

BUREAU OF LAW

MEMORANDUM

Unincorp. Bus. Tax
Determinations A-Z
Bernstein, Louis
and
Martha

TO: Commissioners Murphy, Macduff and Conlon

FROM: Alfred Rubinstein, Hearing Officer

SUBJECT: Petition of Louis and Martha Bernstein for redetermination of a deficiency or for refund of personal income taxes under Article 22 and unincorporated business taxes under Article 23 of the Tax Law for the years 1961, 1962 and 1963

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, New York on November 22, 1966. The taxpayer, Louis Bernstein, appeared with his representative as noted on the transcript.

The issues involved were (1) disallowance of \$1,049.72 deducted as claimed business expenses for 1962, and (2) whether taxpayer's activities as a salesman for multiple principals constituted carrying on of his own business.

A notice of deficiency for additional personal income taxes due for 1962, in the amount of \$85.63, was issued January 17, 1966, based on disallowance, per Federal audit changes, of business expenses in the amount of \$1,049.72. A separate notice of deficiency for unincorporated business taxes for 1961, 1962 and 1963, in the amount of \$1,120.29, was issued January 17, 1966, based on a finding that taxpayer's sales activities during those years constituted regularly carrying on a business.

Taxpayer conceded a deficiency of \$85.63 based on disallowance of claimed business deductions for 1962, and objects solely to the imposition of unincorporated business taxes.

Taxpayer, a commission salesman, represented noncompeting manufacturers of women's and children's wear. He traveled extensively in the middlewest, incurred travel and other expenses, including rent for storage of samples, and reported his income as business income on Schedule C of his Federal income tax returns. No social security or income taxes were withheld from his earnings, nor were any of his expenses reimbursed. In a letter to the Tax Commission dated September 7, 1964, taxpayer described himself as "an independent sales representative" over whom "no supervision of any kind was exercised". Taxpayer now contends that he was an employee, and relies on definitions contained in Federal and State instruction sheets which he submitted.

BUREAU OF LAW

MEMORANDUM

TO:

FROM:

SUBJECT:

WARR

Section 703(f) of the Tax Law provides that a sales representative shall not be deemed engaged in an unincorporated business solely because he sells for more than one principal unless he maintains an office, employs assistants or "otherwise regularly carries on a business". A similar factual situation under Section 386 of Article 16-A of the Tax Law was considered in Briton v. State Tax Commission, 22 A D 24 987, 251 N. Y. S. 2d 557 (aff'd without opinion in the Court of Appeals) in which the Appellate Division confirmed a determination sustaining the assessment.

Taxpayer was not considered to be an employee by his principals, who exercised no supervision, direction or control over him. Neither did they deduct payroll taxes nor reimburse him for expenses. Although taxpayer did not maintain an office or employ an assistant, I am of the opinion, for the reasons stated above, that he regularly carried on a business within the meaning of Section 703(f) of the Tax Law. See memoranda of H. H. Best, Counsel, dated May 5, 1964, in the Matter of Irving A. Stein, and Lawrence Gifford, Hearing Officer, dated October 11, 1964 in the Matter of Samuel Rosenberg, both annexed.

Accordingly, I am of the opinion that both notices of deficiency should be sustained. The decision of the Tax Commission should be substantially in the form herewith submitted.

/s/

ALFRED RUBINSTEIN

~~HEARING OFFICER~~

AR:am

March 1, 1967

Encl. *OK my*
AK

6-26-67

BUREAU OF LAW

MEMORANDUM

TO: Deputy Commissioner Igoe

FROM: E. H. Best, Counsel

SUBJECT: IRVING A. STEIN

1948 Assessment No. AA-455606
 1949 Assessment No. AA-562353
 1950 Assessment No. AA-699549
 1951 Assessment No. AA-840623
 1953 Assessment No. B-262353
 1954 Assessment No. B-461456
 1955 Assessment No. B-554400
 1956 Assessment No. B-472774
 1957 Assessment No. B-781153

Formal Hearing

NEW YORK
 INCOME TAX
 MAY 5 1964
 OFFICE OF THE
 DIRECTOR
 MAY 12 1964

The primary issue involved herein is whether the taxpayer, a sales representative, soliciting the same customers, covering the same area simultaneously for several principals, was an independent contractor subject to unincorporated business tax or an employee exempt therefrom under Section 386 of the Tax Law. The secondary issue is whether the taxpayer is deemed to be engaged in an unincorporated business by reason of the fact that he "maintains an office or employs one or more assistants or otherwise regularly carries on a business" within the intent and meaning of Section 386 of the Tax Law.

