

Unincorp. Bus. Tax
BUREAU OF LAW *Determinations A-Z*
MEMORANDUM *Heymann, Henry*

TO: State Tax Commission

FROM: Vincent P. Molineaux, Hearing Officer

SUBJECT: Henry Heymann
Applications for redetermination of
deficiency of unincorporated business
tax for the years 1963, 1964 and 1965

A hearing on the above applications was held before me at 80 Centre Street, New York, N. Y. on September 18, 1967. The issue is whether income received by the taxpayer for the years in question is income from the practice of a profession for which capital is not a material income producing factor, more than 80 percent of the income being derived from the personal services of the taxpayer, and therefore exempt from unincorporated business tax under section 386 of the Tax Law. The taxpayer's New York resident return for 1963 describes his occupation as buyer consultant and the returns for 1964 and 1965 as merchandising consultant. On the hearing he claimed to be more in the line of industrial designer.

Taxpayer's education and training for his work consists of five years attendance at a technical high school in Germany without graduating. He also attended Technical Evening High School in New York City for three years, obtaining certification for completion of courses in cloth analysis and design, garment design, textile testing and textile chemistry. He also attended seminars on mens' wear at the Fashion Institute of Technology which is sponsored by the Board of Education of the City of New York; took a two-semester course in textiles at Columbia University, and courses in psychology, time and motion study, economics and marketing at the New School of Social Research.

He attended one or two seminars a year for fifteen years during his active career and as a representative with the United States group attended seminars with the Board of Trade in Netherlands and Britain.

During 1959, 1960 and 1961 taxpayer had about ten articles published in trade magazines concerning the clothing industry. He is a member of the Society for Advancement of Management.

Taxpayer maintains an office at 113 West 42nd Street, New York City, where he provides a service which he describes as "the functional improvement of the finished product and for greater

public acceptance of soft goods" (p. 38) to seven clients. The form of the service is consultation, advice and analysis respecting the client's product and includes forecast and projection of the clothing market for two or three seasons or a year to a year and a half ahead. This sometimes includes a design of a garment or part of one to bring out a point and to indicate use of a type of material.

Taxpayer has no employees, there is no inventory and the service is all the personal effort of the taxpayer.

The petitioner cites Teague v. Graves, (1941) 261 AD 882, aff'd 287 N. Y. 549 and Voorhees v. Bates, (1954) 308 N. Y. 184, in support of a claim to be an industrial designer, however taxpayer's activities appear to be more in the nature of business or industrial consultant which has been held as non-professional and subject to unincorporated business tax in Cherington v. Graves, (1945) 269 AD 888; and Boos v. Bragalini, (1955) 1 AD 2d 838.

Also in Backman v. Bates, (1952) 279 AD 1115, aff'd 308 N. Y. 839, an economist was held not to be engaged in a profession when advising business enterprises.

A partnership doing business as educational consultants in school construction was not held to be engaged in a profession in Matter of Englehardt, (1953) 281 AD 1053.

Also the businesses of textile development and textile technologists were held to be not engaged in professions, respectively, in Heineman and Seidman v. Graves, (1940) 260 AD 888 and Schmit v. Bates, (1953) 282 AD 980.

In my opinion the taxpayer has probably attained a high degree of competence in his field but has not identified himself with any recognized profession and has not spelled out the kind of education usually associated with professions and has not, other than two semesters at Columbia University when he pursued only one course, identified himself with any institution of higher learning or published any learned works such as to establish his calling as a profession.

For the foregoing reasons I recommend that the decision of the State Tax Commission denying the petition for redetermination be substantially in the form submitted herewith.

/s/

VINCENT P. MOLINEAUX
Hearing Officer

VPM:pg
Enc.
April 3, 1968

4-8-68

STATE OF NEW YORK
STATE TAX COMMISSION

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IN THE MATTER OF THE PETITION
OF
HENRY HEYMANN
FOR REDETERMINATION OF A DEFICIENCY
UNDER ARTICLE 23 OF THE TAX LAW FOR
THE YEARS 1963, 1964 AND 1965

Henry Heymann having filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1963, 1964 and 1965 and a hearing having been held at the office of the State Tax Commission at 80 Centre Street, New York, N. Y., before Vincent P. Molinsek, 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 petitioner filed New York State resident returns for the years 1963, 1964 and 1965 on which the amount shown to be due was paid.

(2) That on the 17th day of October, 1966 the State Tax Commission issued Notice of Deficiency in the amount of \$218.50 for the year 1963 (File No. 3-5983901) and on February 20, 1967 the State Tax Commission issued Notice of Deficiency in the amounts of \$834.92 and \$208.73 for the years 1964 and 1965, respectively, (File No. 46139226) on the ground that income received as a buying or merchandising consultant is income from a taxable business under Article 23 of the Tax Law for each of the above years.

(3) That taxpayer's education and training for his work consists of five years attendance at a technical high school in

Germany without graduating and that he attended Technical Evening High School in New York City for three years obtaining certifications for completion of courses in cloth analysis and design, garment design, textile testing and textile chemistry; that he also attended seminars on men's wear at the Fashion Institute of Technology sponsored by the Board of Education of the City of New York; that he took a two semester course in textiles at Columbia University, and courses in psychology, time and motion study, economics and marketing at the New School of Social Research; that the taxpayer does not have a degree from any institution of higher learning.

(4) That he attended one or two seminars each year for fifteen years during his active career and as a representative with the United States group attended seminars with the Boards of Trade in Netherlands and Britain.

(5) That during the years 1959, 1960 and 1961 he has had about ten articles published in trade magazines concerning the clothing industry.

(6) That taxpayer is a member of the Society for Advancement of Management.

(7) That taxpayer maintains an office at 113 West 42nd Street, New York City where he provides a service which he describes as "the functional improvement of the finished product and for greater public acceptance of soft goods" to seven clients. That the form of the service is consultation, advice and analysis respecting the client's product and includes forecast and projection of the clothing market for up to a year and a half ahead. That this sometimes includes a design of a garment or part of one to bring out a point and to indicate use of a type of material.

(8) Taxpayer has no employees, there is no inventory, and the service is all the personal effort of the taxpayer.

Based upon the foregoing findings, the State Tax Commission hereby

DECIDES:

(A) That the taxpayer's activities consist of advising his clients with respect to marketing of their products and textile design of such products; that neither of such activities constitutes the practice of a profession for the purpose of section 134 of the Tax Law.

(B) That the Notices of Deficiencies determining unincorporated business tax for the years 1963, 1964 and 1965 are correct and are hereby affirmed together with any additional interest and other amounts which may be lawfully due and owing thereon.

(C) That the taxpayer's petitions for redetermination of deficiencies for the years 1963, 1964 and 1965 be and the same are hereby denied.

Dated: Albany, New York this 1st day of May, 1966.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

/s/ SAMUEL E. LEPLER
COMMISSIONER