

Unincorp. Bus. Tax Determination

BUREAU OF LAW

A-2

MEMORANDUM *Kaden, Robert T.*

TO: The State Tax Commission

FROM: Alfred Rubinstein, Hearing Officer

SUBJECT: Petition of Robert T. Kaden
For 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 on the above entitled petition was held before me at the office of the State Tax Commission, 80 Centre Street, New York, New York on November 3, 1966. The appearances and exhibits were as noted on the transcript.

The issues involved (1) whether the taxpayer's income from his activities as a sales representative for one principal was derived from a business conducted by him, and (2) claimed allocation of business income for out-of-state activities.

Taxpayer filed personal income tax returns for 1961 and 1962 on which he reported business income from his occupation of salesman, as reported on his Federal returns on schedule "G", and on which he paid Federal self-employment taxes for both years. For 1961 he reported net business income of \$16,914.46 after deducting \$11,434.41 expenses from total receipts of \$28,348.87. For 1962 he reported net business income of \$19,739.66 after deducting \$11,157.24 expenses from total receipts of \$30,896.90. By notices of deficiency and statements of audit changes dated November 22, 1965 (File No. 2-5840739) the Income Tax Bureau imposed unincorporated business taxes and penalties in the amounts of \$436.15 for 1961 and \$535.35 for 1962 for failure to file returns and to pay the taxes in those years; imposed additional personal income tax of \$44.82 for 1961 and computed an overpayment of personal income tax of \$14.07 for 1962. The additional personal income tax imposed for 1961 and the overpayment for 1962 were based on unreported Federal changes, the propriety of which were conceded by the taxpayer at the hearing. The remaining issues involved the taxpayer's contentions that (1) "a sales representative who does not maintain an office or employ anybody is exempt from unincorporated business tax," and (2) the taxpayer's income is all derived from sales without the State and he is entitled to an out-of-state allocation of 100% of his business income.

Taxpayer was a sales representative for one principal, Dubette Bags, Inc. of New York City. His customers were in the

middle western states and he made four trips of three weeks each in every year, visiting the trade. Orders were obtained on these trips, as well as at New York, and taxpayer's income consisted of commissions on these sales. Taxpayer maintained no office outside the State, and used the office of Dubette in New York as his base of operations. He had no written contract with Dubette; he was not forbidden to carry other lines (but he testified that the time required to represent Dubette did not allow for additional lines); no taxes or social security were deducted from his commissions; he had no drawing account; his substantial disbursements for travel and other business expenses were not reimbursed by his principal; charges for telephone calls made from the office of Dubette were deducted from his commissions; no supervision, direction or control was exercised over his activities, except that he was required (subject to exceptions) to quote prices set at different levels for retailers and distributors.

The primary question is whether a sales representative who claims that he does not maintain an office, who employs no one and who represents a single principal may be deemed exempt from unincorporated business taxes although no claim is made that he is an employee (transcript, page 11).

Section 703(f) of the Tax Law provides that a sales representative who maintains an office or who employs assistants shall not be deemed engaged in an unincorporated business solely because he represents more than one principal. The section does not exempt independent contractors who do not maintain an office, or employ assistants, or who represent a single principal. Taxpayer does not claim that he was an employee and in accord with Matter of Sundberg v. Bragalini, 7 A. D. 2d 15, if the facts establish his status as an independent contractor, he is, in the first instance, deemed to be conducting an unincorporated business, subject to any allocation or further exemption provided by law. While the sole fact that a person is a multi-line salesman is, in itself, an insufficient basis to deem him engaged in an unincorporated business (Britton v. State Tax Commission, 22 A. D. 2d 987, aff'd. 19 N. Y. 2d 613), it is equally true that the fact of conducting business does not depend for existence on plurality of goods, wares, services, customers or principals. An independent contractor who deals in a single product or service for one customer, or for one principal is as much engaged in his own business as a multi-line independent contractor.

The taxpayer's contention that he maintained no office is not supported by the record. He used the office of his principal, Dubette, in New York City, as his base of operations, where he

made presentations to customers, and conducted business. He was not charged any rent, but he was required to pay for his telephone calls, and his orders and mail were received there. Aside from this office, he maintained no other office outside the State and pursuant to section 707(a) of the Tax Law, in the absence of a regular place of business outside New York, no portion of his business income may be allocated outside New York. The fact that his customers were all outside the State is insufficient to entitle him to an allocation.

While it is not necessary to pass on the specific question in this matter, it should be noted that maintaining an office in New York is neither a statutory requirement nor a necessary element of doing business within the State, under Article 13 of the Tax Law. It is difficult, however, to envision the conduct of a business without an address for the receipt of mail, or some place where contact can be made for business purposes. It would, consequently, appear that some place of doing business must exist. In many cases the residence of the taxpayer or, as in this instance, the principal's place of business has been adopted for the purpose and constitutes an office or place of business.

