

X U. B. T.
 16 SECS. 386, 386a
 WORDS "Conducting a business", as opposed to "employment" as an employee
 SECS. REFS.

STATE OF NEW YORK
 STATE TAX COMMISSION

 IN THE MATTER OF THE APPLICATION

of

CHARLOTTE R. HERMAN

for revision or refund of unincorporated
 business taxes under Article 16-A of Tax
 Law, for the years 1955 and 1956

USE LAW CITATIONS

REMARKS

*A typical licensed
 real estate salesman
 under ordinary
 supervision should
 be held an employee
 (notwithstanding some
 old case law to the
 contrary.)*

The State Tax Commission having assessed unincorporated business taxes on the income of Charlotte R. Herman for the years 1955 and 1956 by additional assessments B-542935 and B-542936, respectively, both dated February 4, 1959, such assessments having been made under Article 16-A of the Tax Law, and the taxpayer having filed applications for revision or refund related to such additional assessments, and such applications having been denied; and a hearing having been held on May 11, 1964 at the office of the New York State Department of Taxation and Finance, 80 Centre Street, New York, New York, before Francis X. Boylan, hearing officer; and the taxpayer having appeared in person and Louis Belsky, a Certified Public Accountant, of New York, New York, having been present; and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) Taxpayer filed applications for revision or refund in relation to additional assessments made by the Department of Taxation and Finance of the State of New York assessing unincorporated business tax on the taxpayer's earnings from commissions earned in the years 1955 and 1956.

(2) Taxpayer in the said years was a real estate saleswoman licensed pursuant to provision of the Real Property Law, and the said commissions were paid to her solely by Curtis Solove, a licensed real estate broker, of New York, New York. The commissions were paid contingently upon the sale of real property, and the taxpayer's services consisted of the soliciting by telephone and personally of property available to be listed for sale, and to a lesser extent the selling of listed properties to purchasers. Her earnings from such commissions as reported by the taxpayer were in the amount of \$28,000 in 1955 and in the amount of \$23,643 in 1956.

(3) Taxpayer was supplied desk space in the office of said broker, but her activities were largely conducted outside of that office, and she was not required to work any fixed hours; taxpayer made telephone calls largely from her home address and met with prospective sellers, buyers and real estate personnel away from the said office of the broker; and her unremunerated expenses related to sales including her telephone bills and entertainment were in the amounts of \$8,117 in 1955 and \$8,471 in 1956.

(4) Taxpayer had no written contract with the broker and the relationship, as it is found, was terminable at will.

(5) The broker did not cover the taxpayer with unemployment insurance or workmen's compensation nor was social security withheld; and the taxpayer in her State tax returns for the years under consideration reported her earnings so as to indicate that they were derived from a business or profession rather than from compensation as an employee.

(6) The relationship initially established conventionally between taxpayer and the broker as it is found was that of an

independent contractor rather than that of an employee, and this relationship, as such independent contractor, continued in the years under consideration.

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

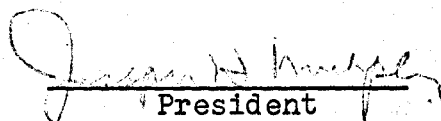
D E T E R M I N E S:


(A) That the taxpayer in her activities as a saleswoman operated as an independent contractor and her activities constituted the conducting of an unincorporated business subject to tax thereon, within the meaning of Tax Law section 386-a imposing tax on any such unincorporated business.

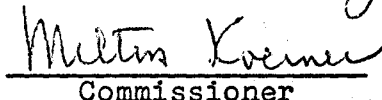
(B) That the additional assessments B-542935 and B-542936, both dated February 4, 1959, assessing unincorporated business tax for the years 1955 and 1956 in the respective amounts of \$461.85 and \$251.95, as of February 4, 1959, were lawful and correct and are affirmed; and taxpayer's related applications for revision or refund are accordingly denied.

Dated: Albany, New York, this 21st day of May , 1969.

STATE TAX COMMISSION


President


Commissioner


Commissioner