

Unincorp. Bus. Tax Determin. A. 2
**BUREAU OF LAW
MEMORANDUM**

*Becker, Arthur
Ludwig E.*

TO: Commissioners Murphy, Macduff and Conlon
FROM: Francis V. Dow, Hearing Officer
SUBJECT: LEONARD E. BECKER

In the matter of the petition for a redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1961 and 1962

ARTHUR BECKER

In the matter of the petition for a redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1961 and 1962

Hearings with reference to the above captioned matters were held before me at 60 Centre Street, New York, New York on January 11, 1967. Since common questions are involved, by consent of the taxpayers and their representative, the minutes and exhibits in each of the hearings were incorporated and made a part of the other. The appearances and the evidence produced were as shown in the stenographic minutes submitted herewith.

A notice of deficiency and a statement of audit charges were issued on November 22, 1965 for the years 1961 and 1962 (File No. 2-7387485) determining that the taxpayer, Arthur Becker, was subject to a tax liability for unincorporated business tax and interest due in the sum of \$806.48 on the basis that his activities as a cutlery salesman, and of boat chartering and aircraft sales constitute the carrying on of an unincorporated business.

A notice of deficiency and statement of audit charges were issued on November 22, 1965 for the years 1961 and 1962 (File No. 2-3436163) determining that the taxpayer, Ludwig E. Becker, was subject to a tax liability for unincorporated business tax and interest due in the sum of \$843.01 on the basis that his activities as a cutlery salesman constitute the carrying on of an unincorporated business.

The taxpayers, Arthur Becker and Ludwig E. Becker, who are brothers, are officers and shareholders (each having a 1/3 interest) of F. V. Engel, Inc., a corporation located in New York which is engaged in the wholesaling of cutlery. They were paid salaries for administrative duties from which deductions were taken for social security and income tax. In addition to their salaries the taxpayers were also paid commissions on sales which they made on behalf of their

company within and without New York State. Income and social security taxes were not deducted from the commissions. They were reimbursed by their company for their selling expenses connected with sales made in the New York area.

Both taxpayers, as individuals, also sold cutlery for E. H. Forchman Company, Inc., a corporation whose only office was located in New York. The taxpayers sold no cutlery for it in the New York area. They were paid commissions on sales from which no withholding taxes were deducted. They were required to maintain route sheets for this company and to call upon designated customers at regular intervals. While on selling trips for the E. H. Forchman Company, Inc., the taxpayers also sold cutlery for F. W. Engel, Inc. In some instances they sold cutlery of both companies to the same customers. They were not reimbursed for any selling expenses which included promotion and entertainment expenses by either company while on these selling trips outside of New York. The taxpayers did not apportion the selling expenses on sales made for both companies. Neither taxpayer maintained an office of their own nor did they employ any assistants. They had no regular place of business outside New York State.

In addition to his selling activities the taxpayer, Arthur Becker, was also engaged in boat chartering and aircraft sales. No aircraft sales were made during the years in question. Charters of the taxpayer's boat were arranged through a broker to whom the taxpayer paid commissions.

It is my opinion that the taxpayers' income which they received as salary from F. W. Engel, Inc. is not subject to unincorporated business tax. However, monies distributed by F. W. Engel, Inc. as commissions on sales were income from an unincorporated business. (See *In re Schirmer's Estate*, 59 B. 2d 188, 189 N. Y. S. 2d 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 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For the reasons stated above, I recommend that the decision of the State Tax Commission affirming the deficiency except to the extent of cancelling the portion of the tax deficiency which resulted from the inclusion of salaries received from F. W. Engel, Inc. as receipts in their unincorporated business be substantially in the form submitted herewith. The proposed determination reduces the tax deficiency of Ludwig E. Becker from \$843.01 to \$248.91 and reduces the tax deficiency of Arthur Becker from \$806.48 to \$24.00.

/s/

FRANCIS V. DOW

~~REVENUE OFFICER~~

FVD:aw

Enc. 3-23-67

March 23, 1967

**STATE OF NEW YORK
STATE TAX COMMISSION**

IN THE MATTER OF THE PETITION

OF

ARTHUR BECKER

**FOR A REDETERMINATION OF A DEFICIENCY OR FOR
REFUND OF UNINCORPORATED BUSINESS TAXES UNDER
ARTICLE 23 OF THE TAX LAW FOR THE YEARS 1961
AND 1962**

Arthur Becker, the taxpayer, having duly filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1961 and 1962, and a hearing having been held in connection therewith at the office of the State Tax Commission, 88 Centre Street, New York, New York on January 11, 1967 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed resident income tax returns for the years 1961 and 1962; that the taxpayer did not file unincorporated business tax returns for the years 1961 and 1962.

(2) That a notice of deficiency and a statement of audit changes were issued on November 22, 1965 for the years 1961 and 1962 (File No. 2-7527485) determining that a tax liability and interest was due from the taxpayer, Arthur Becker, for unincorporated business taxes, and interest for those years in the amount of \$306.48 on the basis that his activities as a cutlery salesman and his boat chartering and aircraft sales constituted the carrying on of an unincorporated

business.

