

BUREAU OF LAW
MEMORANDUM*Unincorporated Bus. Tax Determination*
Lamson, Robert A-2

TO: Commissioners Murphy, MacGuff and Conlon

FROM: Francis V. Dow, Hearing Officer

SUBJECT: In the matter of the petition of Robert Lamson for redetermination of deficiency of a refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1961 and 1962

A hearing with reference to the above matter was held before me at the office of the State Tax Commission, State Campus, Albany, New York on October 19, 1966. The appearances and the evidence produced were as shown in the stenographic minutes submitted herewith.

The issue involved herein is whether the activities of the taxpayer as a sales representative constitute the carrying on of an unincorporated business as defined by section 703 of the Tax Law.

A notice of deficiency and statement of audit changes were issued on June 7, 1965 for the years 1961 and 1962 (File No. 2-7143202) on the basis that the activities set forth in the taxpayer's returns constitute the carrying of an unincorporated business, the income from which is subject to the unincorporated business tax and finding unincorporated business tax and interest due in the amount of \$837.57.

The taxpayer is a sales agent representing four lumber manufacturers and for whom he sold non-competing wood products. He was paid commissions on sales by each of his principals from which no deductions were withheld for social security or income taxes. He solicited orders from office wholesalers who in turn sold the wood products to small lumber dealers. The terms of the sales solicited by the taxpayer were subject to the control of his principals. They did not exercise control over the manner in which the taxpayer carried on his sales activities. There was no arrangement as to the division of the taxpayer's time and effort among the taxpayer's principals. The taxpayer was free to procure and promote sales as he saw fit. The taxpayer also sold wood products for others in addition to his usual principals when called upon to do so by them.

BUREAU OF LAW
MEMORANDUM

(2-67)

TO:
FROM:
SUBJECT:

The taxpayer was not reimbursed for any of his sales expenses which exceeded one-third of his commissions. Non-reimbursed selling expenses included expenses incurred to visit his principals' mills, postage, stationery, telephone and telegraph services, banking services, selling and promotion expenses, traveling expenses, automobile expenses, entertainment expenses and the expenses of maintaining an office in his home. The taxpayer employed no assistants, maintained no inventory and did no billing or shipping.

It is my opinion that the taxpayer is engaged in an unincorporated business subject to the unincorporated business tax. In the case of George H. Britton v. Murphy, 22 A D 2d 987, recently affirmed by the Court of Appeals without opinion, it was held that a multiple line salesman for 11 principals was subject to the unincorporated business tax. In that case it was found that the salesman had an office in his home. The other elements found in that case are similar to the facts in this case and support the conclusion that the taxpayer in the instant matter is also carrying on a business.

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

Hearing Officer

FVB:b4g
Enc.

April 19, 1967

STATE OF NEW YORK
STATE TAX COMMISSION

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IN THE MATTER OF THE PETITION OF
ROBERT LAMBON
FOR REMITTANCE OF DEFICIENCY OF
A REFUND OF UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW
FOR THE YEARS 1961 AND 1962
.....

The taxpayer having duly 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 in connection therewith at the office of the State Tax Commission, State Campus, Albany, New York on October 19, 1966 before Francis V. Dow, 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 resident income tax returns for the years 1961 and 1962; that the taxpayer reported income from commissions as a lumber salesman in the amount of \$14,588.75 for the year 1961 and \$21,209.54 for the year 1962; that the taxpayer did not file unincorporated business tax returns for the years 1961 and 1962.

(2) That a notice of deficiency and statement of audit changes were issued on June 7, 1965 (File No. 2-7143202) finding unincorporated business tax and interest due for the years 1961 and 1962 in the amount of \$897.97 on the basis that the taxpayer's activities constitute the carrying on of an unincorporated business the income of which is subject to the unincorporated business tax.

(3) That the taxpayer is a manufacturer's representative for four lumber manufacturers which sold non-competing lumber products; that the taxpayer was paid commissions on sales made for his principals; that no deductions were withheld from the taxpayer's commissions for social security or income taxes by any of his principals.

(4) That the taxpayer employed no assistants; that he maintained no inventory; that the taxpayer did no billing and shipped no goods to his customers; that the taxpayer made no reports to his principals other than the transmittal of orders; that the taxpayer maintained an office in his home.

(5) That the taxpayer was not reimbursed for any of his selling expenses; that the taxpayer's selling expenses included expenses incurred to visit his principals' mills, postage, stationery, telephone and telegraph services, banking services, traveling expenses, selling and promotion expenses, automobile expenses, entertainment expenses and the expenses of maintaining an office in his home.

(6) That the taxpayer's principals controlled sales prices and delivery of merchandise; that the taxpayer had no arrangement with his principals as to the division of his time; that the taxpayer was free to procure and promote sales as he saw fit; that the taxpayer was free to represent other principals; that the taxpayer sold lumber products for other lumber manufacturers in addition to his usual principals upon his being solicited by such manufacturers to act in their behalf.

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

ISSUED:

(A) That the activities of the taxpayer as a sales representative were conducted by him as an independent contractor and not as an employee and 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 section 703 of the Tax Law.

(B) That accordingly the notice of deficiency and statement of audit changes for the years 1961 and 1962 (File No. 2-716322) 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 taxes for the years 1961 and 1962 to and the same is hereby denied.

Dated: Albany, New York this 1st day of May, 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

/s/

JAMES R. MACDUFF

/s/

WALTER MACLON CONLON