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Unincorp. Bus. Pax BUREAU OF LAW Determinations A-Z MEMORANDUM Caplin, Elliott A.

Commissioners Murphy, Macduff & Conlon TO:

FROM:

Solomon Sies, Hearing Officer

SUBJECT: ELLIOT A. CAPLIN

> 1954 Assessment #B-401252 1955 Assessment #B-566320 1956 Assessment #B-764584

Article 16-A

A hearing with reference to the above matter was held at the New York City office on January 16, 1964.

There are three issues involved herein: (1) whether the taxpay filed a timely application for revision or refund with respect to the assessment for the year 1956; (2) professional exemption from unincorporated business tax with respect to income received from Alfred G. Capp and Art Services, Inc. as a script writer of serialized comic strips; (3) with respect to the income received by taxpayer from The Hearst Corp., Kings Feature Div., whether less than 80% of such gross income represented services actually rendered by him as a writer of comic strips, subject to unincorporated business tax.

The taxpayer filed personal income tax returns under Article 16 of the Tax Law for the years 1954, 1955 and 1956, but did not file any unincorporated business tax returns for said years. On his return for the year 1954, the taxpayer reported wages received as "Writer" from Alfred G. Capp and Art Services, Inc. in the amounts of \$2,255.34 and \$3,273.33, respectively. In addition, he also reported on Schedule "A" net income from business as "Script Writer" conducted at his home at 34 Monroe Avenue, Larchmont, New York, in the amount of \$45,802.03. For the year 1955, he reported on Item 10, compensation as an employee for Art Services, Inc. in the amount of \$13,972.41, and from King Features in the amount of \$74,579.44, or total compensation as a writer in the amount of \$88,551.85, less expenses of \$32,008.33, or net wages as an employee in the amount of \$56,543.52. For the year 1956, the taxpayer reported salary income from U. S. Pictorial, Inc. as an executive in the amount of \$5,000 and, in addition thereto, he reported net business income on Schedule "A" in the amount of \$58,032.34. The Income Tax Bureau issued assessments imposing an unincorporated business tax on the ground that the taxpayer's activities as a writer of comic strips constitutes the carrying on of an unincorporated business. It is to be noted that the income reported by the taxpayer as wages received from Alfred G. Capp & Art Services, Inc. for 1954 were not included in the computation for unincorporated business tax purposes in the assessment for said year but were included in the assessment for 1955. When the assessments were issued in 1958 and 1959, there was doubt as to whether a writer was entitled to professional exemption under Section 386 of the Tax Law. However, Mr. Arvis Johnson, in correspondence with the taxpayer's representative, raised the issue as to whether the 80% rule applied.

The assessment for the year 1956 (Assessment #B-764584) was made on March 16, 1960. The taxpayer's representative wrote a letter dated July 12, 1960 protesting the assessment. Although it is contended that Forms IT-113 (application for revision or refund) were timely filed, no IT-113 could be located for said year. I am, however, of the opinion that the letter of protest of July 12, 1960 constituted a timely application for revision or refund for the year 1956 in accordance with §374 of the Tax Law.

The taxpayer graduated from Ohio State University in 1936 with a Bachelor of Arts degree. During the years in issue and for several years prior thereto, the taxpayer was and still is a writer of comic strips or features. He creates characters, outlines plots and writes the continuity for comic strip serials. He is not an artist. The illustrations and the lettering for the comic strips are performed by artists at the direction of the taxpayer.

The income received from Alfred G. Capp and Art Services, Inc., (successor in interest to Alfred G. Capp) was pursuant to an oral agreement that the taxpayer had entered into with his brother, Alfred G. Capp, whereby the taxpayer wrote the script or continuity for a comic feature called "Abbie An' Slats." Alfred G. Capp had owned the rights to this comic strip and had previously made arrangements with an artist for the execution of the drawings and lettering thereof. The reason Capp requested the taxpayer to write the continuity was that he had become engaged in other ventures. With respect to the income from this source, Al Capp and Art Services, Inc., deducted withholding and social security taxes. The taxpayer had no agreement with the artist who drew the illustrations and lettering for said comic strip, except to provide him with the script (Minutes of hearing, pages 32, 33 and 34). I am of the opinion that the aforementioned income is exempted from unincorporated business tax on the ground that it was derived from the taxpayer's profession as a writer and have recomputed the assessment for 1955 as more fully set forth in the proposed determination.

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The taxpayer entered into written agreements with the Hearst Corp., King Feature Syndicate Division, whereby he was required to prepare and deliver to the Syndicate a daily and weekly Sunday page comic serial strip entitled "The Heart of Juliet Jones" and "Big Benn." Pursuant to said agreements, taxpayer was to receive 50% from the sale of said material plus 50% of the royalties from the sale of book, radio, television, novelty, toy or motion and/or talking picture rights to said material with guaranteed minimums. Although there were four agreements, two for the daily features of each of the comic serials and two for the Sunday pages of each, only the agreement for the Sunday pages of "The Heart of Juliet Jones" was presented. (Tax Comm. Exhibit N) The taxpayer was requested to submit copies of the other three agreements but failed to do so. The agreements further provided that payments were to be made to taxpayer on or about the 20th of the month to cover the share of moneys actually received during the preceding month.

