

BUREAU OF LAW

MEMORANDUM

Income Tax Determination
A-Z
Drowne, H. Russell, Jr.

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: H. RUSSELL DROWNE, JR.

Petition for Redetermination or For Refund
of Unincorporated Business Taxes Under
Article 23 of the Tax Law for the Year 1961.

A formal hearing was held in the above matter at
the New York City office on May 11, 1966.

The issue involved herein is whether the income of the taxpayer during the year in issue is subject to unincorporated business taxes. Determinative of the issue are two questions: (1) Whether commission income of the taxpayer as an independent life insurance agent received from eleven life insurance companies is subject to unincorporated business tax; and (2) whether the salary income received by the taxpayer from Russell Browne, Inc was integrated, interrelated and connected with his business income as an independent life insurance agent so as to constitute additional business income subject to unincorporated business tax.

The taxpayer was and still is licensed by the Insurance Department of the State of New York as an insurance broker and agent in the writing of life and accident and health insurance in this State. The taxpayer was and still is Chairman of the Board of Russell Drowne, Inc. a domestic corporation organized under the laws of the State of New York, engaged in business as general insurance brokers and insurance agents. He was also a 20% shareholder of the capital stock in said corporation.

During the year 1961 and prior thereto the taxpayer was in charge of the Life Insurance Department of Russell Drowne, Inc. handling all types of life, accident, health and hospitalization insurance and all types of annuity group and pension contracts. There was no written agreement between him and the corporation. On applications for insurance, the taxpayer was designated as agent entitled to receive commissions. However, he assigned such commissions, including renewals, to the corporation. The corporation's books were kept on a fiscal-year basis, ending November 30th. The taxpayer was on a cash-calendar year basis. The resolution of the Board of Directors of the corporation provided that the taxpayer was to receive "First \$16,000 of commis-

sions as earned by Russell Drowne Life Insurance and 40% of excess not to exceed an additional \$2,000.00. Life commissions to include Accident and Health, Personal, Accident, etc." In addition, the officers of the corporation were entitled to a bonus whenever the Board of Directors decided that the profits warranted a distribution thereof.

On November 21, 1952, the taxpayer and Russell Drowne, Inc. entered into two separate agreements in writing with Rollins, Burdick, Hunter Co., a foreign corporation organized under the Laws of the State of Illinois and duly authorized to transact business within the State of New York, engaged as general insurance brokers and insurance agents. Under the terms of the agreement between Russell Drowne, Inc. and Rollins, Burdick, Hunter, Co. the former would turn over to the latter all of the insurance business produced by it, except all kinds and types of life, health, accident and hospitalization insurance and all kinds and types of annuity, group and pension contracts. Rollins, Burdick, Hunter, Co. agreed to handle and service such insurance consisting in the main of casualty and marine insurance and in turn agreed to pay to Russell Drowne, Inc. 70% of earned commissions due on the general insurance brokerage business handled by it on behalf of Russell Drowne, Inc. In addition, Rollins, Burdick, Hunter, Co. agreed to furnish and provide Russell Drowne, Inc. office space and facilities at 116 John Street, New York City. The two corporations occupied offices on the 28th floor of said building.

The agreement between Rollins, Burdick, Hunter, Co. and the taxpayer provided that the taxpayer was to act as manager of the Life Insurance Department of the New York office of Rollins, Burdick, Hunter, Co. handling all types of life, accident, health and hospitalization insurance and all types and kinds of annuity group and pension contracts. The taxpayer was designated as the agent on the policy or contract of insurance entitled to receive commissions. Rollins, Burdick, Hunter, Co. advised him of the percentage of commissions in respect to each policy or contract with the company. The taxpayer assigned to Rollins, Burdick, Hunter, Co. one-half of the commissions on each policy or contract including renewals. The taxpayer had the right and privilege of using as much time as he considered it advisable to solicit all types of insurance business for Russell Drowne, Inc. The taxpayer was elected a vice-president of Rollins, Burdick, Hunter Co. to give him identity to solicit life and accident and health insurance through leads

furnished by said corporation. The taxpayer was not a shareholder of stock in Rollins, Burdick, Hunter Co.

On his income tax return for the year 1961 taxpayer reported "wages, salaries, etc." received in the amount of \$33,057.14. This was based upon so-called 'wages' received from Russell Drowne, Inc. in the amount of \$20,130.93, retirement pay from U. S. Army in the amount of \$3,552.48; commissions received as a broker on marine and casualty insurance received from Rollins, Burdick, Hunter Co. \$632.05, and commissions as agent from eleven life insurance companies as follows: New England Mutual Life Ins. Co., \$2,088.92, Connecticut General Life Ins. Co. \$5,071.07; Manufacturers Life Ins. Co. \$1038.08; Union Central Life Ins. Co. \$80.80; Metropolitan Life Ins. Co. \$60.77; Prudential Life Ins. Co. \$118.83, Equitable Life Assurance Society \$19.08; United States Life Ins. Co. \$15.62; Mutual Benefit Life Ins. Co. \$80.96; New York Life Insurance Co. \$4.05; John Hancock Mutual Ins. Co. \$163.50. The total of the aforementioned commissions amounted to \$9,373.73

The taxpayer occupied a private office in the offices of Russell Drowne, Inc. The clerical and stenographic assistance received by the taxpayer in connection with his insurance activities both on behalf of Russell Drowne, Inc. and Rollins, Burdick, Hunter Co. were paid by the former.

