

BUREAU OF LAW

MEMORANDUM

Unincorporated Business Tax Determinations A-2
Zimmerman, Samuel H.

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: Petition of Samuel H. Zimmerman for a Redetermination of a Deficiency or for Refund of Unincorporated Business Tax under Article 23 of the Tax Law for the Years 1960, 1961, 1962.

A hearing with reference to the above-matter was held before me at the New York City office on December 21, 1965. The taxpayer did not appear but was represented by Morris Ouslander, Esq., who stated he was familiar with the facts and testified.

The issue involved is whether the taxpayer's activities as a salesman for multiple principals constituted the carrying on of an unincorporated business subject to unincorporated business tax.

On February 8, 1965, the Income Tax Bureau issued a statement of audit changes adjusting the taxpayer's personal income tax liability for the years 1960 and 1961 to conform with Federal audit of his Federal returns for said years and in addition, held that his activities as a sales agent during the years 1960, 1961 and 1962 constituted the carrying on of an unincorporated business subject to unincorporated business tax. A notice of deficiency therefor was issued on February 8, 1965. The taxpayer is not contesting the notice of deficiency with respect to the imposition of additional personal income taxes for the years 1960 and 1961.

On January 14, 1960, the taxpayer entered into a letter agreement with Tell Chocolate Novelties Corp. of New York City whereby he was to act as its sales representative effective as of January 1, 1960 in the sale of chocolate novelties to chain store accounts for which he was to receive 5% commission on accepted sales orders. In addition he was to act as the corporation's general sales manager for which he was to receive an additional 1% commission on "all other sales received by the house, either by salesmen or otherwise." The taxpayer was required to devote as much time as possible to the business of the aforementioned principal. Pursuant to an oral agreement with Tell Chocolate Novelties Corp., the taxpayer was permitted to sell chocolate novelties on behalf of other manufacturers which were non-competitive with those of Tell Chocolate Novelties Corp. The taxpayer solicited orders from chain stores such as Woolworth's, McCrory, Kresge, Sears, Roebuck & Co. and et.al. on a straight commission basis. He sold the various products of all of the principals whom he represented simultaneously to the same customer.

12/21/19

1. The first step in the process of identifying a potential threat is to determine the source of the information. This can be done by reviewing the information received from the source and determining if it is reliable. If the information is reliable, the next step is to determine the nature of the threat. This can be done by reviewing the information received from the source and determining if it is a threat to the organization's security. If the information is a threat to the organization's security, the next step is to determine the potential impact of the threat. This can be done by reviewing the information received from the source and determining if it is a threat to the organization's security. If the information is a threat to the organization's security, the next step is to determine the potential impact of the threat. This can be done by reviewing the information received from the source and determining if it is a threat to the organization's security.

...dividing the ... and ... of ... and ...
... and ... and ... and ... and ... and ...
... and ... and ... and ... and ... and ...

[illegible][illegible]

No deductions were withheld from his commissions for social security or income taxes by any of the principals when he represented. Taxpayer deducted rent in the amount of \$137.32 (25% of the rental of his apartment) in connection with his sales activities. In addition, he also deducted expenses for travel, entertainment and telephone. He was not reimbursed by any of his principals for his expenses.

The attorney for the taxpayer testified at the hearing that taxpayer was expected to appear at the office of Ball Chocolate Novelties Corp. every day between the hours of 10 a.m. and remain there until 3:00 or 3:30 p.m.; that the use of the room of taxpayer's apartment was for the purpose of storing samples and for maintenance of records of accounts other than those for Ball Chocolate Novelties Corp. It is to be noted that the aforementioned statements were not raised at the previous formal and informal conferences and that the same appear to be afterthoughts. It appears incredible that the chocolate novelties, which are perishable, were actually stored by the taxpayer in his apartment. It further appears that none of the principals exercised sufficient control and supervision over the methods and means employed by the taxpayer in conducting his sales activities so as to constitute any employer-employee relationship between him and the principals when he represented.

In the case of George E. Batten v. Murphy 22 AB 24 907, affirmed 19 NY 2d 611, it was held that a multiple line salesman for eleven principals was subject to 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 taxpayer in the instant matter is also carrying on a business. A finding that taxpayer is not an employee, but an independent contractor is sufficient to subject him in the first instance to unincorporated business tax. See Munich v. Bussell 17 AB 24 15 and High v. Bussell 270 App. Div. 774 2d 2 205 N.Y. 720.

