

BUREAU OF LAW

MEMORANDUM

TO:

The State Tax Commission

FROM:

Solomon Sles, Hearing Officer

SUBJECT:

BEATRICE ADLER, as Administratrix of the
Estate of ROBERT L. ADLER, Deceased

1955 Assessment No. B-782596

1956 Assessment No. B-782597

1957 Assessment No. B-782598

Article 16-A

A hearing with reference to the above matter was held before me at 30 Centre Street, New York, N. Y. on the fourth day of January 1965. The appearances and the evidence produced were as shown in the stenographic minutes and the exhibits submitted herewith.

The issue involved is whether the decedent taxpayer was an independent contractor or an employee for purposes of unincorporated business tax pursuant to Section 386, Article 16-A of the Tax Law.

During the years 1955, 1956 and 1957, the taxpayer was an officer and stockholder of two corporations, Adler Properties, Inc. and A.G.A. Realty Corp., both of which owned industrial buildings located in New York City. The taxpayer owned all of the stock in Adler Properties, Inc. and one-third (1/3) of the stock in A.G.A. Realty Corp. The other stockholders in A.G.A. Realty Corp. were the decedent taxpayer's brother and sister. The taxpayer signed checks on behalf of both of the corporations.

The activities of the taxpayer were conducted from the office of one of the corporations, A.G.A. Realty Corp., 230 Steuben Street, Brooklyn, N. Y. He supervised the maintenance of the buildings, collected the rents and arranged for all necessary repairs. The taxpayer received \$5,000 annually from A.G.A. Realty Corp. and \$4,500.00 annually from Adler Properties, Inc., which were reported on their franchise tax returns as "management fees" and not as salaries for services as an officer and/or employee of said corporations. The corporations did not deduct Federal withholding or social security taxes from the fees paid to the taxpayer.

There was introduced at the hearing a decision of the Unemployment Insurance Referee Section of the New York State Department of Labor dated November 16, 1960 which held that the decedent taxpayer was an employee of A.G.A. Realty Corp. based upon the fact that the decedent taxpayer was at

times the president and only active officer of the aforementioned corporation even though the corporation chose to regard him as an independent contractor and not an employee and pay him managing agent's fees. It has not been shown at this (tax) hearing that the corporation exercised any control over the activities of the decedent taxpayer. The testimony indicated that the decedent taxpayer's brother, Harold Adler, used to come to the office and help him in the renting of the building; that "he came down there most every day; that was about 1936" (Minutes of Hearing, Page 10). It appears that the decedent taxpayer intended to be treated as an independent agent for unemployment insurance purposes and at the same time desired to be treated as an employee for income tax purposes. No evidence was adduced at the hearing to warrant a finding that the compensation received by the taxpayer from the two corporations was for services rendered as an officer thereof.

In determining whether the relationship is that of an employer and independent contractor or employer and employee, an important element is the degree of control exercised by the principal over the agent's activities (Matter of Horton, 204 N. Y. 167). 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 Company, Inc., 209 N. Y. 110, 112).

I am of the opinion that in the instant case the activities of taxpayer constituted the carrying on of a business; that he was an independent contractor and not an employee despite the decision of the Unemployment Insurance Referee that he was an employee for one of the corporations, A.G.A. Realty Corp.

I am of the further opinion that the decision of the Unemployment Insurance Referee is not binding on the State Tax Commission, that the purpose, scope and objective of the Unemployment Insurance Law is quite different from the Tax Law; that the words "employee" and "employment" are specifically defined in the Unemployment Insurance Law. (See Law Bureau memorandum in Matter of Clarke, Moore, Hill & Henny, et al., dated August 11, 1958 (copy attached).) The word "employee" has a different construction under Article 5 of the Business Tax Regulations which provides in part, that:

"If the activities of an agent are independent under the terms of his employment, he is considered to be carrying on an unincorporated business even though under the terms of his contract or otherwise he is designated or considered an employee."

In the case of Matter of Norton, 284 N. Y. 167, the Court, at Page 169, stated:

"The sole question presented on this appeal is whether the claimant was an employee of respondent company rather than an independent contractor within the meaning of the Unemployment Insurance Law

"The question to be reviewed by us is not whether the claimant was an employee of respondent as a matter of fact but whether upon the basis of the record before us we must decide as a matter of law that claimant was not an employee. . . ."

