

STATE OF NEW YORK  
STATE TAX COMMISSION

*U. S. T. Determinations*  
*A-2*  
*Berg, A. Jonas*

In the Matter of the Petition

of  
A. JONAS BERG

AFFIDAVIT OF MAILING  
OF NOTICE OF DECISION  
BY (CERTIFIED) MAIL

For a Redetermination of a Deficiency or  
a Refund of Unincorporated Business:  
Taxes under Article(s) 16-A of the  
Tax Law for the (Year(s) 1949 :

State of New York  
County of Albany

LYNN HORODOWICH , being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 24 day of October , 19 69, she served the within  
Notice of ~~Decision~~ (or Determination) by (~~certified~~) mail upon A. Jonas  
Berg (~~representative of~~) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: A. Jonas Berg, Pleasant Valley, New York  
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(~~post office~~) official depository) under the exclusive care and custody of  
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (~~representative~~  
~~of~~) petitioner herein and that the address set forth on said wrapper is the last  
known address of the (~~representative of the~~) petitioner.

Sworn to before me this

27th day of October , 1969.

*Grace E. Pritchard*

*Lynn Horodowich*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
A JONAS BERG

For a Redetermination of a Deficiency or  
a Refund of Unincorporated Business  
Taxes under Article(s) 16-A of the  
Tax Law for the Year(s) 1949

AFFIDAVIT OF MAILING  
OF NOTICE OF DECISION  
BY (CERTIFIED) MAIL

State of New York  
County of Albany

LYNN HORODOWICH, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of October, 1969, she served the within Notice of ~~Decision~~ (or Determination) by (~~certified~~) mail upon A. Jonas Berg (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Russell E. Newkirk, Esq. 35 Colvin Avenue Albany, New York

and by depositing same enclosed in a postpaid properly addressed wrapper in a (~~post office~~ or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) petitioner herein and that the address set forth on said wrapper is the last known address of the (representative of the) petitioner.

Sworn to before me this

27th day of October, 1969.

Grace E. Pritchard

Lynn Horodowich

To Mr. Edward Rook

Proposed determination. See memo  
in folder. Associate this case with  
that of Simon Feldman.

*(Simon Feldman)*



9/24/69  
FXB/lh

From Francis X. Boylan

PATCH T (FILE A)



## BUREAU OF LAW

## MEMORANDUM

*U. B. T. Determinations*  
*A-Z*  
*Berg, A. Jonas*

TO: Commissioners Murphy, Palestin and Macduff

FROM: E. H. Best, Counsel

SUBJECT: A. JONAS BERG

1949 Assessment  
Article 16-A of the Tax Law

This case of A. Jonas Berg is being considered with the cases of Simon Feldman and Harold D. Farber. All three were general agents of the Security Mutual Insurance Company, and all are being held to be employees as to their earnings from that Company.

The proposed determination holds that the taxpayer was an employee of his principal company and was not liable for unincorporated business tax as to those earnings. It cancels the amount of the additional assessment in the amount of \$190.05 based on such earnings only partially because of an adjustment of certain deductions which were incorrectly taken by the taxpayer. The taxpayer deducted expenses from the taxable part of his income which were in major part referable to his untaxed income as an employee and were not properly allowable. Unincorporated Business Tax for the year 1949 is restated in the determination to be in the amount of \$143.71.

I concur with the proposed determination holding that the taxpayer was an employee and restating the tax due because of the improper deductions. There is authority for denial of the deductions at this stage. (Application of Cooper-Smith v. Bragalini, 4 App. Div. (2d) 374)

The hearings in the cases of this taxpayer and Feldman were held in 1957 and the facts as developed at the hearing appear at length in the memorandum of the hearing officer, Samuel Michelson, dated April 2, 1957. At that time the hearing officer, although finding Feldman an employee of his principal company, found Berg to be an independent contractor and liable for the taxes assessed. He also thought that Berg even if an employee would be liable for the taxes under the language of Section 386 exempting employee "unless such compensation constitutes receipts of a business regularly carried on by such individual."

The facts briefly are these: The taxpayer was a general agent of the Security Mutual Insurance Company and also handled other insurance business. He paid unincorporated business tax on the income not related to the Security Mutual Insurance Company.

He had a written contract with Security Mutual Insurance

Company which designated him as an employee. A recital in the contract required him to devote all his time to the Company but this provision was waived in practice. He was required and did give the Company first refusal on any insurance business in their line. He was paid commissions on his own sales and overriding commissions on the sales of a sub-agent.

He had an office in his own name and he hired and fired the clerical help. He was, however, reimbursed the office expenses and the salaries of employees insofar as they were related to the work of the Company. The Company also paid social security, withholding taxes and unemployment insurance both on the taxpayer's commissions from it and on the commissions paid to sub-agents and salary reimbursed to the clerical help.

The determination originally proposed was reviewed at this office in a memorandum of Mr. Heckelman dated September 23, 1959. That memorandum recommended that Berg, the taxpayer here, should be held to be an employee on the basis of the case law rule of control. (People ex rel. Wittich v. Brown, 270 App. Div. 774, aff'd 296 N. Y. 720; People ex rel. Feinberg v. Chapman, 274 App. Div. 715) The memorandum also points out that the disparities between the instant case and that of the taxpayer, Feldman, held to be an employee were not sufficiently pronounced to warrant opposite holdings where they were both general agents of the same company.

