

BUREAU OF LAW

MEMORANDUM

TO:

State Tax Commission

FROM:

Vincent P. Molineaux, Hearing Officer

SUBJECT:

BORAK AND BORAK

Petition for Redetermination of
Deficiency of Unincorporated
Business Tax Under Article 23
of the Tax Law for the Years
1960 and 1961

A hearing on the above matter was held before me at
80 Centre Street, New York, New York on September 20, 1967.

The question at issue is whether the firm of Borak
and Borak, certified shorthand reporters, is entitled to
professional exemption from the unincorporated business tax
pursuant to Section 703(c) of the Tax Law.

The petitioners, husband and wife, are both certified
shorthand reporters and filed partnership returns for the two
years in question showing gross income of approximately \$138,000
and \$157,000, respectively. The returns computed no unincorpo-
rated business tax.

Notices of deficiency and statements of audit changes
for both years in question were issued April 13, 1965, on the
ground that less than 80 percent of the total income "is derived
from personal services actually rendered by the . . . members of
the partnership", to which taxpayers took exception by the filing,
on June 21, 1965 of petition for redetermination.

The partners cover some of the shorthand reporting
assignments. Other reporters are hired as needed. All typing
is done by employees of the partnership. (P. 30) More than
20 percent of the gross receipts is attributable to manuscripts
on which independent reporters had taken the shorthand reporting
and less than 80 percent of the gross income is attributable to
personal services actually rendered by the partners. This is an
estimate based upon the testimony (P. 29) of Mr. Borak that for
the years 1960 and 1961 they would have an average of two to
four reporters working each day in addition to themselves and the
statements in the Federal income tax returns for 1960 and 1961
showing reporters paid \$28,723 and \$39,309 out of gross income of
\$138,000 and \$157,558, respectively.

Exemption is claimed by the taxpayers on the ground that
all of the work is supervised and directed by the partners.

However, it is inconsistent with the very nature of shorthand reporting which is the personal act of the reporter, that such work be attributable to the firm which sends him out and types up the work that he has taken down and put on a dictaphone record or tape.

This question was previously considered by the Commission in Matter of Sally Goetz decided June 26, 1963. Miss Goetz, also a certified shorthand reporter, hired a free lance certified reporter who accounted for more than 25 percent of the gross income. The Commission determined in that case that the business income was subject to unincorporated business tax. A copy of the determination is submitted herewith.

In Hewitt v. Bates, (1942) 297 N.Y. 248 in which the courts considered the 80 percent requirement, a licensed teacher, conducting a school in which other teachers were employed to account for more than 20 percent of the gross income was held to be subject to the unincorporated business tax as teaching, by its very nature, is a personal act that does not lend itself to the kind of supervision that makes the act of the subordinate attributable to the superior.

Based upon the foregoing, I recommend that the determination of the Commission in this matter denying the petition for revision be substantially in the form submitted herewith.

/s/

V. P. MOLINEAUX

Hearing Officer

VPM:ac
Enc.

February 14, 1968

2-19-68

STATE OF NEW YORK

STATE TAX COMMISSION

: **IN THE MATTER OF THE PETITION** :
: **OF** :
: **BORAK AND BORAK** :
: **FOR REDETERMINATION OF DEFICIENCY OF** :
: **UNINCORPORATED BUSINESS TAX UNDER** :
: **ARTICLE 23 OF THE TAX LAW FOR THE** :
: **YEARS 1960 AND 1961** :
: -----

The taxpayers, Nathan Borak and Isadora S. Borak, having filed a petition for redetermination of deficiency of unincorporated business tax under Article 23 of the Tax Law for the years 1960 and 1961, and a hearing having been held at the office of the State Tax Commission at 80 Centre Street, New York, New York on the twentieth day of September, 1967 before Vincent P. Molinsaux, Hearing Officer of the Department of Taxation and Finance, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers filed partnership returns for the years 1960 and 1961 on which no unincorporated business tax was computed.

(2) That on April 13, 1965 the State Tax Commission issued notices of deficiency in the amounts of \$1,114.92 for 1960 and \$882.33 for 1961 (File Nos. 491 and P-491) on the ground that income received by the partnership from shorthand court reporting, less than 80 percent of the gross income of which is derived from personal services actually rendered by the individual members of the partnership, is income from an unincorporated business subject to Article 23 of the Tax Law for each of the above years.

(3) That the petitioners, husband and wife, are both

certified shorthand reporters who provide reporting services to a large clientele; that the partners cover some of the reporting assignments and other reporters are hired as needed, averaging two to four reporters at all times; that all typing, collecting and servicing of accounts are performed by employees of the partnership.

(4) That more than 80% of the gross receipts is attributable to manuscripts on which independent reporters had taken the shorthand reporting; and that less than 80% of the gross income is attributable to personal services actually rendered by the partners.

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

HOLDING:

(A) That income received by the partnership is from an unincorporated business as defined in Section 703 of the Tax Law and is subject to unincorporated business tax under Article 23 of the said Tax Law.

(B) That the statements of audit charges and notices of deficiency issued against Borch and Borch on April 13, 1943, File Nos. 431 and P-431 are correct, and

(C) That the petition for redetermination is hereby denied.

HEND: Albany, New York this 13th day of March, 1943.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

/s/

A. BRUCE MANLEY

/s/

SAMUEL E. LEPLER