

*Unincorp. Bus. Tax
Determinations A-Z
Wang, Leo H.*

Commissioners Murphy, Macdoff & Conlon

Solomon Sias, Hearing Officer

Leo W. Wang

1957 Assessment B-726293

Article 16-A

A hearing was held with reference to the above matter at the office of the State Tax Commission, 88 Centre Street, New York City, on May 29, 1964. The appearances and the exhibits were as noted on the transcript of the record.

The issue is whether the activities of the taxpayer in the solicitation of orders for the purchase of shares of mutual investment companies and other securities on a commission basis for one principal pursuant to an agreement wherein he is designated as an independent contractor and who also sells life insurance to prospective customers of mutual funds, as an independent agent are subject to unincorporated business tax in accordance with §986, Art. 16-A of the Tax Law.

The taxpayer on his personal income tax return for the year 1957 reported gross income in the sum of \$18,913.49, of which \$16,062.36 was received from Investors Planning Corporation of America arising out of commissions in the sale of mutual funds on behalf of said principal and the sum of \$2,851.13 received from Mary & Ellis for life insurance commissions.

Prior to 1957, the taxpayer entered into an agreement with Investors Planning Corporation of America, whereby he was to solicit and sell shares of mutual investment companies and other securities on behalf of the aforementioned principal on a commission basis. In accordance with his agreement, the taxpayer was to devote his full time as "investment solicitor" and was prohibited from engaging in the sale of mutual funds or other securities for any other firm. He received a weekly statement of earnings from the principal who covered him for disability, workmen's compensation and also paid for group life insurance and major medical insurance on his behalf. The principal did not withhold Federal income taxes or pay social security taxes on the commissions paid the taxpayer. The agreement designated the taxpayer as an "independent contractor" and not that of an employee. The office from which the taxpayer conducted his activities of selling mutual funds was maintained and provided for by the principal at its place of business. The company further

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provided secretarial assistance and telephone service. The expenses of the operation of the office including secretarial help and telephone were all paid for by the principal in the first instance. The taxpayer did not maintain any independent office, had no employees and no business telephone listing in his own name. He attended general sales meetings at the office of the principal on an average of once a month and at meetings with his immediate supervisor about once a week. He was given instruction sheets and further instructed in the method to be employed by him in connection with sales of securities on behalf of the principal who supervised him in connection with sales of securities on behalf of the principal who supervised him in respect to volume of sales produced, the ethical standards used in selling and the sound credit of the persons to whom he made sales. The taxpayer's services were subject to termination if he made an assignment for the benefit of creditors, was declared bankrupt or if a receiver of his property were appointed or if his conduct, in sole discretion of corporation, was such as to adversely affect its business or reputation. The taxpayer by reason of the large volume in sales (\$300,000.00 or over), pursuant to the agreement, was advanced to "career senior" and as such supervised and trained other salesmen and in addition to his own commissions received an overriding commission on the sales of the investment solicitors under his supervision.

Mutual funds were sold by I.P.C. with life insurance features. The taxpayer was confronted with situations where some of his mutual fund customers required additional life insurance coverage in connection with their mutual fund purchases, over and above the life insurance feature provided by I.P.C. The taxpayer obtained a license to sell life insurance to mutual fund purchasers. The additional life insurance was placed through the general insurance agency of Berg & Ellis of New York City for which the taxpayer received commissions during 1957 in the sum of \$2,851.13.

The contention of the taxpayer is that the ruling of June 9, 1959 as to life insurance soliciting agents should apply to him.

Exhibit: 1965 49uncorp. Rev. Tax Determination Jordan, George J. (5/10/65)
In the Matter of George J. Jordan (Formal Hearing Determination dated May 10, 1965) The memorandum of Mr. Kelliher to Deputy Commissioner Igoe, dated June 11, 1964, (copies attached) discusses the policy question whether the ruling of June 9, 1959 governing life insurance soliciting agents should be extended to cover a salesman of mutual funds. It was there held that the taxpayer be considered an employee and not an independent contractor. The facts in the instant case are even stronger in favor of the taxpayer.

I am of the opinion that the activities of the taxpayer as a solicitor of mutual funds and securities on behalf of I.P.C. constituted that of an employer-employee relationship and not that of an independent contractor and that the income derived therefrom was not subject to unincorporated business tax in accordance with §386, Article 16-A of the Tax Law; that with respect to the life insurance commission income, the taxpayer was an independent agent; that, however, since the life insurance

commission income was less than \$5,000.00, the taxpayer was not liable for unincorporated business taxes on said commissions for the year 1957.

For the reasons stated above, it is recommended that the determination of the Tax Commission in this matter be substantially in the form submitted herewith.

SOLOMON SIES

Hearing Officer

SS:nbl

January 23 1967

(Jan. 31, 1967)

/s/

MARTIN SCHAPIRO

Approved

/s/

SAUL HECKELMAN

Approved

Information received from the Department of the Interior, Bureau of Reclamation, dated 10/10/50, regarding the proposed construction of a dam on the Colorado River at the mouth of the Grand Canyon, Arizona, is being reviewed for the purpose of determining the effect of the proposed construction on the navigation of the river.

For the purpose of this report, it is assumed that the proposed construction of the dam will result in the complete obstruction of the river at the mouth of the Grand Canyon, Arizona.