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

SOLOMON SIES
Hearing Officer

SS:sc

October 16, 1968

Enc.

10-30-68

**STATE OF NEW YORK
STATE TAX COMMISSION**

IN THE MATTER OF THE APPLICATION

OF

**BEATRICE ADLER, as Administratrix
of the Estate of ROBERT L. ADLER,
Deceased**

**FOR REVISION OR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 14-A OF THE
TAX LAW FOR THE YEARS 1955, 1956 AND
1957**

The taxpayer, Robert L. Adler, having filed applications for revision or refund of unincorporated business taxes for the years 1955, 1956 and 1957 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on the fourth day of January, 1965, before Solomon Sico, Hearing Officer of the Department of Taxation and Finance, at which hearing I. W. Rosenberg, CPA, appeared on behalf of Beatrice Adler, Administratrix of the estate of Robert L. Adler, testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the decedent taxpayer, Robert L. Adler, filed personal income tax returns for the years 1955, 1956 and 1957; that for each of the years 1955 and 1956, he reported salary income from A. G. A. Realty Corp. in the sum of \$5,000.00 and from Adler Properties Inc. in the sum of \$4,500.00; that for the year 1957, the taxpayer reported on Schedule A total receipts in the sum of \$9,500.00 received from real estate management; that the taxpayer did not file any unincorporated business tax returns for any of the

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aforementioned years; that on May 18, 1960, the Department of Taxation and Finance made additional unincorporated business tax assessments against the taxpayer for the years 1955, 1956 and 1957 (Assessment Nos. B-782596, B-782597 and B-782598, respectively) holding that the activities of the taxpayer constituted the carrying on of an unincorporated business.

(2) That during the years 1955, 1956 and 1957, the taxpayer, Robert L. Adler, was an officer, director and stockholder of Adler Properties Inc. and A. G. A. Realty Corp., domestic corporations, both located in the city of New York, which corporations owned industrial buildings located at 230 Third Avenue, New York, New York and at 230 Steuben Street, Brooklyn, New York, respectively; that the taxpayer was the sole stockholder of Adler Properties, Inc. and owned one-third (1/3) of the shares of stock of A. G. A. Realty Corp.; that the taxpayer supervised the maintenance of the buildings, collected the rents and arranged for all necessary repairs thereof, signed checks on behalf of both corporations, all of which services of the taxpayer were performed from the office of A. G. A. Realty Corp.; that the taxpayer received \$5,000.00 annually from A. G. A. Realty Corp. and \$4,000.00 annually from Adler Properties Inc. as management fees.

(3) That A. G. A. Realty Corp. and Adler Properties Inc. reported the payments made to the taxpayer on their franchise tax returns as management fees and not as salary for services as an officer and/or employee of the aforesaid corporations; that A. G. A. Realty Corp. and Adler Properties Inc. did not treat the taxpayer as an employee for payroll tax purposes, since they did not deduct Federal withholding or social security taxes from the fees paid to the taxpayer; that the aforementioned corporations did not exercise any supervision or control of the activities of

the taxpayer; that the activities of the taxpayer on behalf of both A. G. A. Realty Corp. and Adler Properties Inc. constituted that of an independent contractor engaged in his own business.

(b) That in a proceeding before the New York State Department of Labor, Division of Unemployment Insurance, with respect to the liability of A. G. A. Realty Corp. as an employer liable for contributions under the Unemployment Insurance Law beginning with January 2, 1953, it was contended by A. G. A. Realty Corp. that the decedent taxpayer was an independent contractor and that the compensation paid him represented management fees as reflected on the books of said corporation; that on November 16, 1960, the Unemployment Insurance Referee Section, after a hearing, decided that the decedent taxpayer, Robert L. Adler, was an employee of A. G. A. Realty Corp.

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

DETERMINES:

(A) That the activities of the taxpayer during 1955, 1956 and 1957 constituted that of a managing agent of real estate carrying on an unincorporated business within the intent and meaning of section 386, Article 14-A of the Tax Law.

(B) That, accordingly, the assessments (Assessment Nos. B-782596, B-782597 and B-782598) are correct; that said assessments do not include any tax or other charge which could not have been lawfully demanded and that the applications for revision or refund with respect to said assessments be and the same are hereby denied.

Dated: Albany, New York this 4th day of November , 1968.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

PRESIDENT

/s/

A. BRUCE MANLEY

COMMISSIONER

COMMISSIONER