L 9 (2-67)

Unincorp. Bus. Tax
Determinations A-Z
Cohen, Joseph J.

BUREAU OF LAW MEMORANDUM

TO: Commissioners Murphy, Macduff and Conlon

FROM: Francis V. Dow, Hearing Officer

SUBJECT: In the Matter of the Petition of Joseph J. Cohen for a Redetermination of a Deficiency or for Refund of Unincorporated Business Taxes under Article 23 of the Tax Law for the Year 1962

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, New York on March 7, 1967. The taxpayer did not appear, but was represented by his accountant who stated that he had personal knowledge of the facts. The appearances and the exhibits produced were as shown in the stenographic minutes submitted herewith.

A notice of deficiency and statement of audit changes were issued on November 22, 1965 (File No. 2-3281978) determining unincorporated business taxes of $476.87 and interest of $73.50 on business income of the taxpayer in the amount of $21,456.96 as a sales agent on his failure to file an unincorporated business tax return for the year 1962.

The taxpayer contended that he was not engaged in an unincorporated business as defined by section 703(f) of the Tax Law as amended in 1962 since he maintained no office and was not engaged in a business.

The taxpayer is a sales agent for three principals for whom he sells bottles, labels and bottle caps to soda bottling companies. His sales territory was located in and around New York City and his customers were limited to less than ten. The soda bottling companies to whom he sold purchased products from each of the taxpayer's principals. The taxpayer could not solicit new customers unless he was given permission to do so by his principals. The taxpayer was paid commissions on sales by each of his principals. No deductions were withheld from commissions for social security or income taxes by any principal. The taxpayer did not participate in any of his principals' employee benefit plans. He employed no assistants. The taxpayer was required to file sales reports with his principals but was not otherwise controlled by them.

He maintained a room in which he stored samples of the merchandise sold by his principals. The taxpayer claimed that he maintained no office but that he had a filing cabinet in his home for the storage of records. This is controverted

by the evidence whereby it appears that the taxpayer listed expenses for office stationery and postage for the year in the amount of $336.47. He also deducted $720.00 on his return which he claimed was the cost of storing his records in the filing cabinet in his apartment. In addition, he deducted $250.00 as the expense of renting a room for storing samples of the merchandise that he sold. He also claimed other selling expenses for which he was not reimbursed by his principals. They included entertainment expenses for soliciting customers, gifts and souvenirs for items given at trade conventions for good will given to maintain his customers, and expenses for trade conventions, hotel and food, bank charges, telephone, auto rental and depreciation.

It is my opinion that the taxpayer is engaged in an unincorporated business subject to the unincorporated business tax. In the case of George H. Britten v. Murphy, 22 A D 2d 987, recently affirmed by the Court of Appeals without opinion, it was held that a multiple line salesman for eleven 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.

A finding that the taxpayer is not an employee but an independent contractor is sufficient to subject him in the first instance to unincorporated business taxes. See Sundberg v. Bragalini, 17 A D 2d 15 and Wittich v. Browne, 270 App. Div. 774 aff'd 296 N. Y. 720.

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.

/s/ FRANCIS V. DOW
Hearing Officer

FVD:pg
Enc.
April 17, 1967

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9/27/67

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE PETITION

OF

JOSEPH J. COHEN

FOR A REDETERMINATION OF A DEFICIENCY OR FOR REFUND OF UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 23 OF THE TAX LAW FOR THE YEAR 1962

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The taxpayer having duly filed a petition for a redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the year 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 March 7, 1967 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer's representative appeared and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed an income tax return for the year 1962 in which he reported business income as a sales agent in the amount of $21,456.96; that the taxpayer did not file an unincorporated business tax return for the year 1962.

(2) That a notice of deficiency and statement of audit changes were issued for the year 1962 on November 22, 1965 (File No. 2-3281578) determining unincorporated business tax and interest due in the sum of $544.17 which was based on the failure of the taxpayer to file an unincorporated business tax and computing unincorporated business tax on his income as a sales agent.

(3) That the taxpayer represented three principals for whom he sold bottles, labels and bottle caps to soda bottling companies; that the taxpayer sold the product of his principals to the same customers; that the taxpayer had less than ten customers.

(4) That the taxpayer was not permitted to solicit new customers without obtaining permission to do so from his principals; that the taxpayer was paid commissions on sales from which no deductions were withheld for social security or income taxes; that the taxpayer did not belong to any employee benefit plans of his principals.

(5) That the taxpayer was required to file sales reports with his principals; that the taxpayer was not controlled by his principals as to the manner or means sales orders were obtained; that the taxpayer was not reimbursed for any of his selling expenses; that the taxpayer's claimed expenses included entertainment expenses for soliciting customers, gifts and souvenirs for items given at trade conventions for good will given to maintain his customers, and expenses for trade conventions, hotel and food, bank charges, telephone, auto rental and depreciation.

(6) That the taxpayer rented a room in which he stored samples of the merchandise sold by him for his principals; that the taxpayer employed no assistants; that the taxpayer maintained records of his sales in a file cabinet in his home; that the taxpayer incurred postage and office stationery expenses; that the taxpayer deducted $720 as his expense for maintaining business records and office equipment; that he deducted $250 as the expense of renting a room for storing samples of the merchandise that he sold.

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

D E C I D E S:

(A) That the taxpayer maintained an office in his home in connection with his activities as a sales agent; that the activities of the taxpayer as a sales agent as set forth in the findings of fact were carried on by him as an independent contractor and not as an employee and constitute the carrying on of an unincorporated business the income of which is subject to an unincorporated business tax within the intent and meaning of section 703 of the Tax Law.

(B) That accordingly the notice of deficiency and statement of audit changes for the year 1962 (File No. 2-3281578) do not include any tax or other charge which could not have been lawfully demanded and that the taxpayer's petition for redetermination of a deficiency or for refund of unincorporated business taxes be and the same is hereby denied.

Dated: Albany, New York, this 8th day of May, 1967.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ JAMES R. MACDUFF
Commissioner

/s/ WALTER MACLYN CONLON
Commissioner