(3) That the taxpayer is an officer and shareholder of F. W. Engel, Inc., a corporation located in New York which is engaged in the distribution of cutlery at wholesale; that the taxpayer received a salary of \$8,160 in 1961 and \$6,660 in 1962 from the said corporation from which deductions for social security and income taxes were withheld.

(4) That in addition to his administrative duties, the taxpayer acted as a salesman for the said corporation and received a commission on sales made; that such sales were made within and without New York State; that no deductions were taken from the commissions for social security or income taxes; that the taxpayer was reimbursed for his selling expenses which he incurred while selling cutlery for F. W. Engel, Inc. in the New York area, but was not reimbursed when selling outside the area.

(5) That the taxpayer also sold cutlery for R. H. Forschner Co., Inc., a corporation which has no place of business located outside New York State; that the taxpayer sold none of the products of R. H. Forschner Co., Inc. in New York State; that the taxpayer was paid a commission on sales made for the said corporation; that no deductions were taken from his commissions for social security or income taxes; that the taxpayer was required to call on designated customers at regular intervals and to maintain route sheets in his representation of the R. H. Forschner Co., Inc.; that the taxpayer was not reimbursed for any expenses in connection with sales made for the said corporation.

(6) That the taxpayer while on sales trips in behalf of the R. H. Forschner Co., Inc. also sold cutlery for F. W. Engel, Inc.

in the same territory outside of New York State; that the taxpayer occasionally sold cutlery of both companies to the same customers; that there was no agreement on the division of the taxpayer's time between the two companies; that the taxpayer's commissions less unreimbursed expenses from cutlery sales from both companies amounted to \$8,760.01 in 1961 and the sum of \$9,692.73 in 1962.

(7) That the taxpayer's unreimbursed selling expenses included expenses for entertainment of customers and promotion; that the taxpayer could not apportion his unreimbursed selling expenses between both of the companies; that the taxpayer was not controlled by his principals with regard to the manner or means sales orders were obtained; that the taxpayer maintained no office; that the taxpayer employed no assistants.

(8) That the taxpayer was also engaged in boat chartering and aircraft sales; that no aircraft sales were made by the taxpayer in 1961 or 1962; that the taxpayer chartered a boat owned by him through the services of a broker to whom the taxpayer paid commissions; that in 1961 the taxpayer had income from his boat chartering services in the sum of \$1,544.10; that in 1962 the taxpayer lost the sum of \$141.85 in his boat chartering business.

(9) That the charitable contributions of the unincorporated business of the taxpayer were in the sums of \$485 in 1961 and \$500 in 1962.

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

DECIDES:

(A) That the salary of the taxpayer from F. W. Engel, Inc. in the amounts of \$8,160 in 1961 and \$6,660 in 1962 was not subject

to unincorporated business tax since it was received for administrative duties performed as an employee from which social security and income taxes were withheld, and did not constitute part of a business regularly carried on by him.

(B) That the activities of the taxpayer as a cutlery salesman representing F. W. Engel, Inc. and E. K. Forstner Co., Inc. constitute the carrying on of an unincorporated business and the income from such activities is subject to unincorporated business tax.

(C) That the taxpayer's activities of boat chartering constituted the carrying on of an unincorporated business and income from the source is subject to the unincorporated business tax.

(D) That the taxpayer's unincorporated business tax is recomputed as follows:

	<u>1961</u>	<u>1962</u>
Net Business Income	\$10,304.11	
Less Contributions	483.00	
	<u>\$ 9,821.11</u>	
Less Allowance for Balance Services	1,261.82	
Balance	<u>\$ 8,559.29</u>	
Less Exemption	2,000.00	
Taxable Business Income	<u>\$ 6,559.29</u>	
Tax 4%	122.21	
Business Tax Credit	77.73	
Unincorporated Business Tax Due	44.48	
Interest Computed to 10/22/63	<u>9.60</u>	
TOTAL	\$ 54.08	Insufficient business income to be subject to tax

(E) That the notice of deficiency and statement of audit changes (File No. 2-7327489) is modified by cancelling the unincorporated business tax for the year 1961 to the extent of \$330.91 and by cancelling entirely the unincorporated business tax for the year 1962; that the 1961 unincorporated business tax and interest computed to November 22, 1961, the date of the notice of deficiency, in the

modified amount of \$34.02 is correct; that the notice of deficiency and statement of audit changes as modified do not include any tax or other charges which could not have been lawfully demanded; that the taxpayer's petition for a redetermination of a deficiency or for a refund of unincorporated business tax with respect to the notice of deficiency for the years 1961 and 1962 as modified, be and the same hereby is denied.

