

BUREAU OF LAW

MEMORANDUM

Unincorp. Bus. Tax Determination
Gingold, Robert A-2

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: Robert Gingold

Petition for Redetermination of
a Deficiency or for Refund of
Unincorporated Business Taxes
for the Years 1960, 1961 and 1962

A hearing was held in the above matter at the New York City office on November 29, 1968.

The issue involved herein is whether the taxpayer's income, from his activities as a sales representative for one principal, was derived from a business conducted by him subject to unincorporated business taxes.

Robert and Muriel Gingold filed New York State personal income tax resident returns for the years 1960, 1961 and 1962. The taxpayer, Robert Gingold, also filed unincorporated business tax returns for said years, on which he indicated that he was a manufacturer's representative conducting business at 47 West 34th Street, New York City. The taxpayer computed and paid the unincorporated taxes for the aforementioned years and thereafter on January 23, 1964, filed claims for refunds of said unincorporated business taxes paid on the ground he was an employee exempt from unincorporated business tax. His claims for refund were denied and he filed a timely petition for redetermination of a deficiency or for refund of unincorporated business taxes for the years in issue.

The Internal Revenue Service audited the Federal income tax returns of Robert and Muriel Gingold for the years 1960, 1961 and 1962 increasing interest income and disallowing a portion of travel and entertainment and other expenses. On February 14, 1963, the Department of Taxation and Finance issued a Statement of Audit Changes against the aforementioned taxpayers for the year 1960 imposing additional personal and unincorporated business taxes based on Federal audit in the amount of \$183.40 which has been paid. IT 115's (notices of Federal changes) were filed for 1961 and 1962 and additional personal and unincorporated business taxes based on said Federal audits were computed thereon and paid. The taxpayer is not contesting the amounts of income and disallowance

of expenditures as determined on Federal audit. He is only contesting the unincorporated business taxes paid on the alleged ground that he was an employee not subject to unincorporated business tax.

During the years in issue and prior thereto the taxpayer was a sales representative for one principal, Vogue Shoe, Inc. of Los Angeles, California selling ladies' shoes to retail shoe stores, department stores and chain stores. His territory covered all of New York State, parts of Pennsylvania, Chicago, St. Louis, Washington, D. C., Baltimore, Connecticut and Massachusetts. He was compensated on a straight commission basis. He was not reimbursed for any of his expenses. The taxpayer claims that the corporation maintained a showroom and office at 47 West 34th Street, New York City; that the lease was in the name of Vogue Shoe, Inc. who paid the rent and deducted same from the commissions paid the taxpayer. In addition to the name of Vogue Shoe, Inc. on the door of said office, there also appeared the names of Hollywood Scooters, Ciranno (trade names of Vogue Shoe, Inc.) and Robert Gingold. The listing of the telephone of said office was also in the name of the taxpayer, Robert Gingold. The taxpayer employed a secretary who took care of the office. She also handled correspondence, wrote orders and took messages. The salary of the secretary was paid by the taxpayer who deducted withholding and social security taxes. Samples of shoes were kept at said office. The taxpayer was not reimbursed for any of his expenses. The principal did not deduct social security or unemployment insurance from the commission compensation paid to the taxpayer.

On his unincorporated business tax return for the year 1961, the taxpayer reported gross income of \$45,480.54. He deducted expenses of \$25,233.19, which consisted in part of rent \$1,156.40, payroll \$3,900.00, office expenses \$817.60, trade shows and business expense \$3,028.40, sales promotion \$1,750.03, payroll taxes \$403.56, New York City gross receipts and occupancy tax \$150.83. Similar income and expenses were reported for the other years in issue. On his Federal income tax returns the taxpayer deducted self-employment and New York State unincorporated business taxes.

Although the taxpayer claims that his principal exercised control over his sales activities in that he could only sell exclusively the products of the principal; that the latter fixed selling prices and suggested he call on certain customers, he testified that he developed his own customers; that he could contact anybody he wanted and did; that he picked his own spots (Minutes of

Hearing, pp. 14 and 15).

