

BUREAU OF LAW
MEMORANDUM*Unincorp. Bus. Tax
Determinations A-Z
Weinstock, Jerome*

TO: Commissioners Murphy, Macduff and Conlan

FROM: Francis V. Dow, Hearing Officer

SUBJECT: In the Matter of the Petition of
Jerome Weinstock for a 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 with reference to the above matter was held before me at 80 Centre Street, New York, New York on February 13, 1967. The taxpayer did not appear, but was represented by his accountant who stated he was familiar with the facts. The appearances and the exhibits produced were as shown in the stenographic minutes submitted herewith.

A notice of deficiency and statement of audit changes (File No. 2-6427382) were issued on November 22, 1965 determining that the taxpayer's unincorporated business tax liability and interest for the years 1961 and 1962 was in the amount of \$745.18 on the basis that his business income is considered income received from an unincorporated business.

Although the taxpayer designated himself as an independent salesman on his 1962 personal income tax return, he contended that he was an employee and did not maintain an office.

The taxpayer sells costume jewelry and pearls for The Richelieu Corp. and Jos. E. Meyer Bros., Inc., an associated company to stores and wholesalers. He is paid commission on all sales. No deductions are withheld by either firm from these commissions for social security or income taxes. It appears that the taxpayer handles branded merchandise for The Richelieu Corp. and nonbranded merchandise for Jos. E. Meyer Bros., Inc. The terms of all sales solicited by the taxpayer are controlled by his principals. The taxpayer's route and territory were subject to his principals' control. The taxpayer was furnished a desk, secretarial and other office facilities at the office of The Richelieu Corp. for use in preparing reports and writing orders. The taxpayer was expected to report at this New York office when he was not on the road and to service customers of his own sales area and others. Supervision and control of the taxpayer was limited. He was permitted to sell noncompeting lines of merchandise.

The taxpayer's representative, in the petition for redetermination, claimed that the taxpayer used a room in his house for sample display purposes. However, at the hearing the representative

testified that the taxpayer used part of his house for the storage of records but did not store any merchandise there. This room contained a desk and a file cabinet. The taxpayer deducted \$450 in 1961 and \$204 in 1962 for office rent. The taxpayer was not reimbursed by either principal for his selling expenses which included, in addition to office rent, expenses connected with traveling, office stationery and postage, telephone and telegraph, entertainment, gifts to buyers and advertising. In addition, the taxpayer was charged by The Richelieu Corp. for a portion of his customers' advertising expenses incurred for promotional sales of The Richelieu Corp.'s merchandise.

The issue involved herein is whether or not the taxpayer who acknowledges himself as an independent salesman is subject to the unincorporated business tax. In the case of George H. Britton v. Murphy, 22 A D 2d 987, recently affirmed by the Court of Appeals without opinion, it was held that a multiple line salesman for eleven principals was subject to the unincorporated business tax. In that case it was found that the salesman had an office in his home, and the other elements, which are similar to the facts in this case, support the conclusion that the taxpayer in the instant matter is also carrying on a business.

A finding that the taxpayer is not an employee but an independent contractor is sufficient to subject him in the first instance to unincorporated business taxes. See Sundberg v. Bregalini, 17 A D 2d 15 and Wittich v. Browne, 270 App. Div. 774 aff'd 295 N.Y. 720.

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:aw
Enc.

5-8-67

April 17, 1967

**STATE OF NEW YORK
STATE TAX COMMISSION**

IN THE MATTER OF THE PETITION

OF

JEROME WEINSTOCK

**FOR A REDEMPTION OF A DEFICIENCY OR
FOR REFUND OF UNINCORPORATED BUSINESS TAXES
UNDER ARTICLE 23 OF THE TAX LAW FOR THE
YEARS 1961 AND 1962**

The taxpayer having duly filed a petition for redemption 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 in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on February 10, 1967 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer's representative, appeared and testified and the record having been duly examined and considered,

The State Tax Commission hereby finds:

- (1) That the taxpayer filed resident income tax returns for the years 1961 and 1962; that the taxpayer reported income from business as a salesman in the amount of \$16,772.97 for the year 1961 and \$15,322.93 for the year 1962.
- (2) That a notice of deficiency and statement of audit changes were issued on November 22, 1965 (File No. 2-6427502) finding unincorporated business tax and interest due for the years 1961 and 1962 in the amount of \$745.18 on the basis that business income of the taxpayer was income from an unincorporated business subject to unincorporated business tax.
- (3) That the taxpayer was a salesman for The Richardson Corp. and its associated company, Joe. H. Meyer Bros., Inc., selling

costume jewelry and pearls to stores and wholesalers; that the taxpayer sells branded merchandise for The Richelieu Corp. and non-branded merchandise for the Jee. H. Mayer Bros., Inc.; that the taxpayer was paid commissions on sales by both principals; that no deductions were withheld from the taxpayer's commissions for social security and income taxes by either principal.

(4) That the taxpayer employed no assistants; that the terms of all orders solicited by the taxpayer are controlled by his principals; that the taxpayer's route and territory are subject to the control of the taxpayer's principals; that the taxpayer is provided a desk, the use of secretaries and other office facilities by The Richelieu Corp. for use in preparing reports and writing orders; that when the taxpayer is not on the road he is expected to report to the New York office of The Richelieu Corp. and service customers of his own sales area and others.

(5) That the taxpayer was permitted by his principals to sell noncompeting lines of merchandise; that the supervision and control of the taxpayer by his principals were limited; that the taxpayer was permitted to select his own prospects; that the taxpayer maintained an office in his home used in connection with his selling activities; that he was not reimbursed by either principal for any of his selling expenses; that the taxpayer's selling expenses included expenses connected with traveling, office rent, stationery and postage, telephone and telegraph, entertainment, gifts to buyers and advertising.

(6) That the taxpayer was charged by The Richelieu Corp. a portion of his customers' advertising expenses incurred for promotional sales of The Richelieu Corp.'s merchandise.

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

ISSUES:

(A) That the taxpayer is not an employee but an independent sales agent regularly carrying on an unincorporated business subject to the unincorporated business tax within the intent and meaning of section 703 of the Tax Law.

(B) That accordingly, the notice of deficiency and statement of audit charges for the years 1961 and 1962 (File No. 2-647982) 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 refund of unincorporated business taxes for the years 1961 and 1962 be and the same is hereby denied.

Dated: Albany, New York on this 17th day of May, 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

~~Commissioner~~

/s/

JAMES R. MACDUFF

~~Commissioner~~

/s/

WALTER MACLYN CONLON

~~Commissioner~~