

## BUREAU OF LAW

## MEMORANDUM

*Unincorp. Bus. Est.*  
*Determinations A-2*  
*Weisberg, Marvin*

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: Marvin Weisberg

**PETITION FOR REDETERMINATION OF A  
DEFICIENCY OR FOR REFUND OF UNIN-  
CORPORATED BUSINESS TAXES UNDER  
ARTICLE 23 OF THE TAX LAW FOR THE  
YEARS 1960, 1961 AND 1962.**

A formal hearing was held in the above matter at the New York City office on October 13, 1966.

The issue involved herein is whether the activities of the taxpayer constitute the carrying on of an unincorporated business subject to unincorporated business tax in accordance with the provisions of Section 703 of the Tax Law.

The taxpayer was a manufacturer's representative of food serving equipment which would include soda fountains, sandwich-making equipment, dishwashers, coffee urns, grills, refrigeration and possibly a stove. This would entail the type of equipment usually placed in the front of a restaurant as differentiated from the heavy-food-preparation equipment in the rear such as large gas ranges or stoves. During the years in issue, the taxpayer represented four manufacturers. He solicited dealers who would normally bid on the restaurant to outfit it completely with food-preparation equipment, tables, chairs, electrical work, plumbing and so forth. The taxpayer's territory covered parts of Pennsylvania, Virginia, Maryland, West Virginia and Washington, D. C. The taxpayer was paid on a straight commission basis. He was not reimbursed for any of his expenses. None of the principals deducted withholding or social security taxes. The taxpayer would endeavor to sell a prospective customer all of the items he was handling for the various principals he was representing. None of the principals exercised sufficient supervision and control as to the taxpayer's methods and means of effectuating sales so as to constitute an employer-employee relationship.

In the case of George H. Britton v. Murphy, 22 AD 2d 987 aff'd. 19 N.Y. 2d 613, it was held that a multiple line

salesman was carrying on a business; and, therefore, subject to unincorporated business tax. In that case it was found that the salesman had an office in his home. 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 tax. Sunberg v. Bragialini, 7AD 2d 15 and Wittich v. Browne, 270 App. Div. 774 aff'd. 296N.Y. 720.

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

April 26, 1968

5-20-68

Salomon Liss  
Hearing Officer

Salmon was arriving on a business, executive, which  
to anticipated business was. To this effect the Board  
that the salmon had an office in the house. The other  
element which are added to the fact is that the  
from the conclusion that the lawyer to the Board and  
for is also arriving on a business. A finding that the  
employee is not an employee but an independent contractor  
is sufficient to disqualify him in the Board's view to  
participate in business. Salmon v. Board, 700 P.2d 110,  
and Salmon v. Board, 700 P.2d 110.

For the reasons stated above, I recommend that the  
action of the State Tax Commission in this matter be  
affirmed in the form attached hereto.

Respectfully submitted,  
[Signature]

April 26, 1994

Approved

W. B. [Signature]

State Tax Commission

June 1, 1994

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**STATE OF NEW YORK**

**STATE TAX COMMISSION**

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**IN THE MATTER OF THE PETITION**

**OF**

**MARVIN WEISBERG**

**FOR REEXAMINATION OF DEFICIENCY OF  
UNINCORPORATED BUSINESS TAXES UNDER  
ARTICLE 23 OF THE TAX LAW FOR THE  
YEARS 1960, 1961 AND 1962.**

**- - - - -**

Marvin Weisberg, having filed a petition for  
reexamination of a deficiency of unincorporated business  
taxes under Article 23 of the Tax Law for the years 1960,  
1961 and 1962 and a hearing having been held at the office  
of the State Tax Commission at 20 Centre Street, New York,  
N. Y. on the 15th day of October, 1966 before Solomon Glus,  
Hearing Officer of the Department of Taxation & Finance  
and the taxpayer having been represented by Jack H. Wil-  
son, C.P.A. and the matter having been examined and con-  
sidered,

**The State Tax Commission hereby finds:**

(1) That a notice of deficiency was issued on  
February 6, 1966 determining a deficiency of unincorporated  
business taxes in the total amount of \$1,666.34 for the years  
1960, 1961 and 1962 (File #2-2414997).

(2) That during the years involved the taxpayer's  
income consisted of commissions received by him as a sales  
representative for four different principals engaged in the  
manufacture of food serving equipment for restaurants; that  
the taxpayer solicited and received orders from various  
dealers or contractors who bid on jobs for new restaurants

at terms and prices established by the principals; that the taxpayer's territory covered Pennsylvania, Maryland, Virginia, West Virginia and the District of Columbia; that the taxpayer would endeavor to sell a prospective customer all of the items he was handling for the various principals whom he represented.

(3) That the taxpayer deducted on his personal income tax returns the expenses of telephone, travel, lodging, food, business, gifts, stationery and postage, which expenses were incurred in the production of his commission income and which were not reimbursed by any of the principals.

(4) That none of the principals deducted withholding or social security taxes; that there was no control by any of his principals of the taxpayer with respect to the time spent or the manner of making sales; that none of the principals supervised the activities of the taxpayer.

Based upon the foregoing findings, the State Tax Commission hereby

**HOLDING:**

(A) That during 1960, 1961 and 1962, the years involved, the taxpayer was engaged in an unincorporated business, and unincorporated business taxes were, therefore, properly determined to be due and owing for each year.

(B) That, accordingly, the taxpayer's petition for redetermination of a deficiency is hereby denied and that the taxes set forth in the determination of a deficiency are lawfully due and owing together with interest and other statutory charges.

28th May  
MADE: Albany, New York on the 28th day of May, 1900.

STATE OF NEW YORK

/s/

JOSEPH H. MURPHY

~~President~~

/s/

A. BRUCE MANLEY

~~Commissioner~~

/s/

SAMUEL E. LEPLER

~~Commissioner~~