

Unincorp. Bus. And Determin.
BUREAU OF LAW

MEMORANDUM

A-2
Rose, Robert D.

TO: Commissioners Murphy, Macduff and Conlon

FROM: Francis V. Dow, Hearing Officer

ROBERT D. ROSE

SUBJECT:

Petition for a Redetermination of a
Deficiency or for Refund of Unincorporated
Business Taxes under Article 23 of the Tax
Law for the year 1961

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, New York on October 2, 1967. The appearances and the exhibits produced were as shown in the stenographic minutes submitted herewith.

The issues involved herein are (1) whether the taxpayer's activities as a manufacturer's representative of technical equipment utilized by aero-space and related industries constitutes the practice of an exempt profession and (2) whether the taxpayer's activities as a sales representative is subject to unincorporated business tax.

A notice of deficiency and statement of audit changes (File #1-3792957) were issued on February 16, 1965 determining that the taxpayer's unincorporated business tax liability and interest for the year 1961 was in the amount of \$443.46 on the basis that the taxpayer's income as a manufacturer's engineering and sales representative constitute receipts of an unincorporated business regularly carried on by the taxpayer and is subject to the unincorporated business tax.

The taxpayer is a graduate of Rutgers University and received a Bachelor of Science degree in electrical engineering. He is a member of the Institute of Electrical and Electronic Engineers and the Instrument Society of America. The taxpayer was engaged by his principals because of his engineering knowledge and background and because he knew engineers employed by companies who could use his principal's products.

He is a manufacturer's representative for three principals selling acceleration transducers, gyros and inertia sub-systems. In connection with his sales activities, the

taxpayer ascertained the needs of prospective purchasers through discussions with their engineers and the submission of technical proposals to meet such needs. He contacted technicians, conducted conferences with engineers, wrote reports, participated in engineering seminars and made himself aware of the products, systems and services that his principals were able to provide.

The taxpayer's contract with Donner Scientific Company provided that the taxpayer was franchised to sell products of the company and was given the exclusive sales right on standard transducer products and nonexclusive rights on non-standard transducer products in a designated area. The contract further provided a schedule of commissions to be paid on sales made. The taxpayer was prohibited from selling equipment which was competitive to that manufactured by the Donner Scientific Company.

The taxpayer's activities for his other principals involved the same type of work. His income from principals other than Donner Scientific Company constituted only a small part of his total income.

No deductions were taken from the taxpayer's commissions for social security or income taxes. He had no employees, handled no inventory and did no billing or shipping. He maintained an office in his home.

It is my opinion that the taxpayer's activities did not constitute the practice of an exempt profession. His activities do not meet the usual concept of a professional practice as rendering service or disinterested advice for the benefit of the persons served or advised, the latter ordinarily retaining the services and making compensation for them. The activities of a manufacturer's representative utilizing engineering knowledge in obtaining sales orders are not recognized as the practice of a profession (see Sundberg v. Bragalini, 7 A D 2d 15).

It is also my opinion that the taxpayer's income from his activities as a sales representative is subject to the unincorporated business tax. The taxpayer was not an employee of any of his principals. His principals were interested only in the results produced by the taxpayer rather than the manner or means sales were effected. He was not reimbursed for any of his expenses. No control was exercised over the taxpayer with regard to the utilization of his time in producing sales. In the case of George H. Britton v. Murphy, 22 A D 2d 987, aff'd. 19 N.Y. 2d 613, 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.

/s/

FRANCIS V. DOW

Hearing Officer

FVD:kon

Enc.

October 26, 1967

11-6-67

**STATE OF NEW YORK
STATE TAX COMMISSION**

**IN THE MATTER OF THE PETITION
OF
ROBERT D. ROSS
FOR A REDETERMINATION OF A DEFICIENCY OR
FOR REFUND OF UNINCORPORATED BUSINESS TAXES
UNDER ARTICLE 23 OF THE TAX LAW FOR THE
YEAR 1961**

The taxpayer 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 1961 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on October 2, 1967 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 a resident income tax return for the year 1961; that the taxpayer reported income in the amount of \$18,094.20 from his business as a manufacturer's engineering and sales representative; that the taxpayer did not file an unincorporated business tax return for the year 1961.

(2) That a notice of deficiency and statement of audit changes were issued on February 16, 1965 (File #3-379297) finding unincorporated business tax and interest due for the year 1961 in the amount of \$443.46 on the basis that the taxpayer's income as a manufacturer's engineering and sales representative constituted receipts of an unincorporated business regularly carried on by the taxpayer and is subject to unincorporated business tax.

(3) That the taxpayer is a graduate of Rutgers University and received a Bachelor of Science degree in electrical engineering; that he is a member of the Institute of Electrical and Electronic Engineers and the Instrument Society of America.

(4) That the taxpayer is a manufacturer's representative for three principals selling acceleration transducers, gyros and inertia sub-systems; that the taxpayer was engaged by his principals because of his engineering knowledge and background and because he knew engineers who were employed by companies that could use his principals' products and services.

(5) That in connection with the selling activities of the taxpayer, the taxpayer ascertained the needs of purchasers by contacting technicians and holding engineering conferences; that he wrote reports, participated in engineering seminars and made himself aware of the products, systems and services that his principals were able to provide and submitted technical proposals to meet the needs of such purchasers.

(6) That the taxpayer entered into a sales representative agreement with Banner Scientific Company, one of his principals, which provided that he was franchised to sell products of the Banner Scientific Company; that the taxpayer was given the exclusive sales rights on standard transducer products and nonexclusive sales rights on nonstandard transducer products in a designated area; that the agreement provided that taxpayer was to receive graduated commissions on standard and modified standard instruments.

(7) That the said agreement provided that the taxpayer was not to offer for sale any new equipment competitive to that manufactured by his principals, nor to act as representative, agent, or dealer for any such competitive equipment and that nothing in

the agreement shall be interpreted to alter the taxpayer's status as an independent contractor.

(8) That the taxpayer's activities for all of his principals involved the same type of work; that his income from his principals other than Banner Scientific Company constituted only a small part of his total income as a manufacturer's representative.

(9) That no deductions were withheld from the taxpayer's commissions for social security or income taxes by any of his principals; that he was not covered by workman's compensation; that the taxpayer employed no assistants; that he maintained no inventory; that the taxpayer did no billing or shipping; that capital was not an income producing factor; that he maintained an office in his home.

(10) That the taxpayer's principals exercised no control over the utilization of the taxpayer's time; that his principals were interested only in the results rather than the manner and means sales were effected; that the taxpayer was not reimbursed for any of his expenses; that the taxpayer's expenses included expenses for rent, telephone and telegraph, travel and lodging, entertainment, gifts and gratuities.

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

HOLDING:

(A) That although the taxpayer's knowledge of electrical engineering was useful in the conduct of his sales business, his activities did not constitute the practice of engineering or any other profession within the intent and meaning of section 703 of the Tax law.

(B) That the activities of the taxpayer as a manufacturer's representative were conducted by him as an independent contractor and not as an employee and constituted the carrying on of an unincorporated business the income of which is subject to the unincorporated business tax.

(C) That accordingly the notice of deficiency and statement of audit changes for the year 1961 (File #3-379297) 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 a refund of unincorporated business taxes for the year 1961 be and the same is hereby denied.

Dated: Albany, New York this 27th day of November, 1967.

STATE TAX COMMISSIONER

/s/

JOSEPH H. MURPHY

TAXPAYER

COMMISSIONER

/s/

WALTER MACLYN CONLON

TAXPAYER