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Unincorp. Bus. Tax Determin
A-Z
Kent, Peter J.

BUREAU OF LAW

MEMORANDUM

TO: State Tax Commission

FROM: Francis V. Dow, Hearing Officer

SUBJECT: In the Matter of the Applications of PETER J. KENT for Revision or Refund of Unincorporated Business Taxes under Article 16-A for the Years 1957, 1958, 1959 and Article 23 of the Tax Law for the Year 1960

A hearing with reference to the above captioned matter was held before me at 80 Centre Street, New York, New York, on February 7, 1967. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issue involved is whether income from the taxpayer's life and general insurance sales activities is subject to unincorporated business tax.

From the taxpayer's income tax Returns and other information, it appears that the taxpayer had net income from his activities in the field of insurance as follows:

1957	$27,508.27
1958	59,238.82
1959	57,250.70
1960	45,264.24

The taxpayer did not file unincorporated business tax returns for any of these years. Assessments were issued for unincorporated business tax, penalty and interest for the years in question on the basis that the taxpayer's activities in the field of insurance constitute the carrying on of an unincorporated business, and the income derived therefrom is subject to the unincorporated business tax as follows:

Year	Assessment No.	Issued	Amount
1957	AB 004412	3/27/62	$ 903.43
1958	AB 021131	8/29/62	2,427.86
1959	AB 004413	3/27/62	2,170.40
1960	AB 004414	3/27/62	1,565.73

The assessment for the year 1959 also assessed additional normal tax in the amount of $741.35 on the basis of the disallowance of business expenses of $7,413.54 on a Federal audit of the taxpayer's return. The taxpayer did not contest the disallowance of the business expenses.

The taxpayer solicits both general insurance and life insurance. He is a licensed insurance agent and broker and is required to be so licensed under the terms of his contract with Jay B. Rappaport, Inc., a company which sells general insurance and life insurance.

Under the provisions of the taxpayer's contract with Jay B. Rappaport, Inc., the taxpayer is required to place all orders through it. The contract further provides that in the event Jay B. Rappaport, Inc. becomes liable for the payment of any premiums on insurance policies for any of the taxpayer's customers which are not upon demand paid by such customer, the taxpayer is required to pay the amount thereof to it.

Upon termination of the contract, Jay B. Rappaport, Inc. shall relinquish to the taxpayer all account folders, expiration records, a list of outstanding binders, new orders, and endorsements relating to the taxpayer's customers and the taxpayer shall thereafter receive the customers' accounts without charge or expense to Jay B. Rappaport, Inc. The company shall not directly or indirectly, at any time within five years thereafter, solicit, place, accept or service business of or for accounts so relinquished.

Where Jay B. Rappaport, Inc. or a subsidiary of it or a firm or corporation under common ownership with it is a general agent for a life insurance company, the taxpayer is entitled to the customary full first year and renewal agents' commission on individual life insurances sold by him. In all other instances, the taxpayer is entitled to two-thirds of the first year's commissions and one-half of the renewal commissions payable on individual life insurance.

Out of other commissions and fees actually received by Jay B. Rappaport, Inc. from business obtained by the taxpayer, the company is required to pay one-half thereof to the taxpayer.

The taxpayer was insured by his principal under group life and medical benefit insurance policies. No deductions were withheld from the commissions received by the taxpayer for social security or income taxes. The taxpayer was partially reimbursed at the rate of $100.00 per week for some of his selling expenses incurred for entertaining customers. Unreimbursed expenses included telephone, travel, rent for use of his home for business purposes, accounting to check the correctness of his commissions, gifts and entertainment, splitting of commissions and stationery. The taxpayer's unreimbursed selling expenses incurred by the taxpayer ranged between $10,130.41 and $53,180.79 in the years in question.

The taxpayer received commissions on sales made through other general life insurance agents. The taxpayer's principal received commissions on their sales also. In addition, some of his commissions were received directly from American Life Insurance Company, whose general agent is the taxpayer's principal.

It is my opinion that the taxpayer was not an employee but was an independent contractor (see Rundberg v. Bragalini, 7 A D 2d 15 and Wittich v. Benson, 270 App. Div. 774, aff'd 296 N.Y. 720).

The taxpayer does not come within the provisions of the State Tax Commission ruling dated June 9, 1959. The ruling provides that in some cases full-time life insurance soliciting agents for one company are exempt from the unincorporated business tax. The taxpayer did not sell insurance for one company nor were his activities limited to the sale of life insurance. (See 20 NYCRR 281.3)

For the reasons stated above, I recommend that the determination of the State Tax Commission in the above matter denying the taxpayer's applications be substantially in the form submitted herewith.

/s/ FRANCIS V. DOW
Hearing Officer

FVD:dv
Enc.
February 8, 1968
2-14-68

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATIONS

OF

PETER J. HUNT

FOR REVISION OR REFUND OF UNIN-CORPORATED BUSINESS TAXES UNDER ARTICLE 16-A FOR THE YEARS 1957, 1958, 1959 AND ARTICLE 23 OF THE TAX LAW FOR THE YEAR 1960

Peter J. Hunt, the taxpayer herein, having filed applications for revision or refund of unincorporated business taxes imposed under Article 16-A of the Tax Law for the years 1957, 1958 and 1959 and under Article 23 of the Tax Law for the year 1960 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, N.Y. on February 7, 1967 before Francis V. Nary, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed a resident income tax return for the year 1957 in which he reported income exclusions in the amount of $36,638.68 and claimed business deductions of $9,130.41; that the taxpayer did not file an unincorporated business tax return for the year 1957.

