

BUREAU OF LAW

MEMORANDUM

Unincorp. Bus. Tax Determin. A-2
Sacco, Edward

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: Petition of Edward Sacco
 For Redetermination of a Deficiency
 or for Refund of Unincorporated
 Business Taxes under Article 23 of
 the Tax Law for the Years 1963 and
 1964

Hearings were held in the above entitled matter before me at
 66 Centre Street, New York, New York on August 8 and September 18, 1966.

The issue involved herein is whether the activities of the
 taxpayer during the years in issue constitute the carrying on of an
 unincorporated business.

Edward and Mary Sacco filed New York State resident returns
 for the years 1963 and 1964 in which the taxpayer, Edward Sacco,
 reported net business income as "independent-contractor, sales and
 service" in the amounts of \$11,815.71 and \$13,798.55 for said re-
 spective years. No unincorporated business tax returns were filed by
 said taxpayer. Attached to the Federal returns for the years 1963
 and 1964 were Forms 1099 indicating gross commissions received by
 Edward Sacco from NLR Associates in the amounts of \$16,526.24 and
 \$19,886.30, respectively. He deducted business expenses of \$4,709.79
 and \$5,928.25 for the years 1963 and 1964, respectively. Included
 in said expenses were one-fourth of the expenses in the upkeep of
 his residence, for the use of a portion thereof as an office in con-
 nection with his sales activities, consisting of electric bills, rent
 (taxes), heat and fire insurance; office expense, approximately
 \$200.00; telephone calls at home, approximately \$200.00 less \$20.00
 for personal use; auto business expenses; tolls, garage and parking;
 railroad and taxi fares; telephone; entertainment; gifts, postage
 and tools and equipment.

On August 15, 1966, Department of Taxation and Finance issued
 a statement of audit charges imposing additional unincorporated busi-
 ness taxes against the taxpayer for the years 1963 and 1964, upon the
 ground that his activities as an independent contractor constituted
 the carrying on of an unincorporated business and the income derived
 therefrom was subject to unincorporated business tax and accordingly
 issued a notice of deficiency in the amounts of \$150.32 and \$246.57
 for the years 1963 and 1964, respectively, for a total of \$396.89.

In 1961 the taxpayer, Edward Sacco, was employed by NLR Associates, representatives of manufacturers of electronic instruments, having its main office located at West Orange, New Jersey, as a salesman selling electronic instruments of several manufacturers, most of which were competitive on a straight salary basis of about \$280.00 per week. His sales territory covered Bronx, Westchester and Putnam Counties and Long Island, including Kings and Queens Counties. On February 3, 1962, the taxpayer entered into a letter agreement with NLR Associates, whereby he was designated as an independent contractor to solicit sales and promote the product lines represented by NLR Associates on a straight commission basis of 75 per cent of all commissions when received each month by NLR Associates from the assigned territory. Pursuant to said agreement, the taxpayer was not reimbursed for any sales expenses. NLR Associates did not deduct withholding or social security taxes from the commissions paid to the taxpayer. The taxpayer maintained an office at home in connection with his sales activities. On his Federal income tax returns for 1963 and 1964, he deducted self-employment tax for each of said years in the amount of \$259.20. The taxpayer claims that he was required by his principal to submit weekly reports with respect to the prospective customers contacted by him and also submit a record of his expenses.

The taxpayer has an engineering background, having been employed as an engineer by Grumman Aircraft and other corporations in that capacity. He claims that in order to effect sales, he was required, at times, to solve engineering problems of the firms he solicited for the sale of electronic instruments and also assist in repairs. He was not compensated for such services except for the commissions received on sales made to such customers.

Most of the products which the taxpayer sold were competitive. He would contact a prospective customer and try to effect sales of any or all of the products of the various manufacturers, which his principal represented. The taxpayer was not subject to control by his principal as to the time spent, or the means, or methods of conducting his sales activities.

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 by reason of the fact that he represents more than one principal. The section does not, however, exempt independent contractors who do not maintain an office, or employ assistants, or who represent a single principal. 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 AD 2d 987, Aff'd. 19 NY 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 (See Tax Commission Hearing Decision in Matter of Robert T. Kaden, dated May 10, 1968), copy attached.