The representatives for the taxpayer submitted a copy of a career agent's contract entered into between the taxpayer and Edmond Nouri, general agent of the New England Mutual Life Insurance Co. of Boston on January 11, 1963, effective as of October 1, 1962. The contract provides that the agent may solicit and procure applications for policies in the New England Mutual Life Insurance Company in New York, New Jersey and in such other territories as may be agreed upon without exclusive representation, and subject to the conditions of the contract. The taxpayer was not a full-time soliciting life insurance agent for any insurance company. The taxpayer was under no supervision or control either by Russell Drowne, Inc. or by Rollins Burdick, Hunter Co. The taxpayer was treated as an employee for payroll purposes by Russell Drowne, Inc. since they deducted withholding and Social Security taxes. However, the taxpayer received no compensation from Rollins, Burdick,

Hunter Co.

The 1959 ruling of the Tax Commission, applicable to full-time soliciting life insurance agents, does not apply to the taxpayer since he was not a full-time life insurance agent, but, rather, an independent agent representing eleven life insurance companies.

I am of the opinion that the commission income received by the taxpayer from eleven life insurance companies as an independent agent constituted the carrying on of a business solely within the State of New York subject to unincorporated business tax in accordance with the provisions of Section 703 of the Tax Law. I am of the further opinion that the so-called "salary" income received by the taxpayer from Russell Drowne, Inc. was related, connected and integrated with his commission income as an independent life insurance agent, subject to unincorporated business tax.

For the reasons stated above, I recommend that the decision of the Tax Commission in this matter be substantially in the form submitted herewith.

March 28, 1968.

4-26-68

Solomon Sies
HEARING OFFICER

**STATE OF NEW YORK
STATE TAX COMMISSION**

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IN THE MATTER OF THE PETITION :

OF :

H. RUSSELL BROWN, JR. :

FOR A REDETERMINATION OF A DEFICIENCY :

OR FOR REFUND OF UNINCORPORATED BUSINESS :

TAXES UNDER ARTICLE 23 OF THE TAX LAW :

FOR THE YEAR 1961.

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H. Russell Brown, Jr. having filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the year 1961 and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, N.Y. on the 11th day of May 1966 before Solomon Sles, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and was represented by Webster, Sheffield, Fleischman, Hitchcock and Chrystie, Esqs., by Henry Cassette Smith, Esq. and Stephen Rye, Esq., of Counsel, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer, H. Russell Brown, Jr., filed a New York State Income Tax Return for the year 1961, in which he reported "wages, salaries, etc." received in the amount of \$33,067.14; that included in said amount was \$20,130.93 received from H. Russell Brown, Inc., commission income received from Rollins, Bardick, Hunter Co. and eleven other life insurance companies in the aggregate amount of \$9,373.73 and retirement pay in the amount of \$3,552.48 received from the U.S. Army.

(2) That on September 13, 1965 the Department of Taxation and Finance issued a statement of audit charges against the taxpayer, holding that the amount of \$9,373.73 received by the taxpayer repre-

sented business income received by him as an independent life insurance agent subject to unincorporated business tax, and further holding that the amount of \$20,130.93 received by the taxpayer from Russell Brown, Inc. was integrated with and related to the aforementioned business income so as to constitute additional business income subject to unincorporated business tax and, accordingly, issued a notice of deficiency therefor together with penalty and interest in the amount of \$1,134.99.

(3) That prior to 1961 the taxpayer was, and still is, a duly licensed insurance broker and agent in the writing of life and accident and health insurance; that during the year 1961, and prior thereto, the taxpayer H. Russell Brown, Jr. was, and still is, Chairman of the Board of Russell Brown, Inc., a domestic corporation organized under the laws of the State of New York, engaged in business as insurance brokers and agents, maintaining an office at 116 John Street, New York City; that the taxpayer was in charge of the Life Insurance Department of Russell Brown, Inc., handling all types of life, accident and health and hospitalization insurance and all types and kinds of annuity, group and pension contracts; that there was no written agreement of employment entered into between the taxpayer and Russell Brown, Inc.; that on the applications for insurance heretofore mentioned the taxpayer was designated as agent entitled to receive commissions on the premiums paid thereon, including renewal commissions; that the aforesaid commissions were assigned by taxpayer to Russell Brown, Inc.; that the corporate resolution of Russell Brown, Inc. (these books were kept on a fiscal year basis ending November 30th) provided that the taxpayer be paid an annual salary of \$16,000 from the first \$16,000 of commissions earned by the Life Insurance Department of Russell Brown, Inc. plus 40% of additional commissions with a maximum limit of \$3,000; that the taxpayer reported his income on a cash calendar year basis; that the taxpayer received from Russell Brown, Inc. during the year 1961 the

amount of \$19,810.93; that Russell Brown, Inc. paid the taxpayer a bonus of \$300 in 1961; that Russell Brown, Inc. withheld Social Security and Federal and State Income Taxes from the compensation paid to the taxpayer.