The memorandum further took the view that Berg's income as an employee was not nevertheless taxable on the asserted basis that it constituted "receipts of a business regularly carried on by such individual" within the meaning of that phrase in Tax Law, Section 386. His employment relationship with Security was not nominal or merely an incident to a business of his own. (See Maffett v. Bates, 276 App. Div. 38, aff'd. 301 N. Y. 597; People ex rel. Ralph L. Blaikie v. State Tax Commission, 267 App. Div. 923)

In his memorandum dated April 25, Mr. Gifford concurred generally in the view taken in the Law Bureau's memorandum as to the instant case and the proposed determination reflects the conclusions outlined in his memorandum.

The proposed determination makes a ruling that is in harmony with the current rulings as to life insurance soliciting agents holding them to be employees of their principal company under these circumstances.

I would point out that paragraph C of the proposed determination restates the taxes in sentence form, and that they might be restated more clearly in tabular form. The Order can be readily revised if this is thought to be necessary.

---

Counsel

FB:mt

April 9, 1964

STATE OF NEW YORK  
STATE TAX COMMISSION

---

In the Matter of the Application :  
of :  
A. JONAS BERG : DETERMINATION  
For Revision or Refund of Unincorporated :  
Business Income Taxes under Article 16-A :  
of the Tax Law for the Year 1949 :  

---

A. Jonas Berg, the taxpayer herein, having filed an application for revision or refund of Unincorporated Business Income Taxes assessed under Article 16-A of the Tax Law for the year 1949 and a hearing having been held in connection therewith at the office of the State Tax Commission, Gov. Alfred E. Smith State Office Building, Albany, New York, on September 18, 1956 before Samuel Michelson, Senior Tax Administrative Supervisor, Income Tax Bureau, Department of Taxation and Finance, at which hearing the taxpayer appeared personally together with his representatives, Mr. Joseph E. Kahn, Certified Public Accountant, and Mr. Russell E. Newkirk, Esq., of counsel, and the facts and the record having been duly examined and considered, the State Tax Commission hereby

DETERMINES:

(A) That the income of the taxpayer during 1949 from his activities as a general agent of the Security Mutual Life Insurance Company was received by him as an employee of Security and as such was exempt from Unincorporated Business Tax liability under Article 16-A of the Tax Law.

(B) That in computing net income on his return filed under Article 16-A of the Tax Law for the year 1949, the taxpayer, as it

is found, deducted against his income as an independent insurance broker, which was subject to unincorporated business tax, various expenses which, to the extent that they were in fact incurred, were related to sales made for Security Mutual Life Insurance Company, his employer, which were not subject to the unincorporated business tax as determined under Paragraph (a) above; such total expenses together with the respective percentages thereof applicable to income not subject to UBT tax and therefore not allowable on said return and the dollar amounts of claimed expenses so disallowed were as follows:

	TOTAL EXPENSES	PERCENTAGE OF EXPENSES NOT APPLICABLE TO INCOME SUB- JECT TO UBT; DISALLOWED	DOLLAR AMOUNTS OF CLAIMED EXPENSES DISALLOWED
Sub-commissions	\$3941.96	60%	\$2,400.00
Clerical payroll	5328.84	75%	4,000.00
Office expenses	3225.39	90%	2,892.85
Entertainment and pro- motional expenses	1420.77	90%	1,278.69
Traveling and automobile expenses	3282.52	90%	2,954.27
Total expenses applicable to excluded income			<u>13,525.81</u>
Less expenses reimbursed			<u>7,537.62</u>
Unreimbursed expenses applicable to excluded income but claimed as deductions in computing taxable income			\$ 5,988.19

(C) That the unincorporated business tax liability of the taxpayer under Article 16-A of the Tax Law for the year 1949 is restated as follows:

1949

Total income from unincorporated business before contributions, as reported.....	\$6,506.81
Add: Claimed expenses disallowed.....	5,988.19
	12,495.00
Less Contributions.....	<u>61.60</u>
	\$ 12,433.40





20% Service Credit; 80%.....	\$ 9,946.72
Less, in lieu of salary.....	<u>5,000.00</u>
Taxable income subject to UBT.....	\$ 4,946.72
Unincorporated business tax at 3%.....	148.40
Less payment.....	<u>4.69</u>
Net additional tax due, as restated.....	\$ 143.71

(D) That the additional taxes as now restated in the amount of \$143.71 are correct and represent taxes legally due and owing.

This stated amount of additional tax due is subject to interest which is fixed (pursuant to provisions of Tax Law §379.2 and 377.3) at the reduced rate of 6% per annum from June 13, 1951, the date of the original additional assessment to the date of payment, provided that payment is made not later than thirty days after the date of mailing of notice of the Determination herein; but if not then paid, the said amount of additional tax due is subject instead to 6% interest from June 13, 1951 to the date of mailing of notice of this Determination, and to a penalty of 5% on this said amount of additional tax due, and to further interest at the rate of 1% per month on the said amount from the said date of mailing of notice of this Determination until the date of payment.

Dated, Albany, New York

October 23 , 1969.

STATE TAX COMMISSION

*Korman Gallivan*

PRESIDENT

*Bruce Manley*

COMMISSIONER

*Mittin Koerner*

COMMISSIONER