

**BUREAU OF LAW
MEMORANDUM***Unincorp. Bus. Tax
Determinations A-Z
Miller, Edward M.*

TO: Commissioners Murphy, Macduff and Conlon

FROM: Alfred Rubinstein, Hearing Officer

**SUBJECT: Petition of EDWARD M. MILLER for
Redetermination of a Deficiency or
for Refund of Unincorporated Business
Taxes Under Article 23 of the
Tax Law for the Year 1960**

A hearing on the above-entitled matter was held before me at the office of the State Tax Commission, 88 Centre Street, New York, New York, on November 2, 1966. The appearances and exhibits produced were as noted in the transcript.

The issue involved whether the taxpayer's income, reported as salaries, was income from a business, trade or occupation conducted by him.

Taxpayer filed a return for 1960 reporting income from salaries of \$49,171.33. By statement of audit changes (File No. 4320156) dated April 13, 1964 the Income Tax Bureau determined that all of taxpayer's income was derived from a business conducted by him, and imposed unincorporated business taxes and interest in the amount of \$1,648.51. Taxpayer filed a petition for redetermination or refund on July 9, 1964. Taxpayer contended that he no longer maintained an office in 1960 and consequently, was not conducting a business.

Taxpayer was a traveling sales representative for two corrugated carton manufacturers, Gaylord and Hoerner. Both principals paid him commissions for sales made by him, without any drawing account. Taxpayer alleged that Hoerner withheld taxes and reimbursed him for travel and entertainment expenses, but that Gaylord neither withheld nor reimbursed him for any expenses. His return for 1960, however, showed no withholding of taxes, and his use of the standard deduction permitted him to omit itemized deductions. Taxpayer was requested to furnish a copy of his Federal return, to substantiate his claim that his travel and entertainment expenses were reimbursed, and to show whether he had reported his income as salaries for Federal purposes, but he refused to do so.

Taxpayer's base of operations was an office at 18 East 42nd Street, New York, New York. Prior to 1960 he paid the rent, telephone bills, clerical salaries and all other expenses (see Application of Edward Miller under Article 18-A for 1959) but in 1960 all of these expenses were alleged to have been paid by Hoerner, and adjusted by reduction of commissions paid to the

taxpayer. No change took place in the *modus operandi*, however, as taxpayer continued to use the same office to represent both of his principals, in exactly the same manner as he had previously. Gaylord, at all times, maintained its own office at 484 Lexington Avenue, New York City. Hoerner, neither in 1952, nor at any prior time, had any office in New York, except for the one maintained by the taxpayer.

No supervision was exercised over taxpayer's activities, nor did either of his principals require him to account for his time. His principals are competitors and in some cases he obtained orders for both from the same customers.

Section 703(f) of the Tax Law provides that a sole representative shall not be deemed engaged in an unincorporated business solely because he sells for more than one principal unless he maintains an office, employs assistants or otherwise regularly carries on a business.

Taxpayer has not ceased to maintain his office or to incur business expenses, including salaries, merely by use of the device of having one of his principals become the conduit for payment. All other factors, including lack of reimbursement of expenses by one principal, and failure to substantiate alleged reimbursement by the other; lack of withholding as reflected on his return; and lack of any supervision, direction or control over his activities by either principal indicate the conduct of an independent business by the taxpayer. See Britton v. State Tax Commission, 22 App. Div. 2d 887, 284 N.Y.S. 2d 887.

Accordingly, I am of the opinion that the notice of deficiency should be sustained. The decision of the Tax Commission should be substantially in the form herewith submitted.

/s/

ALFRED RUBINSTEIN

Hearing Officer

AR:ps
Enc.

August 14, 1967

8-17-67



ALL INFORMATION CONTAINED

12

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION :
OF :
EDWARD M. MILLER :
FOR REDETERMINATION OF A DEFICIENCY OR :
FOR REFUND OF UNINCORPORATED BUSINESS :
TAXES UNDER ARTICLE 23 OF THE TAX LAW :
FOR THE YEAR 1960 :

Edward M. Miller 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 year 1960 (File No. 4320158), and a hearing having been held on November 2, 1960 at 80 Centre Street, New York, New York before Alfred Rubinstein, Hearing Officer, of the Department of Taxation and Finance, at which hearing the taxpayer, Edward M. Miller appeared, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed a personal income tax return for 1960 reporting income of \$49,171.33 from his occupation of "salesman"; that by notice of deficiency issued April 13, 1960 in the amount of \$1,848.51 it was determined that the taxpayer failed to compute or to pay unincorporated business taxes for 1960; that the taxpayer filed a petition for redetermination or refund on July 9, 1964.

(2) That during 1960 Edward M. Miller was a sales representative for two manufacturers of corrugated cartons; that he traveled extensively making sales to customers; that he incurred expenses for travel and entertainment which were not reimbursed;

that his activities were subject to no direction, supervision or control by either of his principals, who were competitors; that both principals remunerated taxpayer by commissions paid to him without any deduction for withholding of taxes.

(3) That during 1960 and prior thereto the taxpayer maintained, at his own cost and expense, an office at 50 East 42nd Street, New York, New York; that prior to 1960 the taxpayer paid the rent, salaries, telephone and other office expenses directly; that during 1960 such expenses were disbursed by Hoerner, one of taxpayer's principals, who was repaid by the taxpayer out of commissions payable to him by Hoerner; that the taxpayer conducted business on behalf of both of his principals at such office during 1960 at his sole expense.

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

DECIDES:

(A) That during 1960 the taxpayer was a sales representative for two principals; that he maintained an office for the pursuit of his occupation at which he incurred expenses for rent, salaries, telephone and other expenses; that taxpayer during 1960 incurred expenses for travel and entertainment in pursuit of his occupation; that neither of taxpayer's principals reimbursed him for any expenses; that taxpayer's income during 1960, in the sum of \$49,171.33 was derived from a business regularly carried on by him.

(B) That, accordingly, the notice of deficiency imposing unincorporated business taxes upon the taxpayer for 1960 is correct; that the amount set forth therein is due and owing together with additional interest, if any, and other statutory charges; that

said notice of deficiency does not include any tax or other charge which could not have been lawfully demanded, and that taxpayer's petition for redetermination or refund with respect thereto be and the same is hereby denied.

DATED: Albany, New York on this 22nd day of September , 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
PRESIDENT

/s/

JAMES R. MACDUFF
COMMISSIONER

/s/

WALTER MACLYN CONLON
COMMISSIONER