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Unincorp. Bus. Tax

BUREAU OF LAW

Determinations A-Z

MEMORANDUM

Wolfe, Alfred

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: ALFRED WOLFE
1958 Penalty Assessment $200
Assessment #AB 005692 - Art. 16-A

A formal hearing was held in the above matter at the New York City Office on December 27, 1967.

The issue involved herein is whether the activities of the taxpayer during the year 1958 constituted the carrying on of an unincorporated business.

The Income Tax Bureau wrote the taxpayer on February 3, 1961, that although the normal tax was forgiven for the year 1958, this relief did not extend to unincorporated business tax or to capital gains tax; that since his 1959 New York State income tax return indicated that he was subject to unincorporated business tax for said year, he was requested to complete the enclosed personal and unincorporated business tax forms and file them within thirty days. The taxpayer having failed to file the forms or submit any information, the Income Tax Bureau issued a penalty assessment in the amount of $200 on April 4, 1962 for failure to furnish information.

During the year 1958 and prior thereto, the taxpayer was a sales representative for Imperial Optical Manufacturing Co. Inc. of Miami, Florida. His sales territory covered New York, New Jersey, New England, Philadelphia, Baltimore, Washington, D. C., Michigan, Ohio, Illinois and Canada. He was paid on a commission basis, receiving a drawing of $150 per week against commissions.

The taxpayer maintained an office at 1133 Broadway, New York City. He paid the rent of the office and was not reimbursed by the principal for any expenses. The office consisted of shelving with inventory from the factory in Miami, plus a desk, chairs, etc. The company manufactured optical frames and the taxpayer kept an inventory in the office in New York. He would also ship the frames to customers. There was also an answering service. He employed no assistants. Customers would come to the office in New York on occasion, and he took orders. At times they would come to pick up the merchandise.

On his New York State income tax return for 1959, the taxpayer reported drawings against commission in the amount of $10,350, commissions received in the amount of $19,997.50. He deducted business expenses including rent of the office for a total of $9,892.04, and reported net income in the amount of $10,105.46. The Income Tax Bureau assessed unincorporated business tax against the taxpayer for 1959 in the amount of $106.04.

The taxpayer submitted at the hearing a U. S. Treasury Department Internal Revenue Service Form 1099 (U. S. Information Return for Calendar Year 1958) indicating that he received from the principal commissions in the amount of $12,764.39 for the year 1958. No withholding or social security was deducted from the aforementioned commissions. However, the taxpayer also received drawings against commissions from the principal in the amount of $7,800 from which Federal income and social security taxes were withheld.

The taxpayer was not subject to control by the principal as to time to be spent or the means or methods of conducting his sales activities. The taxpayer stated at the hearing that he had no copy of his Federal income tax return for the year 1958 and was unable to furnish any information as to the amount of expenses incurred during said year.

I am of the opinion that the taxpayer was not an employee, but an independent contractor subject to unincorporated business tax; that in view of the fact that his income for the year 1958 amounted to $20,000 and he is unable to submit any evidence as to the amount of expenses, the penalty assessment of $200 is not excessive but is reasonable and that the aforementioned assessment should be sustained.

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

June 26, 1968

7-30-68

SOLOMON SIES

Hearing Officer

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION

OF

ALFRED WOLFE

FOR REVISION OR REFUND OF UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 16-A OF THE TAX LAW FOR THE YEAR 1960.

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The above-named taxpayer having filed an application for revision or refund of unincorporated business taxes under Article 16 of the Tax Law for the year 1960, and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, N. Y. on the 27th day of December, 1967 before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally, testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That on February 3, 1961 the Department of Taxation and Finance wrote the taxpayer that under an amendment to the New York State Tax Law the normal tax was forgiven for the year 1960, but that this relief did not extend to the unincorporated business tax or to the capital gains tax; that since the taxpayer's 1960 New York State income tax return had indicated that he was subject to the unincorporated business tax, he was requested to complete

Forms IT-201 (Personal Income Tax Return) and IT-202 (Unincorporated Business Tax Return) and file same with the Income Tax Bureau; that if an unincorporated business tax is due, a remittance should be made when filing these returns; that a reply was requested within thirty days; that the taxpayer failed to file the forms or furnish any information; that on April 4, 1962 the Department of Taxation and Finance issued a penalty assessment against the taxpayer in the amount of $200 pursuant to Section 376 of the Tax Law for failure to furnish the information requested in the letter of February 3, 1961.

(2) That during the year 1960 and prior thereto the taxpayer was a sales representative for Imperial Optical Manufacturing Co.,Inc., a corporation organized under the laws of Florida and maintaining its principal place of business in Miami, Florida; that his sales territory covered New York, New Jersey, New England, Michigan, Illinois, Ohio, Canada, Philadelphia, Baltimore and Washington, D.C.; that the principal manufactured optical frames; that the taxpayer's compensation was paid on a commission basis; that he received a drawing of approximately $150 per week against commissions.

(3) That in connection with his sales activities the taxpayer maintained an office located at 1133 Broadway, New York, N.Y.; that the office consisted of shelving where the taxpayer kept an inventory from the principal's factory in Miami, Florida plus a desk, chairs, etc.; that the taxpayer would also ship optical frames to customers; that he had an answering service; that he employed no assistants; that customers would come to the New York office on various occasions and he took orders from customers; that customers

would also come to the New York office to pick up merchandise; that the taxpayer was not reimbursed for any of his expenses, including the expenses for the maintenance of the aforementioned office.

(4) That during the year 1960 the taxpayer received from his principal total commissions in the amount of $20,564.30, of which $7,800 represented drawings against commissions; that the principal withheld federal income and social security taxes from the drawings paid to the taxpayer; that with respect to the commissions in the amount of $12,764.30 no deductions were made either for income or social security taxes.

(5) That the principal exercised no control over the time spent by the taxpayer or the manner or means conducted by him in effectuating sales on behalf of the principal.

(6) That the taxpayer was unable to submit any evidence at the hearing as to the amount of expenses incurred by him in connection with his sales activities; that for 1960 the taxpayer reported on his New York State income tax return business expenses in connection with sales activities incurred by him in the amount of $[illegible].04.

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

The State Tax Commission hereby

DETERMINES:

(A) That during the year 1960 the 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 §386, Article 16-A of the Tax Law.

(3) That in view of Finding ([illegible]) above, the penalty assessment imposed in the amount of $[illegible] is not excessive but is reasonable and reflects an amount approximately that of the amount of unincorporated business tax the taxpayer would be required to pay in the absence of proof of his expenses for said year; that, accordingly, the taxpayer's application for revision or refund of unincorporated business tax for the year [illegible] be and the same is hereby denied.

DATED: Albany, New York on the 29 day of Aug., [illegible].

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ A. BRUCE MANLEY
Commissioner

Commissioner