Dated: Albany, New York this 13th day of April , 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

PRESIDENT

COMMISSIONER

/s/

WALTER MACLYN CONLON

COMMISSIONER

**STATE OF NEW YORK
STATE TAX COMMISSION**

IN THE MATTER OF THE PETITION

OF

LUDWIG E. BECKER

**FOR A REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW
FOR THE YEARS 1961 AND 1962**

Ludwig E. Becker, the taxpayer, having duly filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1961 and 1962, and a hearing having been held in connection therewith at the office of the State Tax Commission, 82 Centre Street, New York, New York on January 11, 1967 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed resident income tax returns for the years 1961 and 1962; that the taxpayer did not file unincorporated business tax returns for the years 1961 and 1962.

(2) That a notice of deficiency and a statement of audit changes were issued on November 22, 1963 for the years 1961 and 1962 (File No. 2-3491163) determining that a tax liability and interest was due from the taxpayer, Ludwig E. Becker, for unincorporated business taxes, and interest for those years in the amount of \$843.01 on the basis that his activities as a cullery salesman constituted the carrying on of an unincorporated business.

(3) That the taxpayer is an officer and shareholder of F. W. Engel, Inc., a corporation located in New York which is engaged in the distribution of cutlery on wholesale; that the taxpayer received a salary of \$8,100 in 1961 and \$6,000 in 1962 from the said corporation from which deductions for social security and income taxes were withheld.

(4) That in addition to his administrative duties, the taxpayer acted as a salesman for the said corporation and received a commission on sales made; that such sales were made within and without New York State; that no deductions were taken from the commissions for social security or income taxes; that the taxpayer was reimbursed for his selling expenses which he incurred while selling cutlery for F. W. Engel, Inc. in the New York area, but was not reimbursed when selling outside the area.

(5) That the taxpayer also sold cutlery for R. H. Furuchner Co., Inc., a corporation which has no place of business located outside of New York State; that the taxpayer sold none of the products of R. H. Furuchner Co., Inc. in New York State; that the taxpayer was paid a commission on sales made for the said corporation; that no deductions were taken from his commissions for social security or income taxes; that the taxpayer was required to call on designated customers at regular intervals and to maintain route sheets in his representation of the R. H. Furuchner Co., Inc.; that the taxpayer was not reimbursed for any expenses in connection with sales made for the said corporation.

(6) That the taxpayer while on sales trips in behalf of the R. H. Furuchner Co., Inc. also sold cutlery for F. W. Engel, Inc. in the same territory outside of New York State; that the taxpayer occasionally sold cutlery of both companies to the same customers;

that there was no agreement on the division of the taxpayer's time between the two companies; that the taxpayer's commissions less unreimbursed expenses from outlery sales from both companies amounted to \$7,546.87 in 1961 and the sum of \$13,513.66 in 1962.

(7) That the taxpayer's unreimbursed selling expenses included expenses for entertainment of customers and promotion; that the taxpayer could not apportion his unreimbursed selling expenses between both of the companies; that the taxpayer was not controlled by his principals with regard to the manner or means sales orders were obtained; that the taxpayer maintained no office; that the taxpayer employed no assistants.

(8) That the charitable contributions of the unincorporated business of the taxpayer were in the sum of \$203 in 1961 and \$205 in 1962.

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

HOLDING:

(A) That the salary of the taxpayer from F. V. Engel, Inc. in the amount of \$8,100 in 1961 and \$6,000 in 1962 was not subject to unincorporated business tax since it was received for administrative duties performed as an employee from which social security and income taxes were withheld, and did not constitute part of a business regularly carried on by him.

(B) That the activities of the taxpayer as a outlery salesman representing F. V. Engel, Inc. and E. E. Forrester Co., Inc. constitute the carrying on of an unincorporated business and the income from such activities is subject to unincorporated business tax.

(C) That the taxpayer's unincorporated business tax is recomputed as follows:

	1961	1962
Net Business Income		\$13,213.00
Less Contributions		250.00
		\$12,963.00
Less Allowance for Balance Services		1,222.12
		\$11,740.88
Balance		\$11,740.88
Less Exemption		1,000.00
taxable Business Income		\$10,740.88
Tax at		22.50
Interest Computed to 10/12/63		11.12
TOTAL		\$ 108.90

(D) That the notice of deficiency and statement of audit changes (File No. 2-563418) is modified by cancelling entirely the unincorporated business tax for the year 1961 and by cancelling the unincorporated business tax for the year 1962 to the extent of \$213.12; that the 1962 unincorporated business tax and interest computed to November 22, 1965, the date of the notice of deficiency, in the modified amount of \$108.90 is correct; that the notice of deficiency and statement of audit changes as modified do not include any tax or other charges which could not have been lawfully demanded; that the taxpayer's petition for a redetermination of a deficiency or for a refund of unincorporated business tax with respect to the notice of deficiency for the years 1961 and 1962 as modified, be and the same hereby is denied.

Dated: Albany, New York this 13th day of April, 1967.

STATE TAX COMMISSIONER

/s/

JOSEPH H. MURPHY
COMMISSIONER

COMMISSIONER

/s/

WALTER MACLYN CONLON
COMMISSIONER