply to the taxpayer since the principals did not regard or treat him as an employee for any purpose and they did not exercise any control over the method or manner in which he was to perform his selling operations. The taxpayer was therefore an independent contractor regularly carrying on an unincorporated business within the intent and meaning of §136, Article 16-A of the Tax Law.

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

SEP 22 1965

SOLOMON SIES

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Hearing Officer

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Approved

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Approved

SS:nbl

**STATE OF NEW YORK**

**STATE TAX COMMISSION**

**-----**  
**IN THE MATTER OF THE APPLICATION**

**OF**

**JOSEPH TIMMAN**

**FOR REVISION OR REFUND OF UNINCORPORATED  
BUSINESS TAXES UNDER ARTICLE 16-A OF THE  
TAX LAW FOR THE YEAR 1957.**  
**-----**

Joseph Timman, the taxpayer herein, having filed an application for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law, for the year 1957, 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 9th day of November, 1964, before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, the taxpayer having appeared personally and testified in connection therewith and having been represented by Sanford Greene, Esq., 342 Madison Avenue, New York, N.Y. and the record 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 and reported on Schedule A thereof commissions as a sales representative for several handbag manufacturers aggregating the sum of \$31,358.92 and total business expenses aggregating the sum of \$15,302.82; that the taxpayer did not file any unincorporated business tax return for said year, that on August 2, 1960 the Department of Taxation and Finance made an additional assessment of unincorporated business taxes against the taxpayer for the year 1957 (B-602295) on the ground that the taxpayer's activities constituted the carrying on of an unincorporated business and that the income derived therefrom was subject to unincorporated business tax.

(2) That during the year 1957 the taxpayer was a sales

representative for five (5) manufacturers of handbags on a straight commission basis, handling non-competitive lines; that he had no written contracts of employment with any of the aforementioned principals; that his territory covered New England and the Eastern States; that in connection with his activities he was required to make trips out of town during approximately twenty weeks of the year soliciting the same customers, primarily department and chain stores, for each of the principals whose products he sold (Minutes of Hearing, page 6); that each of the principals whom the taxpayer represented was aware that he was representing the others; that the taxpayer was not reimbursed for any traveling or other business expenses by any of the principals whom he represented; that when the taxpayer was not on the road, he was required to service customers at the show rooms in New York City of the various principals whom he represented (Minutes of Hearing, pages 10, 11 & 12); that the taxpayer used a part of his home for the purpose of storing samples, maintaining records and making telephone calls and deducted the sum of \$300.00 rental of a portion of his home as part of his business expenses.

(3) That the taxpayer was not regarded by any of the principals whom he represented as an employee for payroll tax purposes since they did not deduct withholding or social security taxes from the commissions paid to him; nor was the taxpayer regarded or treated as an employee for any purpose whatsoever by the various principals whom he represented.

(4) That it has not been shown that there was any agreement between the various principals as to the division of the taxpayer's time and efforts with respect to his sales activities for said principals; that it has not been shown that the various principals whom the taxpayer represented exercised sufficient supervision or control over the methods and means of selling activities so as to constitute an employer-employee relationship between the parties.

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

**FINDINGS:**

(A) That the occupational activities of the taxpayer described herein during the year 1957 constituted that of an independent contractor regularly carrying on an unincorporated business subject to unincorporated business tax within the intent and meaning of §190, Article 16-A of the Tax Law; that said unincorporated business was carried on solely within the State of New York.

(B) That, accordingly, the assessment for the year 1957 (assessment 02-001203) 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 to said assessment be and the same is hereby denied.

DATED: Albany, New York, on the 18th day of October, 1955.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**President**

/s/

IRA J. PALESTIN

**Commissioner**

/s/

JAMES R. MACDUFF

**Commissioner**