The material facts indicate that the taxpayer was a sales representative for six plumbing supply companies during the years 1948 through 1950; five in 1951 and 1953 and four during the years 1954 through 1957; that none of his principals exercised control over the manner in which the taxpayer carried on his sales activities; that all of the principals knew and permitted such multiple representation; that the taxpayer solicited the same customers in the same territory simultaneously on behalf of all of the principals whom he represented; that only one of the principals treated him as an employee for payroll tax purposes and only during the years 1948 through 1951 and 1953; that he maintained an office in the basement of his home during the years 1948 through 1951 and also in 1953; that he employed his brother to assist him in connection with his sales activities during the year 1948 and part of 1949 and thereafter employed his son-in-law as such sales assistant at a fixed annual salary; that the assistant was under the taxpayer's control and that he paid social security, unemployment insurance and workmen's compensation on behalf of such assistant; that the taxpayer's traveling expenses for himself and his assistant was borne solely by him and that none of said expenses was reimbursed by the principals whom he represented.

TO: Deputy Commissioner Igoe

Page 2

RE: IRVING A. STEIN

The taxpayer contends: (a) that he was an employee of all of the firms whom he represented; (b) that the use of his basement was not actually an office but merely a place where he kept records of the commissions due him; (c) that the employment of an assistant was necessitated by the fact that his eye-sight was failing.

It is to be noted that a formal hearing was held for the years 1946 and 1947 involving practically the same issue and that a determination was issued by the Commission on August 19, 1955 holding the taxpayer subject to unincorporated business tax in accordance with Article 16-A of the Tax Law.

The hearing officer is of the opinion that the principals of the taxpayer were more interested in the results of the activities of the taxpayer rather than the manner in which they were carried on; that the simultaneous representation by the taxpayer of several principals constituted the carrying on of an unincorporated business in accordance with the decision in the case of Peo. ex. rel. Feinberg v. Chapman, 274 App. Div. 715. In addition thereto in accordance with Section 386, Article 16-A and Section 705 (f), Article 23 of the Tax Law, an individual who employs one or more assistants is deemed to be engaged in unincorporated business be reason of selling goods, wares, merchandise for more than one enterprise. Although the taxpayer contends that he was compelled to engage the services of an assistant because of his failing eye-sight and his inability to cover the territory when it became dark, his testimony at the hearing discloses that he solicited customers without his son-in-law (Minutes of Hearing, Page 31) and that two cars were used during the years in question, except 1948.

I am in accord with the opinion of the hearing officer and am submitting the entire file together with the proposed determination for your review. Kindly return the file together with your comments.

5/18/64
J. Igoe
SS/kk
Encls.
May 5, 1964

I agree 5/17/64

E. H. Best
Counsel

5/19/64
concur
E. H. Best

DEPARTMENT OF TAXATION AND FINANCE

MEMORANDUM

TO: Edward D. Igoe, Director
FROM: Laurence S. Gifford
SUBJECT: Samuel Kossower
1954 Assessment B-197887

OFFICE Income Tax - Albany
DATE October 11, 1962

RECEIVED
NEW YORK STATE
INCOME TAX BUREAU
OCT 30 1962
OCT 30 1962
OFFICE OF THE
DIRECTOR

DEPT. TAX & FINANCE
DEC 24 1964
TAXPAYER'S OFFICE - ALBANY

Formal Hearing

This formal hearing case requires a determination as to whether a sales representative was subject to the unincorporated business tax where he maintained no office within or without the state of New York.

During the above year, the taxpayer sold furniture for the Youngville Star Manufacturing Company of Pennsylvania. He also represented, on a limited scale, two other non-competing firms.

The record shows that the sales territory of the taxpayer was the eastern seaboard of the United States. He had no written agreement with any of his principals. Each principal was aware that the taxpayer represented the other two firms. The taxpayer maintained no office within or without New York State, the taxpayer stating in this regard that he worked from his home. Approximately two-thirds of the sales commissions of the taxpayer were attributable to sales made by him while he was working without the State of New York. None of his principals exercised control over the time or manner in which he carried on his work in their behalf.

