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Unincorp. Bus. Tax Determinations A-Z

# BUREAU OF LAW

## MEMORANDUM

Borchardt, Stanley A.

TO: State Tax Commission

FROM: Alfred Rubinstein, Hearing Officer

SUBJECT: Application of Stanley A. Borchardt for Revision or Refund of Unincorporated Business Taxes under Article 16-A of the Tax Law for the Years 1951, 1952 and 1953

A hearing with reference to the above-entitled matter was scheduled before me on November 16, 1967 at 80 Centre Street, New York, New York. The taxpayer defaulted in appearance.

The issue involved whether the taxpayer's activities as a life insurance soliciting agent constituted services as an employee or as an independent contractor.

The taxpayer filed personal income tax returns reporting on Schedule A (Income from Business or Profession) total receipts of $27,186.75 for 1951, $29,482.80 for 1952 and $33,013.93 for 1953. In addition, in 1952 he reported $3,600 as salary from one of his principals, Northwestern Mutual Life Insurance Company. Northwestern Mutual paid 65% of his commissions in 1951, 60% in 1952 and 62 1/2% in 1953. The balance of his commission income in those years was paid by several other companies he represented.

Taxpayer deducted business expenses of $7,278.75 in 1951, $9,940.27 in 1952 and $9,088.37 in 1953 in computing his net income from business, which expenses included salaries, travel and entertainment, telephone, stationery and supplies and other usual business expenses. In computing his business expenses taxpayer deducted reimbursements from Northwestern Mutual in the sums of $193.61 for 1951, $141.59 for 1952 and $138.89 for 1953, which were denominated "secretarial allowance" and paid to him at the rate of 75¢ per $1,000 of life insurance written by him with Northwestern Mutual (see letter dated July 20, 1962 signed by Harry Krueger, General Agent of Northwestern Mutual).

Taxpayer was employed by Northwestern Mutual under a contract containing the usual clause that no employee-employer relationship was created thereby and permitting him complete freedom in performance of his duties (see letter of S. W. Haas dated September 12, 1957) and occupied an office rent-free where he employed a secretary at his own expense (see letter of taxpayer dated June 24, 1959). No copy of the contract is contained in the file, and it is unknown what restriction or limitation existed, if any, as to placing lines with other companies. Apparently, the substantial business submitted by taxpayer to other companies was of a type either not written by Northwestern Mutual or unacceptable for other reasons (see letter of taxpayer dated May 5, 1962).

The Income Tax Bureau imposed unincorporated business taxes on the taxpayer in the sum of $327.86 for 1951 (Assessment No. AA884943), $340.02 for 1952 (Assessment No. AA884944) and $424.21 for 1953 (Assessment No. B149631) on a finding that his income was derived from activities which constituted carrying on a business. Taxpayer filed applications for revision and demands for hearing, contending that his contract with Northwestern Mutual subjected him to forfeitures and loss of pension benefits; that he was covered by social security under the contract; and that previous determinations of the Department of Taxation and Finance had established that agents under the contracts of Northwestern Mutual were employees.

It should be noted, at the outset, that the taxpayer raises no issue with respect to his income received from any of his principals except Northwestern Mutual, nor does he make an apportionment of his business expenses between his activities on behalf of Northwestern Mutual and those on behalf of his other principals, indicating that he considered all of his activities on behalf of all of his principals as one unitary occupation.

Ruling of the State Tax Commission dated June 9, 1939 provides that a life insurance soliciting agent will be considered an independent contractor subject to unincorporated business taxes where he, himself, employs one or more permanent employees paying salaries not specifically reimbursed to him. In 1951, taxpayer paid salaries of $2,279 of which $193.01 was reimbursed. In 1952, he paid salaries of $2,388 of which $141.59 was reimbursed. In 1953, he paid salaries of $2,805.46 of which $138.89 was reimbursed. All reimbursements were made by Northwestern Mutual, at the rate of 75¢ per $1,000 of life insurance written by him. Inasmuch as the reimbursement for "secretarial allowance" was neither "specific," nor "substantial" as construed by the Tax Commission, and taxpayer's income from other companies was more than 1/3 of his total income, and considering the nature and extent of his unreimbursed business expenses, including the employment of a secretary, I am of the opinion that his activities were of the nature of an independent contractor subject to unincorporated business taxes and that the assessments should be sustained.

Taxpayer's contentions that he was subjected to forfeitures and the loss of pension benefits and that he was covered by social security under his contract with Northwestern Mutual are not determinative of the issue, and cannot affect his status with respect to his other principals. His claim of prior determinations is unsubstantiated, and would not, in any event, prevent a different finding at this time, Marx v. Goodrich, 286 App. Div. 913; Consolidated Edison v. State Tax Commission, 23 A D 2d 478.

Section 703(f) of Article 23, as amended by Chapter 683 of the Laws of 1961 to provide that salesmen (including insurance salesmen) would not be deemed engaged in an unincorporated business by reason of employment of clerical or secretarial assistance is applicable to years ending December 31, 1960 and thereafter. Accordingly, this opinion is restricted to these applications for 1951, 1952 and 1953 under Article 16-A.

