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Unincorp. Bus. Tax Determinations A-Z

BUREAU OF LAW

MEMORANDUM

Caplin, Elliott A.

TO: Commissioners Murphy, Macduff & Conlon

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.

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

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 Hewitt v. Bates, 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 Voorhees v. Bates 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 Matter of Salter v. Murphy, 11 A D 2d 262, it was held that the State Tax Commission properly sustained assessments of unincorporated business taxes under Article 16-A of the Tax Law on earnings of a group, of which the petitioner, in charge of arranging the music and conducting the orchestra, 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 musical director and orchestra 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 recommend that the determination of the Tax Commission be substantially in the form submitted herewith.

/s/ SOLOMON SIES
Hearing Officer

/s/ MARTIN SCHAPIRO
Approved

/s/ SAUL HECKELMAN
Approved

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STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

MILIOT A. OGLIN

FOR REVISION OR REFUND OF UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 16-A OF THE TAX LAW FOR THE YEARS 1954, 1955 and 1956

Miliot A. Oglin, the taxpayer herein, having filed due and timely applications for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the years 1954, 1955 and 1956, and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, N. Y. on the 16th day of January, 1964, before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and was represented by Irving Segal, C.P.A., 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 the years 1954, 1955 and 1956; that on his return for 1954 the taxpayer reported wages received as "writer" from Alfred G. Gapp and Art Services, Inc. in the amounts of $1255.34 and $3273.20 respectively and also reported on Schedule "A" net income from business as "weight writer" conducted at home at 24 Ramsen Ave., Larchmont, New York, in the sum of $45,002.03; that for the year 1955 the taxpayer reported on Item 1b, compensation as employee for Art Services Inc., in the amount of $13,972.41 and from King Features in the amount of $74,579.64 for a total of $88,551.05 less expenses of $32,000.00 or a net total of $56,543.52; that for 1956 taxpayer reported salary income from U. S.

Pictorial Inc. as executive in the amount of $8,000 and reported net business income on Schedule "A" in the amount of $58,022.34; that the taxpayer did not file any unincorporated business tax returns for the years 1954, 1955 and 1956 on the ground that his activities constituted the practice of a profession exempt from unincorporated business tax; that on March 11, 1958 and on March 16, 1959 the Department of Taxation and Finance made additional assessments against the taxpayer (Assessment Nos. 2401252 and 276564) for the years 1954 and 1956, respectively, holding that the net business income reported by the taxpayer for said years was subject to unincorporated business tax; that on March 12, 1959 the Department of Taxation and Finance made an additional assessment against the taxpayer (Assessment [illegible]) for 1955 holding that the net income of the taxpayer in the sum of $[illegible].71, reported by him as salary income, was subject to unincorporated business tax and computed unincorporated business taxes due for said year in the sum of $1,747.89.

(2) That the taxpayer, Elliot A. Caplin, graduated from Ohio State University in 1936 with a Bachelor of Arts degree; that during the years 1954, 1955 and 1956 and for several years prior thereto, the taxpayer was and still is a writer of syndicated comic strips or features; that he is not an artist; that he creates characters, outlines plots, writes continuity and directs the artists in their activities with respect to the panels to be drawn for the aforementioned comic strips. (Minutes of hearing, page 18).

(3) That on February 5, 1954 the taxpayer entered into a written agreement with The Hearst Corp., King Features Division, hereinafter referred to as the Syndicate (Tax Commission Exhibit 2) whereby the taxpayer was required to prepare and deliver to the Syndicate a Sunday page each week entitled "The Heart of Juliet Jones"; that pursuant to the terms of said agreement, the Syndicate agreed to

pay to the taxpayer fifty percent from the sale or license of said material, plus fifty percent of any royalties received from the sale of book, radio, television, novelty, toy or motion and/or talking picture rights to said material with a guaranteed minimum of $250.00 per week; that the payments were to be made to the taxpayer on or about the 20th of the month and would cover the share due to the taxpayer of moneys actually received during the preceding month; that the taxpayer entered into three additional agreements with the Syndicate for the daily page of the comic strip or feature entitled "The Heart of Juliet Jones" and for the daily page and the Sunday page of the comic strip or feature entitled "Big Ben"; that the same provisions were contained in the other agreements as those contained in Tax Commission's Exhibit N except that the guaranteed minimum for "Big Ben" was $375.00 per week; that the agreements were renewed by letter for an additional two years and were in full force and effect during the years in issue; that although the taxpayer was requested to submit copies of the three other agreements with the Syndicate, he has failed to do so.

