

MEMORANDUM

Clarfield, Albert

TO: Commissioners Murphy, Macduff and Conlon

FROM: Francis V. Dow, Hearing Officer

SUBJECT: In the Matter of the Petition of
Albert Clarfield for a Redetermination
of a Deficiency or for Refund of Unincorporated Business Taxes Under Article 23
of the Tax Law for the Years 1961 and 1962

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, New York on February 9, 1967. The appearances and the exhibits produced were as shown in the stenographic minutes submitted herewith.

The issue involved herein is whether the taxpayer's income from his activities as a manufacturer's representative is subject to the unincorporated business tax. A notice of deficiency and statement of audit changes (File No. 2-3133929) were issued on November 20, 1965 determining that the taxpayer's unincorporated business tax liability and interest for the years 1961 and 1962 was in the amount of \$684.96.

The taxpayer contended that he was not subject to the unincorporated business tax since his income was received from the practice of a profession and that he was not regularly carrying on an unincorporated business.

The taxpayer is a manufacturer's representative for five firms in the New York metropolitan area for whom he sold electronic components. He was paid commission on sales by them from which no deductions were withheld for social security or income taxes. He had no employees, handled no inventory and did no billing or shipping as this was done directly from the firms he represented. He maintained an office in his home.

The control exercised over the taxpayer was limited to the setting of sales policies, pricing and controlling the delivery of merchandise. The taxpayer was not limited by his principals as to the number of lines he could carry as long as he was able to effectually handle the firms which he represented. It appears that they were interested in results and not with the manner in which sales were effected. The taxpayer devoted a greater portion of his time to those firms which produced the greatest income for him. The taxpayer was not reimbursed for his selling expenses, which included expenses for traveling, telephone, postage, advertising, business lunches and business insurance.

It is my opinion that the taxpayer was engaged in an unincorporated business as defined in section 703 of the Tax Law. The activities of a manufacturer's representative are not recognized as the practice of a profession (see Sundberg v. Bregalini, 7 A D 2d 15). In the case of George H. Griffin v. Murphy, 22 A D 2d 967 recently affirmed by the Court of Appeals without an opinion, it was held that a multiple line salesman for 11 principals was subject to the unincorporated business tax. In that case it was found that the salesman had an office in his home. The other elements found in that case are similar to the facts in this case and support the conclusion that the taxpayer in the instant matter is also carrying on a business.

For the reasons stated above, I recommend that the determination of the State Tax Commission denying the taxpayer's petition in the above matter be substantially in the form submitted herewith.

DEPT. OF REVENUE

FVD:aw
Enc.

April 19, 1967

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

ALBERT CLAWFIELD

**FOR A REIMBURSEMENT OF A DEFICIENCY OR
FOR REFUND OF UNINCORPORATED BUSINESS TAXES
UNDER ARTICLE 23 OF THE TAX LAW FOR THE
YEARS 1961 AND 1962**

The taxpayer having duly filed a petition for reimbursement of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1961 and 1962, and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on February 9, 1967 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed resident income tax returns for the years 1961 and 1962; that the taxpayer reported income from business as a manufacturer's representative in the amount of \$12,333.12 for the year 1961 and \$13,134.83 for the year 1962; that the taxpayer did not file unincorporated business tax returns for the years 1961 and 1962.

(2) That a notice of deficiency and statement of audit changes were issued on November 22, 1965 (File No. S-3153949) showing unincorporated business tax and interest due for the years 1961 and 1962 in the amount of \$484.96 on the basis that the taxpayer's income from business was subject to the unincorporated business tax.

(3) That the taxpayer is a manufacturer's representative for five principals selling electronic components; that the taxpayer was paid commission on sales; that no deductions were withheld from the taxpayer's commissions for social security or income taxes by any of his principals.

(4) That the taxpayer employed no assistants; that he maintained no inventory; that the taxpayer did no billing and shipped no goods to his customers; that capital was not a material income producing factor; that he maintained an office in his home.

(5) That the taxpayer's principals controlled sales policies, prices and deliveries of merchandise; that the taxpayer was required to file reports of his activities with his principals.

(6) That the taxpayer had no arrangement with his principals as to the division of his time; that the taxpayer divided his time on behalf of his principals on the basis of whichever of his principals' lines produced the greatest profit to the taxpayer; that the taxpayer was free to represent other principals as long as he devoted sufficient time for the principals which he represented.

(7) That the taxpayer was not reimbursed for any of his selling expenses; that the taxpayer's selling expenses included expenses for traveling, telephone, postage, advertising, business lunches and business insurance.

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

HOLDING:

(A) That the activities of the taxpayer as a manufacturer's representative were conducted by him as an independent contractor and not as an employee; that such activities constitute the carrying on of

an unincorporated business the income of which is subject to the unincorporated business tax within the intent and meaning of section 703 of the Tax Law and that his activities do not constitute the practice of a profession exempt from the unincorporated business tax.

(B) That accordingly the notice of deficiency and statement of audit changes for the years 1961 and 1962 (File No. 2-3153929) are correct and do not include any tax or other charge which could not have been lawfully demanded; that the taxpayer's petition for redetermination of a deficiency or for a refund of unincorporated business taxes for the years 1961 and 1962 be and the same is hereby denied.

Dated: Albany, New York this 1st day of May , 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

CHAIRMAN

/s/

JAMES R. MACDUFF

COMMISSIONER

/s/

WALTER MACLYN CONLON

CLERK