The determination of the Tax Commission should be substantially in the form submitted herewith.

/s/ ALFRED RUBINSTEIN
Hearing Officer

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Enc.

March 4, 1968

3-5-68

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION

OF

STANLEY A. BORCHARDT

FOR REVISION OR REFUND OF UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 16-A OF THE TAX LAW FOR THE YEARS 1951, 1952 AND 1953

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Stanley A. Borchardt having filed applications for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the years 1951, 1952 and 1953 and a notice of hearing having been duly served by mail on the taxpayer on September 28, 1967, setting down a hearing for November 14, 1967, at 3 p.m., at 80 Centre Street, New York, New York, before Alfred Rubinstein, Hearing Officer of the Department of Taxation and Finance, and the taxpayer having defaulted in appearing, and a notice thereafter having been served on the taxpayer by certified mail, according him a further opportunity to appear and be heard, and an official receipt of the United States Post Office having been received as proof of delivery of said notice, and the taxpayer not having responded thereto, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed personal income tax returns for 1951, 1952 and 1953 on which he reported income from commissions of $27,186.75 for 1951, $33,062.80 for 1952 and $33,[illegible] for 1953; that taxpayer deducted business expenses for 1951 of $7,[illegible] of which $2,879 was for salaries; that taxpayer deducted business expenses for 1952 of $9,940.37 of which $2,308 was for salaries;

that taxpayer deducted business expenses for 1953 of $9,882.37 of which $2,805.46 was for salaries; that the balance of taxpayer's deductions for business expenses for all years included charges for travel and entertainment, telephone, stationery and supplies and other usual business expenses; that in computing deductions for business expenses, taxpayer included credits for reimbursements for salary expense of $193.01 for 1951, $141.89 for 1952 and $130.89 for 1953.

(2) That on August 11, 1955 the Income Tax Bureau issued Assessment No. AA884843 against the taxpayer for 1951, imposing unincorporated business taxes of $327.06; that on August 11, 1955 the Income Tax Bureau issued Assessment No. AA884844 against the taxpayer for 1952, imposing unincorporated business taxes of $340.02; that on July 19, 1956 the Income Tax Bureau issued Assessment No. B149631 against the taxpayer for 1953, imposing unincorporated business taxes of $484.21; that all assessments were issued on findings that taxpayer's activities during such years constituted the carrying on of an unincorporated business; that the taxpayer filed applications for revision or refund and demands for hearing with respect to such assessments.

(3) That during 1951, 1952 and 1953 the taxpayer was engaged as a life insurance soliciting agent for Northwestern Mutual Life Insurance Company under a written contract which included provisions, (a) that he was not to be considered an employee of the company or its general agent, and (b) that he was to exercise his own judgment in soliciting business; that taxpayer during such years represented several other insurance companies; that in 1951 taxpayer derived 65% of his income from Northwestern Mutual Life Insurance Company and 35% thereof from his other principals; that in 1952, taxpayer derived 60% of his income from Northwestern Mutual Life Insurance Company and 40% thereof from

his other principals; that in 1953, taxpayer derived 62 1/2% of his income from Northwestern Mutual Life Insurance Company and 37 1/2% thereof from his other principals; that during such years the taxpayer occupied an office furnished by Northwestern Mutual Life Insurance Company rent free where he employed a secretary at a cost of $2,379 in 1951, $2,380 in 1952 and $2,808.46 in 1953 at his own expense; that except for an allowance by Northwestern Mutual Life Insurance Company of $193.01 for 1951, $141.20 for 1952 and $130.09 for 1953, computed at 75¢ per $1,000 of life insurance written by him with the company, the taxpayer received no reimbursement for his expenses; that except for social security claimed to have been deducted by Northwestern Mutual Life Insurance Company, none of taxpayer's principals made any deductions or withheld any taxes from his earnings; that neither Northwestern Mutual Life Insurance Company nor any of his other principals exercised any supervision, direction or control over the taxpayer in his business activities.

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

DETERMINES:

(A) That during 1951, 1952 and 1953 the taxpayer's activities as a life insurance soliciting agent for multiple principals were carried on by him as an independent contractor and not as an employee; that taxpayer's activities during such years constituted the conduct of an unincorporated business within the meaning of Section 386 of the Tax Law.

(B) That, accordingly, the assessments against the taxpayer imposing unincorporated business taxes in the sum of $327.86 for 1951, $340.03 for 1952 and $484.21 for 1953 are correct; that the amounts set forth therein are due and owing together with interest, if any, and other statutory charges; that said assessments do not include any tax or other charges which could not have been lawfully demanded, and that taxpayer's applications for revision or refund with respect thereto be and the same are hereby denied.

Dated: Albany, New York this 25th day of March , 1968.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

/s/ SAMUEL E. LEPLER
COMMISSIONER