

STATE OF NEW YORK

TAX

ART. 16-A SECS. 386

STATE TAX COMMISSION

KEY WORDS

GROSS PROFITS

In the Matter of the Application

of

HAROLD O. DOUGLASS

For Revision or Refund of
Unincorporated Business Taxes
under Article 16-A of the
Tax Law for the Years 1954, 1955,
1956 and 1957.

CASE LAW CITATIONS

D E T E R M I N A T I O N

REMARKS

The Department of Taxation and Finance of the State of New York having assessed unincorporated business tax pursuant to Article 16-A of the Tax Law for the years 1954, 1955, 1956 and 1957 by several notices of additional assessment, and the taxpayer having filed applications for revision or refund of such unincorporated business taxes additionally assessed as to each of the said years, and such applications having been denied, and demands for a formal hearing having been duly filed, and a formal hearing having been held on February 27, 1964 at the office of the State Tax Commission, 80 Centre Street, New York, New York, before Francis X. Boylan, Hearing Officer, and the taxpayer having appeared by Angelo E. Nigro, Esq. of New York, and having appeared personally, and the record having been duly examined and considered, the State Tax Commission hereby finds that:

(1) The Department of Taxation and Finance of the State of New York, by notices of additional assessment, numbered B482472 dated October 14, 1958, B482473 dated October 14, 1958, B636048 dated July 14, 1959, and B482474 dated October 14, 1958, assessed unincorporated business tax and related penalties and interest in the amounts of \$192.07 for the year 1954, \$79.74 (\$75.42 net after a credit from personal income tax in the amount of \$4.32) for the year 1955, \$104.43 (\$114.01 net after a credit from personal income tax in the amount of \$9.58) for the year 1956, and \$128.20 for the year 1957, on the taxpayer's total business income for these years, including in such total income, salary received by the taxpayer as an officer of Douglass Brokerage Corporation in the

amounts of \$3,600 for 1954 and \$6,000 for each of the years, 1955, 1956 and 1957.

The earnings other than from salary, held to be subject to unincorporated business tax were from life insurance commissions, and were the amounts of \$8,652.34 in 1954, \$2741.93 in 1955, \$3764.34 in 1956, and \$4526.47 in 1957.

(2) The taxpayer, by applications for revision and refund related to each of the said additional assessments, sought revision or refund of so much of the said taxes assessed as was related to his salary received in each year from the Douglass Brokerage Corporation.

On the 1956 assessment in the amount of \$114.01, taxpayer paid \$104.43 on September 8, 1959, and in his application for refund requested a refund in that amount. He had earlier paid \$9.58 additionally by a credit so that the full amount of the 1956 unincorporated business tax assessment in the amount of \$114.01 was paid.

On the assessments of unincorporated business tax for 1954, 1955 and 1957, taxpayer, with his application for revision or refund, received March 6, 1959, paid \$416.77 by check, according to his statement endorsed thereon.

(3) Since about 1935 taxpayer was self-employed as an agent selling life insurance and in the years under consideration had an office at 85 Railroad Avenue, Greenwich, Connecticut.

(4) In or about 1948 the Douglass Brokerage Corporation, with offices (in 1964) at 366 Madison Avenue, New York, New York, was incorporated as a close family corporation controlled by the taxpayer, 40 of its 100 shares being owned by taxpayer, 40 by his wife and 10 by his two sons. The taxpayer was the president of the corporation. It engaged in the business of selling policies of marine, casualty and fire insurance, its total receipts being derived from commissions on the sales of such insurance. Normally all of these sales were effected by taxpayer functioning as its salesman out of his office as president.

(5) The Douglass Brokerage Corporation was licensed to sell marine, casualty and fire insurance but not life insurance.

The taxpayer personally was licensed to sell life insurance as an agent for the several insurance companies whose policies he sold.

