

BUREAU OF LAW

MEMORANDUM

Unincorp. Bus. Nat.
Determinations A-Z
Guerra, Joseph M. & Mildred

TO: State Tax Commission

FROM: Vincent P. Molineaux, Hearing Officer

SUBJECT: JOSEPH M. and MILDRED GUERRA

Petition for Redetermination of
Deficiency under Article 23 of
the Tax Law for the Years 1961,
1962 and 1963

A hearing on the above matter was held before me at 65 Court Street, Buffalo, New York on August 3, 1966. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issue involved is whether income reported as salary from a corporation constitutes additional business income to taxpayer's unincorporated business and is subject to unincorporated business tax under section 703 of the Tax Law.

Taxpayer is a printer. Since 1930, he has been the principal in Benton Announcements, Inc., a corporation which supplies engraved wedding invitations and announcements and other incidentals such as paper napkins, book matches, etc., used at wedding receptions.

In 1940, as a partnership, which later changed to an individual proprietorship, he began to provide lower priced printed and novographed invitations and announcements as Cordon Bleu. The incidental line is the same. Benton and Cordon Bleu advertise separately and have separate catalogs, neither mentioning the existence of the other. Both businesses are conducted at the same location but have separate addresses. Benton is 3006 and Cordon Bleu is 3420 Bailey Avenue, Buffalo.

Benton Announcements, Inc. does all of the printing for Cordon Bleu and handles the administration, billing Cordon Bleu for 90 to 92 percent of the charge to the customer.

All of the taxpayer's time is spent at the plant. He supervises the operations of both enterprises and actually works on the machines.

Taxpayer's son testified to being Vice President of Benton Announcements, Inc. and to handling the bookkeeping and accounting for Cordon Bleu.

This case is dissimilar to the usual situation in which a taxpayer in an unincorporated business attempts to segregate part of his income by forming a corporation and taking part of his profits in the form of a salary from the corporation which is the situation which section 703(b) seeks to control by the words, "unless such services constitute part of a business regularly carried on by such individual." See People ex rel Moffett v. Bates, (1949) 278 A.D. 38, aff'd 301 N.Y. 557, cert. den., 340 U.S. 865; People ex rel Blaikie v. State Tax Commission, (1944) 287 A.D. 873. See also Matter of Librik Brothers, presently before the Commission. A copy of the memorandum to the Commission is submitted herewith.

In the present instance, the two businesses are closely inter-related, but the corporation, Benton Announcements, Inc. could not be considered part of the business of Cordon Bleu, the proprietorship since the two operations handle distinctly different main lines, they advertise separately and separate catalogs go to different classes of clients, and each operation has a separate accounting system.

It is my opinion therefore that the business of the corporation, Benton Announcements, Inc., is separate and distinct from that of the partnership, Cordon Bleu, and does not constitute "part of a business regularly carried on" by the partnership and the salary received by taxpayer should not be included in income of Cordon Bleu subject to unincorporated business tax.

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

/s/

VINCENT P. MOLINEAUX

Hearing Officer

April 26, 1968
VPM:nn

Enc.

5-10-68

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION
OF
JOSEPH M. AND MILDRED GUERRA
FOR A REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF TAXES UNDER ARTICLE
22 OF THE TAX LAW FOR THE YEARS 1961,
1962 AND 1963

The taxpayers, Joseph M. and Mildred Guerra, having filed a petition for redetermination of a deficiency or for refund of taxes for the years 1961, 1962 and 1963 (File #0102400), and a hearing having been held at the office of the State Tax Commission, 65 Court Street, Buffalo, New York, on the third day of August, 1966 before Vincent P. Molineaux, Hearing Officer of the Department of Taxation and Finance, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers filed unincorporated business tax returns for the years 1961, 1962 and 1963 on which the amount shown to be due was paid.

(2) That taxpayers included in their personal income for the years 1961, 1962 and 1963 salary received from Benton Announcements, Inc. A statement of audit changes was issued by the Tax Commission including such salary as part of the business income of Gordon Bleu and assessing additional unincorporated business tax of \$698.32 plus interest of \$166.22, which were paid.

(2) That petitioner, Joseph M. Guerra, is a printer. He and several others formed the corporation Benton Announcements, Inc., in 1930. During the years under review, Guerra was holder of more than 80% of the shares, the remainder being held by his four children. The taxpayer runs the business which consists of plate engraving of wedding invitations, which is the expensive method considered socially acceptable. The corporation also provides engraved cards and note paper, and incidental printed paper such as napkins, book matches, nuptial mass books, etc. such as are commonly used at weddings. Petitioner Guerra devotes a full day to this work and receives a salary from the corporation.

(3) That around 1940, Guerra went into a less expensive line which he called Cordon Bleu, as an unincorporated business partnership between himself and B. O. Edwards, who had also been a stockholder in Benton. Guerra acquired Edwards's interest in 1944. The principal difference between the two operations is that Benton uses engraving which costs the customer two to three times as much as the printed or mimeographed work of Cordon Bleu. The incidental items offered to the customers are the same in both cases and the same price.

(4) That the location of both organizations is the same but the address differs. The printing of all the items sold by Cordon Bleu is carried out by Benton Announcements, Inc. and billed to Cordon Bleu at 80 or 85% of the price to the customer.

(5) That advertising is carried on separately by Benton and Cordon Bleu and separate catalogs, neither mentioning the other, are sent to prospective customers according to their

expressed wishes.

(7) That both businesses are conducted at the same plant and Benton does the printing for Cordon Bleu; that, however, separate books of account are maintained for each organization by the same bookkeeper.

(8) That other firms in the same business offer both varieties of announcements with the indicated difference in price.

(9) That the salary paid to taxpayer by Benton Announcements, Inc. was not related to the business of Cordon Bleu except that the volume of business provided by Cordon Bleu was a large part of the printing business of Benton Announcements, Inc.

(10) That the two entities provide miscellaneous items which are the same, but that the principal item of engraving as against printing or neograph is different and is not sold to the same customers.

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

DECIDES:

(A) That the income of the taxpayers from Benton Announcements, Inc. is not includible as income from an unincorporated business.

(B) That the taxpayers' petition for redetermination of the deficiencies for the years 1961, 1962 and 1963 is granted and the determination of deficiency for the said years is cancelled

in full and any amount paid thereunder shall be refunded.

Dated: Albany, New York this 28th day of May, 1968.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ A. BRUCE MANLEY
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COMMISSIONER

/s/ SAMUEL E. LEPLER
COMMISSIONER