Since the taxpayer maintained an office, was not regarded by his principal as an employee for payroll tax purposes and the principal did not exercise control as to the manner or means in which the taxpayer effected sales, I am of the opinion that the taxpayer was not an employee, but an independent contractor subject to unincorporated business tax in accordance with the provisions of Section 703 of the Tax Law.

For the reasons stated above, I recommend that the decision of the State Tax Commission in the above matter be substantially in the form submitted herewith.

SOLOMON SIES
Hearing Officer

February 24, 1969

SS:jm

Enc.

Sent to Commission 3/4/69

BUREAU OF LAW
MEMORANDUM

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 "C", 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 singly 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 his 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 singly 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 23 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.

Alfred Rubinstein

Hearing Officer

September 19, 1967
AR:nn

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 redetermination 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.

(4) 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.

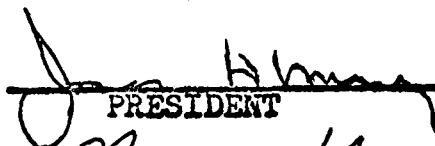
(C) That taxpayer's total income for 1961 was \$20,263.09; that taxpayer's total income 1962 was \$19,047.45; that taxpayer's taxable business income for 1961 was \$8,723.57; that taxpayer's taxable business income for 1962 was \$10,707.33.

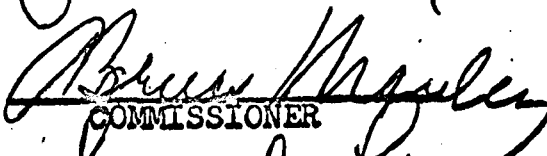
(D) That, accordingly, the notices of deficiency imposing additional personal income tax for 1961, reducing personal income tax for 1962, and imposing unincorporated business taxes and penalties on the taxpayer for 1962 and 1962 are correct;

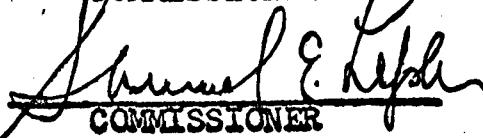
that the amounts set forth therein are due and owing together with additional interest and other statutory charges; that said notices of deficiency do not include any tax or other charges which could not have been lawfully demanded, and that taxpayer's petition for redetermination or refund with respect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

DATED: Albany, New York this 10th day of May, 1968.

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

**STATE OF NEW YORK
STATE TAX COMMISSION**

IN THE MATTER OF THE PETITION

OF

EDWARD SACCO

**FOR REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF UNINCORPORATED BUSI-
NESS TAXES UNDER ARTICLE 23 OF THE
TAX LAW FOR THE YEARS 1963 AND 1964**

Edward Sacco 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 1963 and 1964, and hearings having been held before Solomon Sica, Hearing Officer, of the Department of Taxation and Finance, at 88 Centre Street, New York, New York, on August 8 and September 20, 1966, at which hearings the taxpayer was represented by Lee M. Rothstein, CPA, and at which the taxpayer appeared personally on September 20, 1966, testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Edward and Mary Sacco filed joint New York State income tax resident returns for the years 1963 and 1964; that the taxpayer, Edward Sacco, reported on said returns net business income as "independent contractor, sales and service" in the amounts of \$11,815.71 and \$13,799.55 for the years 1963 and 1964 respectively; that the taxpayer, Edward Sacco, did not file any New York State unincorporated business tax returns for said years; that on August 15, 1966, the Department of Taxation and Finance issued a statement of audit changes against the taxpayer, Edward Sacco, imposing additional unincorporated

business taxes for the years 1961 and 1962 in the amounts of \$158.32 and \$246.32, respectively, including interest for a total of \$397.24 and accordingly, issued a notice of deficiency therefor.

(2) That in 1961 the taxpayer, Edward Sacco, was employed by HLR Associates, representatives of manufacturers of electronic instruments, having its main office located at West Orange, New Jersey, as a salesman selling electronic instruments of several manufacturers; that most of the products of said manufacturers were competitive; that the said taxpayer was compensated on a straight salary basis of about \$200.00 per week; that his sales territory covered Dutchess, Westchester and Putnam Counties and Long Island including Kings and Queens Counties; that on February 3, 1962, the taxpayer, Edward Sacco entered into a letter agreement with HLR Associates whereby he was designated an independent contractor to solicit sales and promote the product lines of the various manufacturers represented by HLR Associates on a straight commission basis of 75 per cent of all commissions when received each month by HLR Associates from the assigned territory; in accordance with said agreement the taxpayer was not reimbursed for any of his selling expenses.