For the reasons stated above I recommend that the determination of the State Tax Commission denying taxpayer's petition in the above matter be substantially in the form submitted herewith.

SOLOMON SIEG

Hearing Officer

OCT 3 - 1967

O.K. MS
S. H.

A.B.M.

1-9-68

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE ESTATE OF
OF
SAMUEL H. KINNEBURN
FOR A REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF UNINCORPORATED BUSI-
NESS TAXES UNDER ARTICLE 23 OF THE TAX
LAW FOR THE YEARS 1960, 1961 AND 1962.

The taxpayer having duly filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax law for the years 1960, 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, N. Y. on December 21, 1963 before Solomon Sles, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer's representative, Morris Gusslander, Esq., of the firm of Hoffman, Langner & Gusslander, Esqs., appeared and testified and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers Samuel H. and Gladys B. Kinneburn filed joint New York State income tax resident returns for the years 1960, 1961 and 1962; that the taxpayer Samuel H. Kinneburn reported on said returns, profit from business, "commissions - sales agent" as follows:

Year	Total Receipts	Expenses	Net Income
1960	\$41,835.85	\$14,451.90	\$27,383.95
1961	42,715.80	18,452.90	24,262.90
1962	42,715.96	11,391.23	31,324.73

that the taxpayer Samuel H. Kinneburn did not file any New York State unincorporated business tax returns for said years; that on February 8, 1963, the Department of Taxation & Finance issued a statement of audit charges against the taxpayer adjusting his personal tax liability for the years 1960 and 1961 to

conform with the Federal audit of his Federal returns for said years and in addition held that his activities as a sales agent during the years 1960, 1961 and 1962 constituted the carrying on of an unincorporated business and that the income derived therefrom was subject to unincorporated business tax and accordingly, issued a notice of deficiency therefor; that the taxpayer is not contesting the notice of deficiency with respect to the imposition of additional personal income taxes for the years 1960, and 1961.

(2) That on January 4, 1960, the taxpayer Samuel H. Zimmerman entered into a letter agreement with Tell Chocolate Novelties Corp. of New York City whereby he was to act as sales representative effective as of January 1, 1960 in the sale of chocolate novelties to chain store accounts for which he was to receive a 25% commission; that in addition he was to act as the aforementioned company's general sales manager for which he was to receive a 15% commission on 'all other sales received by the house, either by salesman or otherwise'; that the taxpayer was required to 'devote as much time as possible' to the business of the aforementioned principal; that pursuant to an oral agreement with Tell Chocolate Novelties Corp. the taxpayer was permitted to sell chocolate novelties on behalf of other manufacturers which were non-competitive with that of Tell Chocolate Novelties Corp.

(3) That during the years 1960, 1961 and 1962, the taxpayer was sales representative for three other chocolate novelty manufacturers besides Tell soliciting orders from chain store accounts such as Woolworth's, McCrory, Kroger, Sears Roebuck & Co., et. al. on a straight commission basis; that the taxpayer sold the various products of all of the principals when he represented simultaneously to the same customers; that no deductions were withheld from the taxpayer's commissions for social security and income taxes by any of the principals when he represented.

(4) That the taxpayer deducted rent in the amount of \$397.32 (25% of the rental of his apartment) in connection with his sales activities; that the taxpayer was not reimbursed by any of his principals for his selling expenses; that the taxpayer's expenses also included car, travel, entertainment, telephone, sample carriers, accounting fees, gifts to personnel and customers and expenses in attending sales meetings and conventions.

(5) That none of the principals exercised sufficient control or supervision over the methods and means employed by the taxpayer in conducting his sales activities so as to constitute any actual employer-employee relationship between the parties.

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

THE

(A) That during the years 1960, 1961 and 1962, the taxpayer was not an employee but an independent manufacturer's sales agent regularly carrying on an unincorporated business subject to unincorporated business tax within the intent and meaning of Section 701 of the Tax Law.

(B) That, accordingly, the notice of deficiency and statement of audit charges for the years 1960, 1961 and 1962 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 tax for the years 1960, 1961 and 1962 be and the same is hereby denied.

Dated: Albany, New York ~~the~~ 17th day of January

1968

January

J. Bruce Manly