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STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION OF

LEE W. WANG

**FOR REVISION OR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 14-A OF THE
TAX LAW FOR THE YEAR 1957**

The taxpayer, Lee W. Wang, having filed an application for revision or refund of unincorporated business taxes under Article 14-A of the Tax Law for the year 1957 and a hearing having been held in connection therewith at the office of the State Tax Commission at 88 Centre Street, New York, N. Y. on the 19th day of May, 1960 before Solomon Sico, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and was represented by Newman, Aronson & Neumann, Esqs., by Reuben J. Aronson, Esq., of Counsel, 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 the year 1957 wherein he set forth in Schedule A thereof net income reported in the sum of \$12,757.80; that no unincorporated business tax return was filed by the taxpayer herein upon the ground that the compensation received constituted wages as an employee; that the total income reported by the taxpayer in the year 1957 was \$18,913.49 of which \$16,062.36 was received from Investors Planning Corporation of America for commissions in the sale of shares in mutual investment companies and other securities and the sum of \$2,851.13 received from Bury & Ellis for commissions on life insurance sold to some of his mutual fund customers; that on June 1, 1960, the Department of Taxation and Finance made an assessment against the taxpayer for the year 1957 assessing unincorporated business taxes on the ground that the activities of the taxpayer constituted the carrying on of an unincorporated business subject to unincorporated business tax under Article 14-A of the Tax Law.

(2) That prior to 1957 the taxpayer entered into an agreement with Investors Planning Corporation of America, 60 East 42nd Street, New York, N.Y., whereby he was to solicit orders for the purchase of shares of mutual investment companies and other securities for the aforementioned principal on a commission basis; that the taxpayer was registered with the National Association of Security Dealers; that in accordance with said agreement, the taxpayer was designated as "investment solicitor" and was required to devote his full time in the solicitation of such orders and was prohibited from engaging in the solicitation or sale of mutual funds or other securities for any other firm or organization; that all applications or orders obtained by taxpayer required the approval of Investors Planning Corporation and it had the right, in its sole discretion, at any time, to reject any and all applications or orders transmitted to it by taxpayer who would not be entitled to receive any commissions on such rejected orders or applications; that taxpayer was required to comply with the rules of National Association of Security Dealers and the regulations of Securities Exchange Commission; that Investors Planning Corporation had the right to terminate the agreement in the event that the aggregate volume of sales made by taxpayer shall be less than \$30,000.00 during any calendar year or in the event that taxpayer had not made any sales during any six months period or in the event that taxpayer failed to comply with the terms of the agreement or makes an assignment for the benefit of creditors or is declared a bankrupt or has a receiver appointed of his property or engaged in any conduct or becomes involved in any matter which Investors Planning Corporation in its sole discretion deems detrimental to its business or reputation; that the agreement designated taxpayer as an "independent contractor";

(3) That in connection with his activities on behalf of Investors Planning Corporation, the taxpayer was provided with an office telephone and stenographic services in the offices of the principal who paid the expenses therefor in the first instance; that the taxpayer maintained no office, had no business telephone listing in his own name and had no employees; that the taxpayer was advanced to the status of "career

senior" by reason of increased sales, pursuant to the agreement, and as such supervised other investment solicitors or salesmen and received an overriding commission on their sales; that the taxpayer was supervised by the corporation in respect to production of sales, the ethical standards of salesmanship used and the financial responsibility of the persons to whom he made sales; that in addition to making his own contacts with respect to prospective purchases for mutual funds, the taxpayer was furnished with leads by the corporation.; that taxpayer was required to attend general sales meetings conducted by the principal once a month and meetings with his immediate supervisor once a week.

(4) That the principal covered the taxpayer for disability, workmen's compensation insurance and also paid for group life insurance and major medical insurance on his behalf but did not withhold Federal income taxes or pay social security on the commissions received by him.

(5) That the mutual funds sold by the taxpayer on behalf of Investors Planning Corporation contained some life insurance features; that some of the taxpayer's mutual fund customers requested additional life insurance in connection with their mutual fund purchases over and above the life insurance feature provided by the principal; that the taxpayer obtained a license to sell additional life insurance to mutual fund purchases as an independent agent; that such life insurance was placed through the general insurance agency of Mary A. Ellis of New York City for which the taxpayer received commissions therefor in the sum of \$2,821.13 for the year 1957.

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

The State Tax Commission hereby

DETERMINE;

(A) That during the year 1957 the activities of the taxpayer as a solicitor of mutual funds and securities on behalf of Investors Planning Corporation of America constituted that of an employer-employee relationship and not that of an independent contractor and that the income derived therefrom was not subject to unincorporated business tax in accordance with §386, Article 16-A of the Tax Law and

20 N.Y.C.R.R., §281.3.

(B) That the activities of the taxpayer as a salesman of life insurance constituted those of an independent agent subject to unincorporated business taxes in accordance with §186, Article 18-A of the Tax Law; that, however, since the income received therefrom was less than \$5,000.00 there was no unincorporated business tax due with respect to said income for the year 1957.

(C) That accordingly, the additional assessment of unincorporated business taxes for the year 1957 (Assessment No. S-786293) was not due and not lawfully demanded and that the aforesaid assessment be and the same is hereby cancelled in full.

AND IT IS SO ORDERED.

DATED: Albany, New York on the 14th day of February, 1957.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
President

/s/

JAMES R. MACDUFF
Commissioner

/s/

WALTER MACLYN CONLON
Commissioner