(3) That pursuant to the aforementioned agreement the taxpayer endeavored to sell the products of Sonton Electronics Corporation, Krohn-Hite Corporation, B K Instruments, Inc., Engelhart Industries, Inc., Industrial Equipment Division, Motorola Communications and Electronics, Inc., James J. Riddle Company, and Knott Electronics, Inc.; that when taxpayer called on prospective customers including aviation companies or others, he endeavored to sell all of the products of the various manufacturers that his principal, HLR Associates, represented.

(4) That the taxpayer has an engineering background having been employed as an engineer by Grumman Aircraft and other corporations in that capacity; that he claims that in order to effect sales, he was required, at times, to solve engineering problems of the firms he solicited for the sale of electronic instruments and also assist

in repairs; that he was not compensated for such services except for the commissions received on sales to such customers; that he claims he was required to submit to his principal a weekly report of customers contacted and an itemized list of expenses incurred by him, for which expenses he was not reimbursed.

(5) That on his Federal returns for the years 1963 and 1964, the taxpayer reported gross commissions received in the amounts of \$16,524.24 and \$15,886.30, respectively; that he deducted the following expenses:

	<u>1963</u>	<u>1964</u>
Auto Business Use	\$2,065.00	\$2,452.42
Tolls	80.50	90.25
Garage and Parking	101.00	140.00
Fares-Bus, RR, etc.	12.00	32.40
Fares-Taxi	14.00	47.30
Meals and Hotels	139.30	180.20
Telephone (Less \$60.00 personal use in each year)	786.07	870.00
Entertainment	655.43	1,100.25
Office Expense	190.00	251.30
Xmas Gifts	76.20	112.00
Postage	117.07	137.70
Tools and Equipment (Depreciated over five years)	122.00	132.00
Electric Bill-1/4 of \$142.64 1/4 of \$146.32	35.66	37.00
Rent (Taxes)-1/4 of \$788.00 1/4 of \$760.00	197.00	190.00
Heat-1/4 of \$259.26 1/4 of \$236.00	64.81	59.75
Fire Insurance-1/4 of \$163.00	40.75	40.75
Custodian charges for self-employed Retirement Fund-Bankers Trust		1.22
Totals	\$4,780.29	\$5,920.24

(5) That in connection with the taxpayers sales activities, he maintained a portion of his home as an office and workshop area with the use of several desks plus storage area for correspondence; that he also maintained a small workshop area for the solution of engineering problems in connection with his sales activities; that the taxpayer deducted one-fourth of the maintenance and upkeep of his office at home, as more fully set forth in finding (4) above.

(7) That NLR Associates did not deduct withholding or social security taxes from the commissions paid to the taxpayer.

(8) That the principal, NLR Associates, exercised no control over the time spent by the taxpayer or the manner, or the means conducted by him in effecting sales on behalf of said principal.

(9) That the taxpayer deducted self-employment tax on his U. S. individual income tax returns, in the amount of \$266.26 for each of the years 1963 and 1964.

Based upon the foregoing findings and all of the evidence presented herein,

The State Tax Commission hereby

DECIDES:

(A) That during the years 1963 and 1964, a taxpayer was not an employee, but an independent contractor engaged in an unincorporated business conducted solely within the State of New York and subject to unincorporated business taxes within the intent and meaning of Section 703 of the Tax Law.

(B) That, accordingly, the statement of audit changes and notice of deficiency issued against the taxpayer for the years 1963 and 1964 imposing unincorporated business taxes are correct; that the same do not include any tax or other charge, which could not have

been lawfully demanded; that the taxpayer's petition for determination of a deficiency or for refund filed with respect thereto be and the same is hereby denied.

DATED: Albany, New York this 10th day of March , 1939.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
PRESIDENT

/s/

A. BRUCE MANLEY
COMMISSIONER

/s/

MILTON KOERNER
COMMISSIONER