(6) The casualty insurance policies sold by the Douglass Brokerage Corporation in the years under consideration to a large extent consisted of policies of fire insurance on homes, and of automobile insurance, and the taxpayer's acquaintanceship with the persons to whom he sold life insurance, in many cases led to sales in behalf of the Douglass Brokerage Corporation of policies of automobile, fire and other casualty insurance; and conversely but to a lesser extent, persons to whom casualty insurance was sold in behalf of Douglass Brokerage Corporation sometimes purchased life insurance through the taxpayer.

(7) The taxpayer usually spent most of his business day from 9:30 A.M. to 5:00 P.M. Mondays to Fridays at the Manhattan offices of the Douglass Brokerage Corporation, but he was free to make appointments for the sale of life insurance or in connection with such sales, and did make such appointments insofar as it was convenient for him to do so during such times.

Upon the foregoing findings, and all the facts and evidence submitted herein, the State Tax Commission hereby

DETERMINES:

(A) That the salary earned by the taxpayer in the amounts of \$3600 in 1954 and \$6000 in each of the years 1955, 1956 and 1957 as an officer of Douglass Brokerage Corporation was not properly subject to unincorporated business tax under Tax Law §386 and the additional assessments made for those years, set forth in ¶1 hereof, were erroneous to that extent.

Tax Law §386 in stating that an unincorporated business means any trade business or occupation "conducted" or "engaged in" by an individual (or by some other non-corporate entity, as stated) implies that the business is conducted as a proprietor and not as an employee; and the section further states that it is not intended that an individual shall be deemed to be engaged

in conducting a business "with respect to compensation for services rendered by him as an employee, or as an officer of a corporation, unless such compensation constitutes receipts of a business regularly carried on by such individual."

Under this language, salary of a corporation officer is not meant to be subjected to tax when it is bona fide in the sense that it is not a guise for a payment to an independent contractor for his service nominally stated to be "salary"; and there is no reasonable basis for concluding that salary is not bona fide when the services of the corporate officer are rendered in direct furtherance of the corporation's main business activity generally, even if that activity is similar to or the same as that which the corporate officer engages in in his own independent business; and generally it is only the contribution of a technical, or other special or limited service to the corporation (whose own activities typically are broader) by the nominal "corporate officer", which is the same service as he renders to his other customers for a fee (or other payment) in his own business but not the same as the corporation's main general activity, that can reasonably be regarded as an extension, and further instance, of such fees (or other payments) to the person as an independent contractor, and therefore as further receipts of the person's unincorporated business, rather than as "salary" from the corporation, which, it is judged, it is only nominally.

Consequently, the clause "unless such compensation constitutes receipts of a business regularly carried on by such individual", does not have application to the salary of a corporate officer and major stockholder of a close corporation for services rendered directly in the main line of its activities generally, here the sale of automobile, fire and casualty insurance, although the corporate activity is similar to that which he engages in, in his own business as an independent contractor, here the sale of life insurance. The corporation in these circumstances cannot

reasonably be regarded as equivalently another customer of his personal business.

(B) The taxpayer's earnings other than from salary (see paragraph 1) for the years 1955, 1956 and 1957 were not sufficient to give rise to any actual unincorporated business tax; and the additional assessments of unincorporated business tax for those years, set forth in paragraph 1 hereof, accordingly are cancelled.

(C) The unincorporated business tax for the year 1954, on taxable income in the amount of \$8,652.34, is hereby restated to be the amount of \$76.88.

(D) The separate application for revision or refund as to the year 1956 is granted, and a refund in the amount of the assessment, \$114.01, which has been paid, should be made, with lawful interest.

(E) The application for revision or refund as to the years 1954, 1955 and 1957 is granted also, and the amount paid by the taxpayer referable to unincorporated business taxes for the said years, or to interest and penalties thereon, (stated to be \$416.77), less the amount of \$76.88, the restated unincorporated business tax assessment for 1954, should be made (in the amount of \$339.89, or as a proper accounting may indicate), with lawful interest.

DATED Albany, New York

Sept. 9, 19 69

STATE TAX COMMISSION

Norman Gallison
PRESIDENT

Barbara Manley
COMMISSIONER

John X. X.
COMMISSIONER