(d) that the taxpayer submitted at the hearing a copy of a written "contract of employment" with John Quinn Murphy dated December 31, 1949, hereinafter referred to as the "Artist"; for a period of ten years from the date thereof whereby the taxpayer agreed to write or cause to be written the continuity of a comic strip or feature known as "Big Ben" and to deliver the same to the artist in sufficient time in advance of the release dates of each installment of the feature to enable the artist to prepare and deliver the completed installments to the taxpayer or at his direction to the Syndicate; that the artist was required to draw the feature in black and white or color together with such other drawings and other art work, including the lettering for the daily and Sunday installments of said feature; that the artist was to receive from the taxpayer fifty percent of the

net amount received by the latter from the use of said features or comic strips plus 33-1/3 percent of the net amounts received by the taxpayer from the Syndicate for royalties including book, radio, television, song, toy, novelty and other merchandise and advertising from the sale of such rights; that the artist was to receive from the taxpayer a guaranteed minimum of $300.00 per week which was to be paid to him as and when received by the taxpayer; that the taxpayer testified that he had a similar contract of employment with one Stan Drake, the artist who was required to draw in black and white or color such drawing and other art work including lettering both for the daily and Sunday pages of the comic strip or feature called "The Heart of Juliet Jones"; that the same terms and conditions were contained in said written contract as those contained in the written contract with Murphy; that although the taxpayer was requested to submit a copy of the written contract of employment with Stan Drake, he has failed to do so.

(5) That there was introduced 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 Ben" amounted to approximately $130,000.00 (including royalties) of which $75,000.00 was paid to the taxpayer; that approximately $55,000.00 was paid to both artists (approximately $27,000.00 to Stan Drake and approximately $28,000.00 to John Dallas Murphy); that the expenses incurred by the artist were not shared by the taxpayer; that they incurred their own expenses separate and apart from that of the taxpayer (Minutes of Hearing, page 21); that although the taxpayer was requested to submit similar statements for the years 1954 and 1955, he has failed to do so.

(6) That although the taxpayer contends that the Syndicate employed him to write the continuity and the artists to do the illus-

tations and that the artists were under the supervision and control of the Syndicate, he has failed to establish such facts although afforded a reasonable and ample opportunity to do so (Minutes of Hearing, pages 20 and 53); that the taxpayer was not an employee of the Syndicate but was an independent agent who had agreed to furnish the Syndicate with a complete comic strip which included the story as well as the illustrations and lettering; that the taxpayer had entered into independent contracts with the artists to do the illustrations and that the latter were under the taxpayer's supervision and control.

(7) That with respect to the income which the taxpayer received from Alfred G. Dapp and Art Services, Inc., the successor in interest to Alfred G. Dapp, for the year 1954 and from Art Services, Inc. in the amount of $13,972.41 for the year 1955, the taxpayer merely wrote the continuity or script of a comic feature called "Ohbie An' Slats"; that he was not the originator of said feature or comic strip; that his brother Al Dapp owned the rights thereto and the latter had previously engaged the services of an artist to do the illustrations; that since his brother became involved in other ventures, taxpayer was requested to merely continue writing the plot or script for said feature; that with respect to the aforementioned income from this source, capital was not an income-producing factor and more than eighty percent of the gross income received by the taxpayer therefrom was derived from the personal services actually rendered by him in the practice of his profession as a writer.

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

DETERMINES:

(A) That the income which the taxpayer received from the Hearst Corporation, King Features Division, during the years 1954, 1955

and 1955 did not constitute salary income as an employee but constituted income received as an independent contractor.

(b) That the remuneration received by the taxpayer from the Manat Corporation, King Features Division, during the years in issue, was not merely for services rendered as a writer but was for the entire production of completed serialized comic strips or features including the illustrations and lettering thereof and as such did not constitute the practice of a profession within the intent and meaning of Section 306, Art. 16-A of the Tax Law.

(c) That even if the taxpayer's above mentioned activities were to be deemed the practice of a profession, less than 80% of the gross income derived from such activities was attributable to the personal services actually rendered by him as more fully set forth in Finding (5) above; that, accordingly, the assessments for the years 1954 and 1956 (Assessment Nos. B-401152 and B-704854, respectively) are correct; that said assessments do not include any tax or other charge which could not have been lawfully demanded; and that the taxpayer's applications for revision or refund filed with respect thereto be and the same are hereby denied.

(d) That the income received by the taxpayer in the sum of $13,972.41 for the year 1955 as more fully set forth in Finding (7) above constituted income in which he was engaged in the profession of writing; that more than eighty percent of the aforementioned gross income was derived from personal services actually rendered by him in his profession as a writer and capital was not a material income-producing factor; that said income was therefore exempt from the imposition of unincorporated business tax in accordance with the intent and meaning of Section 306, Article 16-A of the Tax Law.

(e) That by reason of determination D above, the assessment for the year 1955 (Assessment B-[illegible]) should be recomputed as follows:

Business Income Subject to unincorporated business tax	$74,219.44	
Less Business Expenses claimed	[illegible]	
Net Business Income	[illegible]	
Less Contributions	[illegible]	
Balance	[illegible]	
Less Statutory Exemption and credit for taxpayer's services	[illegible]	
Amount subject to unincorporated business tax	$20,734.05	
Unincorporated business tax on above at 4% - Amount due		$[illegible]

together with lawful interest and any other charges that may be due and owing thereon; that accordingly, the assessment for the year 1965 is hereby cancelled to the extent of $156.90; that said assessment (Assessment 09-066139), except as modified herein is correct; that said assessment does not include any tax or other charge which could not have been lawfully demanded and that the taxpayer's application for revision or refund filed with respect thereto, except as modified herein, be and the same is hereby denied.

DATED: Albany, New York, on the 15th day of June 1967.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ JAMES R. MACDUFF
Commissioner

/s/ WALTER MACLYN CONLON
Commissioner