In the absence of such employer control, the taxpayer is deemed to be an independent contractor. As an independent contractor, he would not be exempt under the 1953 salesman amendment, pursuant to the Law Bureau interpretation of such statute.

However, since the taxpayer maintained no business office either within or without New York State, and since he carried on the same type of activities (solicitation of orders) without the state as within the state, the sales commissions earned from outside solicitations would be excluded from New York income, in accordance with the determination of the State Tax Commission in the case of Benjamin Dubin.

On such a basis, the income of the taxpayer from New York sources in 1954 was less than the \$5,000.00 unincorporated business tax statutory exemption; so that the entire amount of the assessment should be cancelled.

A proposed determination in accordance with the above conclusions is submitted herewith for the consideration of the State Tax Commission.

LSG:MC

Hearing Officer

I agree
Laurence S. Gifford
10/20/62
James J. Donovan

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

LOUIS AND MARTHA BERNSTEIN

**FOR A REDETERMINATION OF A DEFICIENCY OR
FOR REFUND OF PERSONAL INCOME TAXES UNDER
ARTICLE 22 AND UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW FOR
THE YEARS 1961, 1962 AND 1963**

Louis and Martha Bernstein having filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 and unincorporated business taxes under Article 23 of the Tax Law for the years 1961, 1962 and 1963 (File #3-1172845), and a hearing having been held on November 22, 1966 at 80 Centre Street, New York, New York before Alfred Rubinstein, Hearing Officer of the State Tax Commission, at which hearing taxpayer, Louis Bernstein, and his representative, Sidney Rubin, CPA, appeared, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers filed joint personal income tax resident returns for the years 1961, 1962 and 1963, on which Louis Bernstein reported income of \$12,655.13 for 1961, \$13,980.85 for 1962, and \$21,629.00 for 1963 from his occupation as "independent sales representative"; that by the notice of deficiency issued January 17, 1966, in the amount of \$1,120.29, it was determined that the taxpayers had failed to compute unincorporated business taxes for 1961, 1962 and 1963; that by a separate notice of deficiency dated January 17, 1966, in the amount of \$05.43, based on Federal audit changes, claimed business expenses in the amount of \$1,049.72 deducted for 1962 were disallowed, and the taxpayers' income recomputed for that year at \$15,524.38.

(2) That the taxpayers consent to the disallowance of \$1,049.72 of claimed business expenses deducted for 1962.

(3) That during 1961, 1962 and 1963 Louis Bernstein was a sales representative for three manufacturers of women's and children's apparel; that he traveled extensively in the Middle-west making sales to regular customers and soliciting new customers; that he incurred expenses on selling trips of about \$175 per week; that the nature and extent of the expenses he incurred were solely in his own discretion; that he was free to follow an itinerary of his own choice subject only to the necessities of the trade; that his principals exercised no supervision, direction or control over his activities.

(4) That for the years 1961, 1962 and 1963 taxpayers filed Federal income tax returns showing no salaries from any of Louis Bernstein's principals; that his income for such years was designated "business income" and computed on Schedule C of the Federal return on which all of his expenses were deducted as being business incurred; that he computed a self-employment tax on such Federal income tax returns; that none of his expenses were reimbursed by any of his principals; that no income taxes, social security contributions or other deductions were withheld from his compensation by any of his principals.

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

DECIDES:

(A) That for 1962 business expenses deducted in the sum of \$1,049.72 by the taxpayers were properly disallowed as unsubstantiated pursuant to Federal audit changes; that the taxpayers' New York income was \$15,524.38 for such year.

(B) That during 1961, 1962 and 1963 taxpayer Louis Bernstein's earnings from his activities as an independent sales representative, in the sum of \$12,655.13 for 1961, \$13,988.85 for 1962 and \$21,429.00 for 1963, constituted receipts from a regular business carried on by him.

(C) That accordingly, the notice of deficiency imposing additional personal income taxes upon the taxpayer for 1962, and the notice of deficiency imposing unincorporated business tax on the taxpayer for 1961, 1962 and 1963 are correct; that the amounts set forth therein are due and owing together with additional interest and other statutory charges; that neither of said notices of deficiency includes any tax or other charges which could not have been lawfully demanded, and that the taxpayers' petition for redetermination or refund with respect thereto be and the same is hereby denied.

Dated: Albany, New York this 10th day of July , 1967

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

JAMES R. MACDUFF

Commissioner

/s/

WALTER MACLYN CONLON

Commissioner