The taxpayer submitted a copy of a written "contract of employment" dated December 31, 1949 for a period of ten years from said date entered into with one John Cullen Murphy whereby the latter was to deliver to the taxpayer, or, at his direction, to the Syndicate installments of the comic strip, "Big Benn" in black and white or color, together with such other drawings and other art work, including the lettering; that pursuant to said agreement, Murphy was to receive fifty percent of the net amounts received by the taxpayer from the Syndicate plus 33-1/3 percent of the net amounts received by the taxpayer from royalties including the sale of book, radio, television, novelty, song and motion and/or talking picture rights to said material with a guaranteed minimum of \$200.00 per week. The taxpayer also entered into a similar contract of employment with one Stan Drake, the artist commissioned to do the drawings and other art work, including lettering for the comic strips, "The Heart of Juliet Jones" both the daily and Sunday installments. Although the taxpayer was requested to submit a copy of the written agreement with the artist, Stan Drake, he has failed to do so.

There was submitted into evidence a statement of the Syndicate for the year 1956 (Taxpayer's Exhibit #4) indicating that the grand total paid for the daily and Sunday comic strips for both "The Heart of Juliet Jones" and "Big Benn" amounted to approximately \$130,000.00 (which included royalties of \$75,000); that approximately \$55,000.00 was paid to both artists - approximately \$27,000 to Stan Drake and \$28,000 to John Cullen Murphy. Although the taxpayer was requested to submit similar statements for the years 1954 and 1955, he failed to do so.

The taxpayer contends that the Syndicate employed him to write the continuity and the artists to do the illustrations; that the

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Syndicate and not the taxpayer exercised control and supervision of the artists; that the taxpayer was merely an intermediary in connection with the payments that were made by him to the artists. The taxpayer was requested to submit corroboration in the form of an affidavit or the testimony of an officer of the Syndicate. The representative for the taxpayer stated at the hearing that the Syndicate felt that its relationship with the taxpayer was fully covered in their written agreements with him, and that they would not furnish him further or additional information or be involved in the dispute of the taxpayer with the Tax Commission (Minutes of hearing, page 53).

In the case of <u>Hewitt v. Bates</u>, 297 N.Y. 239, it was held that teachers operating a day school although supervising and outlining courses of instruction are not necessarily considered a part of the personal services actually rendered in a teacher's profession and that the work performed by the assistants should not be ascribed to the supervisor. In that case it was shown that additional teachers and assistants employed were paid salaries from gross income ranging from 36§ to 51% so that the amount of gross income available for the taxpayer's personal services was reduced to less than 80% fixed by statute.

The instant case is to be distinguished from the case of <u>Voorhees v. Bates</u> 308 N.Y. 184 where one of the issues was whether 80% of the taxpayer's gross income was derived from his personal services. The Court there held that the taxpayer was not, in fact, the employer of the musicians and arrangers, although on his return he indicated the total amount received from the sponsor and deducted as expenses the salaries paid to said musicians and arrangers.

I am of the opinion that under the agreements of the taxpayer with the Syndicate, the former was required to furnish the latter with complete comic strips, thatis, the continuity plus the illustrations; that the taxpayer entered into separate and independent contracts with the artists for the drawings and illustrations of said comic strips; that the moneys which the taxpayer either paid or had the Syndicate pay to the artists were not attributable to services actually rendered by him; that the gross income which the taxpayer was to receive from the Syndicate exceeded twenty percent of the gross income derived from personal services actually rendered by him in which capital is not a material income-producing factor; that the activities of the taxpayer in connection with such income constituted the carrying on of an unincorporated business in accordance with the intent and meaning of §386, Article 16-A, of the Tax Law, similar to that of a producer who undertakes the complete production of a play. In the case of <u>Matter of Salter v. Hurshy</u>, 11 A D 34 262, it was held that the State Tax Commission properly sustained assessments of unincorporated business taxes under Article 16-A of the Tax Low on carnings of a group, of which the petitioner, in charge of arranging the music and conducting the orchestre, was a member. The group were bound under an agreement which provided for the production of a radio and television show; that while the services of a professional man such as petitioner, who is a masterial director and orchestre leader, may not be taxed under Article 16-A, the petitioner may be so taxed for his income which is derived from the nonprofessional activities of the group.

For the reasons stated above, I recommond that the determination of the Tax Counission be substantially in the form submitted herewith.

/s/ SOLOMON SIES

SAUL HECKELMAN

MARTIN SCHAPIRO

5-18-67

/s/

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STREET THE CONSTRAINTS

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(A) that the income which the tangeger secolved from the Incost Corporation, King Posture Division, during the years 2006, 2006 and 1996 did not constitute salary income as an employee but easstituted income secolved as an independent contractor.

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Milling Albury, Mur Yack, en the 15th day of

JOSEPH H. MURPHY

June

WALTER MACLYN CONLON