L 9 (2-67)

Unincorp. Bus. Tax Determinations A-Z
Spilka, Sydney

BUREAU OF LAW MEMORANDUM

TO: Commissioners Murphy, Macduff and Conlon

FROM: Francis V. Dow, Hearing Officer

SUBJECT: SYDNEY SPILKA

Application for revision or refund of unincorporated business taxes under Article 23 of the Tax Law for the year 1960

A hearing with reference to the above matter was held before me at 60 Centre Street, New York, New York on October 5, 1966. The appearances and the exhibits produced were as shown in the stenographic minutes submitted herewith.

The taxpayer filed unincorporated business and personal income tax returns in which he reported net income of $9,769.03 from his business as a builder and $17,000.00 for building fees received for supervising the construction of a seven-story apartment building. He claimed that the $17,000.00 which he received for building fees was not subject to unincorporated business tax, and did not include it in his unincorporated business tax return.

An assessment was issued for 1960 on August 2, 1962 (Assessment No. AB016246) which assessed additional unincorporated business tax due in the amount of $769.68 on the basis that the building fees in the amount of $17,000.00 were an integral part of the taxpayer's operations as a builder and subject to the unincorporated business tax.

In 1949 the taxpayer entered into the business of building one and two-family houses on his own account. All construction work was contracted for except general cleaning of the construction sites and the job of watchman. These jobs were performed by the taxpayer's employees.

In 1959 the taxpayer organized the S.H.S. Building Corp. and became owner of 25 percent of its stock and its president. He entered into an agreement during that year with the other stockholders of the corporation to supervise the construction of a seven-story apartment house for the corporation. All construction work was subcontracted except that of a watchman and some labor which was done by the corporation's employees. The apartment building was completed in 1960. At the time that the taxpayer

entered into the supervision of the construction of the apartment building, the amount that he was to receive for his services was indefinite. The taxpayer was not subject to any supervision and control of his activities. He was paid $17,000.00 for these services. Payments were not made to him on a regular basis but were made as he required them. The taxpayer was not listed on the books of the corporation as an employee. No income taxes or social security taxes were withheld from the payments made to him. The taxpayer however was covered by workman's compensation insurance under a policy obtained by the corporation. He received no salary as an officer of the corporation. Upon completion of the apartment house the taxpayer again continued his business of building one and two-family houses which he had discontinued during the construction of the apartment house.

The entire facts herein disclose that the $17,000.00 received by the taxpayer for building fees was received as an independent contractor and not as an employee, despite the fact that the taxpayer was covered by workman's compensation insurance. Accordingly, his activities in the supervision of the construction of the apartment building constituted the carrying on of an unincorporated 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

June 27, 1967
FVD:lb
Enc.

7-6-67

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

[illegible]

FOR REVISION OR REFUND OF UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 23 OF THE TAX LAW FOR THE YEAR 1960

The taxpayer herein having filed an application for revision or refund of unincorporated business taxes under Article 23 of the Tax Law for the year 1960 and a hearing having been held in connection therewith before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance at the office of the State Tax Commission, 80 Centre Street, New York, New York at which hearing, the taxpayer testified and was represented and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed unincorporated business and personal income tax returns for the year 1960 in which he reported net income of $9,786.03 from his business as a builder, and $17,000 for building fees; that the taxpayer did not include the $17,000 received as building fees as business income in his unincorporated business tax return.

(2) That an assessment was issued for 1960 on August 8, 1961 (Assessment No. AB016096) assessing additional unincorporated business tax due in the amount of $769.68 on the basis that building fees in the amount of $17,000 were an integral part of the taxpayer's operation as a builder and subject to the unincorporated business tax.

(3) That prior to 1959 the taxpayer was a builder of one and two-family houses on his own account; that in his business as a builder the taxpayer concentrated all work except that of a

watchman and labor to do general cleaning of construction sites which was done by employees of the taxpayer; that in 1959 the taxpayer organized the S.H.S. Building Corp. and became its president and the owner of 25 percent of its stock; that the taxpayer received no salary as an officer of the corporation.

(4) That the taxpayer entered into an agreement with the other stockholders of the corporation whereby the taxpayer agreed to supervise the construction of a seven-story apartment house for the corporation; that no definite agreement was made with the stockholders of the corporation for the compensation of the taxpayer for his supervisory services; that there was no supervision and control of the taxpayer's activities; that the taxpayer was paid $17,000 for his services in supervising the construction of the apartment building; that the taxpayer was paid for his services whenever he required and asked for payment for them and not on a regular basis.

(5) That the construction work of the apartment building was performed by subcontractors except that of a watchman and some labor which was performed by employees of the corporation.

(6) That no deductions were taken from the building fees paid to the taxpayer for social security or income taxes; that the taxpayer was not listed on as employee of S.H.S. Building Corp.; that the taxpayer was covered by workmen's compensation insurance under a policy obtained by the S.H.S. Building Corp.

(7) That upon completion of the apartment building in 1960 the taxpayer continued in his business and his business of building one and two-family houses which business the taxpayer discontinued during the building of the apartment house.

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

DETERMINES:

(A) That the activities of the taxpayer in supervising the

construction of the apartment building for the S.H.S. Building Corp. 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 section 703 of the Tax Law.

(D) That accordingly the assessment issued for 1960 (Assessment No. AB016046) is correct and does not include any tax or other charge which could not have been lawfully demanded; that the taxpayer's application for revision or refund of unincorporated business taxes for the year 1960 be and the same is hereby denied.

Dated: Albany, New York this 13th day of July, 1967.

BEFORE THE COMMISSION

/s/ JOSEPH H. MURPHY
[redacted]

/s/ JAMES R. MACDUFF
[redacted]

/s/ WALTER MACLYN CONLON
[redacted]