(4) That on or about November 21, 1962 the taxpayer entered into an agreement with Rollins, Burdick, Hunter Co., a foreign corporation organized under the laws of the State of Illinois and duly authorized to transact business within the State of New York, engaged in business as general insurance broker and life insurance agent at 116 John Street, New York City whereby the taxpayer was to act as manager of the New York office of the aforesaid corporation, handling all types of life, accident, health and hospitalization insurance and annuity, group and pension contracts; that the taxpayer was elected a vice president of Rollins, Burdick, Hunter Co. to give him identity to solicit life, accident and health insurance through leads furnished by said corporation; that the corporation advised him of the percentage of commission he would be entitled with respect to each policy or contract; that the taxpayer was designated as the agent on the policy or contract of insurance entitled to receive commissions; that the taxpayer assigned to Rollins, Burdick, Hunter Co. one-half of the commissions on each policy or contract, including renewals; that the taxpayer was permitted to devote as much time as he considered advisable in the solicitation of all types of insurance on behalf of Russell Brown, Inc.; that the taxpayer received from Rollins, Burdick, Hunter Co. as broker on marine and casualty insurance commissions in the amount of \$633.85; that pursuant to the above-mentioned agreement the taxpayer received the following commissions from eleven (11) life insurance companies: New England Mutual Life Insurance Co., \$2,000.00, Connecticut General Life Insurance Co. \$5,071.67; Manufacturers Life Insurance Co. \$1,038.00; Union Central Life Insurance Co. \$80.00;

Metropolitan Life Insurance Company \$50.77; Prudential Life Insurance Co. \$115.53; Equitable Life Assurance Society \$19.55; United States Life Insurance Co. \$15.62; Mutual Benefit Life Insurance Co. \$50.96; New York Life Insurance Co. \$4.55; John Hancock Mutual Insurance Co. \$163.50.

(5) That on or about the 21st day of November 1932 Russell Brown, Inc. entered into a written agreement with Rollins Burdick Hunter Co. whereby Russell Brown, Inc. would turn over to the company all of the insurance business produced by it as an insurance broker except all kinds and types of life, health, accident and hospitalization insurance and all kinds and types of annuity, group and pension contracts which the company agreed to handle and service on its behalf and in turn pay certain commissions to Russell Brown, Inc.; that the company agreed to and did provide Russell Brown, Inc. with office space and facilities in New York City and paid the rent therefor; that the company would charge the Russell Brown, Inc. commission account as a debit, all unusual office and traveling and out-of-office expenses and the amount of commissions credited to said account which shall be refunded, retained or returned; that the aforementioned agreement was modified in 1935 so as to provide that the percentage of commissions due and payable to Russell Brown, Inc. shall be 70% of earned commissions due on general insurance business handled by the company on behalf of Russell Brown, Inc.

(6) That the taxpayer had entered into a career agent's agreement with Edmund Hurri, General Agent of the New England Mutual Life Insurance Company of Boston, to solicit and procure applications for policies in said company in New York and New Jersey and other territories as may be agreed upon, but without exclusive representation; that the taxpayer was not a fulltime collecting life insurance agent for the Hurri Agency, New England Mutual Life Insurance Co., or

any other insurance company, but was an independent life insurance agent representing eleven insurance companies, none of which deducted withholding or social security taxes.

(7) That neither Russell Brown, Inc. nor Rollins Hardick Hunter Co. exercised sufficient supervision or control over the activities of the taxpayer so as to constitute an employer-employee relationship.

(8) That the income received by the taxpayer from Russell Brown, Inc. was integrated, inter-related and connected with and in furtherance of the taxpayer's independent life insurance agent activities for eleven insurance companies so as to constitute additional business income.

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

HOLDINGS:

(A) That the commissions earned by the taxpayer and received by him directly from eleven insurance companies as an independent life insurance agent and his activities in connection therewith constituted that of an independent contractor regularly carrying on a business solely within the State of New York subject to unincorporated business tax in accordance with the intent and meaning of Section 703 of the Tax Law.

(B) That the income received by the taxpayer from R. Russell Brown, Inc. and his activities in connection therewith were integrated, interrelated, connected with and in furtherance of his activities as an independent life insurance agent for eleven insurance companies so as to constitute additional business income subject to unincorporated business tax within the intent and meaning of Section 703 of the Tax Law.

(C) That, accordingly, the Statement of Audit Changes and Notice of Deficiency made against the taxpayer for the year 1961 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 refund of unincorporated business tax filed with respect thereto be and the same is hereby denied.

Dated: Albany, New York this 10th day of May 1960.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

A. BRUCE MANLEY

Commissioner

/s/

SAMUEL E. LEPLER

Commissioner