(2) That on March 27, 1962 a notice of assessment of additional tax for the year 1957 was issued (Assessment No. AB 004412) assessing unincorporated business tax, penalty and interest due in the amount of $993.43 on the basis that

the taxpayer's activities in the field of insurance constitute the carrying on of an unincorporated business, the income of which business is subject to the unincorporated business tax.

(3) That the taxpayer had net income from activities as an insurance salesman during the year 1958 in the amount of $59,238.00; that the taxpayer did not file an unincorporated business tax return for the year 1958; that on August 29, 1962 a notice of assessment was issued for the year 1958 (Assessment No. AS 021131) assessing unincorporated business tax, penalty and interest due in the amount of $2,427.26 on the basis that the taxpayer's activities as an insurance salesman constituted the carrying on of an unincorporated business, the income of which is subject to the unincorporated business tax.

(4) That the taxpayer filed a resident income tax return for the year 1959 in which he reported business income of $103,017.95 and claimed business expenses of $53,180.79; that on a Federal audit of the taxpayer's return, business expenses claimed by the taxpayer in the sum of $7,413.54 were disallowed due to lack of substantiation that they represented ordinary and necessary business expenditures; that the taxpayer did not file an unincorporated business tax return for the year 1959.

(5) That on March 27, 1962 a notice of assessment was issued for the year 1959 (Assessment No. AS 004413) assessing additional income tax, unincorporated business tax, penalty and interest due in the amount of $2,911.75 on the basis of the disallowance of business expenses on the Federal audit and that the taxpayer's activities in the field of insurance constitute the carrying on of an unincorporated business, the income of which is subject to the unincorporated business tax; that the taxpayer did not contest the disallowance of $7,413.54 claimed as business expenses.

(6) That the taxpayer filed a resident income tax return for the year 1960 in which he reported net income as an insurance salesman in the amount of $45,284.84; that the taxpayer did not file an unincorporated business tax return for the year 1960.

(7) That on March 27, 1962 a notice of assessment was issued for the year 1960 (Assessment No. ABOC44347) assessing unincorporated business tax, penalty and interest due in the amount of $1,955.73 on the basis that the taxpayer's activities in the field of insurance constitute the carrying on of an unincorporated business, the income of which is subject to the unincorporated business tax.

(8) That the taxpayer is a licensed insurance agent and broker; that he solicited both general insurance and life insurance; that under the terms of his contract with Jay R. Rappaport, Inc., all insurance orders obtained by the taxpayer were required to be placed through the company; that Jay R. Rappaport is a general agent for insurance companies selling life insurance and general insurance.

(9) That the taxpayer's contract with Jay R. Rappaport, Inc. provides that in the event that it becomes liable for the payment of any premiums on insurance policies for any of the taxpayer's customers which are not upon demand paid by such customer, the taxpayer will pay the amount thereof to his principal; that in the event of the termination of the contract, Jay R. Rappaport, Inc. is required to relinquish to the taxpayer the renewal folders, expiration records, a list of outstanding binders, new orders and endorsements relating to the taxpayer's customers which said customers' accounts the taxpayer is required thereafter to service without charge or expense to his principal and thereafter the principal Jay R. Rappaport, Inc. cannot directly or indirectly at any time within five years solicit, place, accept or service

business of any of the accounts relinquished to the taxpayer; that the taxpayer was required by his contract to be a licensed insurance broker and insurance agent under the laws of New York State.

(10) That the taxpayer's said contract further provided that the taxpayer was to receive one-half of the commissions received on business obtained by him; that where Jay B. Rappaport, Inc. or a subsidiary of it or a firm or corporation under common ownership with it is the general agent, the taxpayer is entitled to receive the customary full first year and renewal agents' commissions on individual life insurance; that in all other instances, taxpayer is entitled to two-thirds of the first year's commissions and one-half of the renewal commissions payable on individual life insurance.

(11) That no deductions were withheld from the commissions received by the taxpayer for social security or income taxes; that the taxpayer was insured by his principal under group life and medical benefit insurance policies; that the taxpayer was paid $100 per week in addition to his commissions as a partial reimbursement of some of his selling expenses incurred for the entertainment of customers; that the taxpayer claimed expenses for telephone, rent for use of his home for business purposes, accounting to check the correctness of his commissions, unreimbursed expenses for gifts and entertainment, commissions split with other insurance agents and brokers, travel expenses and stationery; that the taxpayer's principal did not supervise his sales activities, nor was he subject to direction and control.

(12) That the taxpayer received commissions on insurance sales through other general insurance agents with the knowledge and consent of Jay B. Rappaport, Inc; that office services were provided for the taxpayer by Jay B. Rappaport, Inc.

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

DETERMINES:

(A) That the activities of the taxpayer in the field of insurance were conducted by him as an independent contractor and not as an employee; that such activities constitute the carrying on of an unincorporated business, the income of which is subject to the unincorporated business tax within the intent and meaning of Sections 386 and 703 of the Tax Law;

(B) That the additional taxes assessed against the taxpayer for the years 1957, 1958, 1959 and 1960 were properly and timely issued; that the additional taxes assessed for such years were correct and legally due and owing together with interest and other statutory charges; that the taxpayer's applications for revision or refund of personal income taxes and unincorporated business taxes with respect to the years 1957, 1958, 1959 and 1960 be and the same are hereby denied.

DATED: Albany, New York this 13th day of March, 1968.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

/s/ SAMUEL E. LEPLER
COMMISSIONER