Accordingly, for the reasons stated above, I am of the opinion that unincorporated business taxes were properly imposed on the taxpayer and that the Notices of Deficiency should be sustained.

The decision of the Tax Commission should be in the form submitted herewith.

/s/

ALFRED RUBINSTEIN
Hearing Officer

September 19, 1967

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4-8-68

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION
OF
ROBERT T. KADEN
FOR REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF UNINCORPORATED BUSI-
NESS TAXES UNDER ARTICLE 23 OF THE
TAX LAW FOR THE YEARS 1961 AND 1962

Robert T. Kaden 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 years 1961 and 1962, and a hearing having been held before Alfred Rubinstein, Hearing Officer of the Department of Taxation and Finance, at 80 Centre Street, New York, New York, on November 3, 1966, at which hearing the taxpayer's representative, Harry Edman, appeared, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed personal income tax returns for 1961 and 1962 reporting net business income of \$16,914.46 for 1961 and \$19,739.66 for 1962; that by notices of deficiency dated November 22, 1965 (File No. 2-5840739) the Income Tax Bureau recomputed taxpayer's income for 1961 by an increase of \$448.22 and by a reduction for 1962 of \$140.74, based on Federal audit changes for such years, and imposed unincorporated business taxes and penalties for failure to file unincorporated business tax returns for such years, in the amounts of \$436.15 for 1961

and \$535.35 for 1962; that the taxpayer failed to file unincorporated business tax returns or pay unincorporated business taxes for 1961 and 1962; that the taxpayer filed a petition for re-determination on February 16, 1966.

(2) That the taxpayer was an independent sales representative for one principal, Dubette Bags, Inc., of New York City; that his agreement with his principal was not in writing, and provided for commissions payable on sales made to the taxpayer's customers in the middle West; that during each year the taxpayer made four selling trips to his territory, each of three weeks duration; that the balance of each year was spent in New York where presentations and sales were made to his customers by the taxpayer; that the taxpayer's activities were unrestricted, and subject to no supervision, direction or control by his principal; that the taxpayer was free, if he so chose, to represent other principals and carry additional lines; that taxpayer had no drawing account; that no social security contributions nor taxes were deducted or withheld from his commissions.

(3) That the taxpayer maintained no office or place of business out of the State; that he used the office of his principal, Dubette Bags, Inc., in New York City for presentations, sales, receipt of mail and to make and receive telephone calls; that his principal made no charge for such use of its office by the taxpayer, except that he was required to pay for all telephone calls; that the taxpayer's business cards bore the address of his principal, Dubette Bags, Inc., in New York as his place of business; that the taxpayer incurred business expenses of \$11,434.41 in 1961 and \$11,157.24 in 1962; that such expenses were deducted from taxpayer's gross business income on his Federal

returns on Schedule "C", and on which he paid Federal self-employment taxes for both years; that none of such expenses were reimbursed by taxpayer's principal.

(A) That the Federal audit changes by which the taxpayer's income for 1961 and 1962 was adjusted were not reported; that the taxpayer concedes that the Income Tax Bureau properly recomputed his income for 1961 and 1962 in accord with such Federal audit changes.

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

DECIDES:

(A) That during 1961 and 1962 the taxpayer was an independent contractor and engaged as a sales representative; that the taxpayer's income during such years constituted the receipts of the conduct of an unincorporated business within the meaning of section 703(a) of the Tax Law.

(B) That during 1961 and 1962 the taxpayer conducted his business from an office in New York City; that during such years taxpayer maintained no office or regular place of business outside New York; that for such years taxpayer's entire receipts from his business were allocable to New York pursuant to section 707(a) of the Tax Law.

(C) That taxpayer's total income for 1961 was \$20,263.09; that taxpayer's total income 1962 was \$19,047.45; that taxpayer's taxable business income for 1961 was \$8,723.57; that taxpayer's taxable business income for 1962 was \$10,707.33.

(D) That, accordingly, the notices of deficiency imposing additional personal income tax for 1961, reducing personal income tax for 1962, and imposing unincorporated business taxes and penalties on the taxpayer for 1962 and 1963 are correct;

that the amounts set forth therein are due and owing together with additional interest and other statutory charges; that said notices of deficiency do not include any tax or other charges which could not have been lawfully demanded, and that taxpayer's petition for redetermination or refund with respect thereto be and the same hereby is denied.

DATED: Albany, New York this 30th day of April , 1960.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
PRESIDENT

/s/

A. BRUCE MANLEY
COMMISSIONER

/s/

SAMUEL E. LEPLER
COMMISSIONER