Section 703(f) of the Tax Law provides that an individual, other than one who maintains an office or employs one or more assistants or who otherwise regularly carries on a business, shall not be deemed engaged in an unincorporated business solely by reason of selling goods, wares, merchandise or insurance for more than one enterprise. This subdivision was amended by L. 1961, c. 683, applicable to tax years commencing on or after January 1, 1961, to provide that the employment of clerical and secretarial assistance shall not be deemed the employment of "assistants". It was further amended by L. 1962, c. 128, applicable to tax years commencing on or after January 1, 1962, to provide that space utilized solely for the display of merchandise shall not be deemed an "office". The section does not automatically exempt independent contractors who do not maintain an office, or employ an assistant or who represent a single principal. While the sole fact that a person is a multi-line salesman is, in itself, an insufficient basis to deem him engaged in an unincorporated business (Britton v. State Tax Commission, 22 A. D. 2d 987, *aff'd*, 19 N. Y. 2d 613), it is equally true that the fact of conducting business does not depend for existence on plurality of goods, wares, services, customers or principals. An independent contractor who deals in a single product or service for one customer, or for one principal is as much engaged in his own business as a multi-line independent contractor.

In the instant case, the taxpayer maintained an office, paid New York City gross receipts and occupancy tax in connection with the operation of said office. He was not reimbursed for any of his expenses. He participated in trade shows, setting up exhibits on his own and deducted expenses in connection therewith for which he was not reimbursed. The principal did not regard the taxpayer as an employee for payroll tax purposes since it did not deduct withholding or social security taxes. The taxpayer considered himself an independent contractor since he filed originally unincorporated business tax returns. The taxpayer has failed to establish that the principal exercised control over the time spent or the manner or means used to effect sales. I am, therefore, of the opinion that the taxpayer was not an employee but an independent contractor subject to unincorporated business tax within the intent and meaning of Section 703, Article 23 of the Tax Law.

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

SOLOMON SIES
Hearing Officer

SS:nn
March 6, 1969

Enc.

Sent to Comm. 3/9/69

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION
OF
ROBERT GINGOLD
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

Robert Gingold having 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 before Solomon Sies, Hearing Officer, for the Department of Taxation and Finance at 80 Centre Street, New York, New York on November 29, 1968, 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 Robert and Muriel Gingold filed New York State personal income tax resident returns for the years 1960, 1961 and 1962 in which they reported gross income of \$17,891.46, \$21,023.11 and \$22,725.20 for said respective years; that the taxpayer Robert Gingold filed New York State unincorporated business tax returns for the years 1960, 1961 and 1962 on which he reported gross income from commissions as a manufacturer's

representative indicating business location at 47 West 34th Street, in the amounts of \$47,207.66, \$45,480.54 and \$43,374.80 and business deductions of \$29,514.50, \$25,233.19 and \$22,246.81, respectively; that the said taxpayer computed and paid unincorporated business tax in the amounts of \$366.20, \$674.93 and \$617.46 for said respective years; that on January 3, 1964, the taxpayer, Robert Gingold, filed claims for refund of unincorporated business income taxes paid as aforementioned on the ground that he was an employee and therefore exempt from the imposition of unincorporated business taxes; that said claims for refund were denied and the taxpayer, Robert Gingold, filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes for the years 1960, 1961 and 1962.

(2) That the Internal Revenue Service audited the Federal income tax returns of Robert and Muriel Gingold for the years 1960, 1961 and 1962 increasing interest income and disallowing a portion of travel, entertainment and other expenses; that on February 14, 1963, the Department of Taxation and Finance issued a Statement of Audit Changes against the aforementioned taxpayers for the year 1960 imposing additional personal and unincorporated business taxes in the amount of \$183.40, which has been paid; that IT 115's (notice of Federal changes) were filed for 1961 and 1962 and additional personal and unincorporated business taxes were computed thereon and paid; that the taxpayer is not contesting the amounts of income and the disallowance of expenditures as determined on Federal audit; that he is only contesting the unincorporated business taxes paid for the years in issue on the alleged ground that he was an employee not subject to unincorporated business tax.

(3) That during the years 1960, 1961 and 1962 and prior thereto the taxpayer, Robert Gingold, was a sales representative for Vogue Shoe, Inc. of Los Angeles, California, in the sale of ladies' shoes to retail shoe stores, department and chain stores on a straight commission basis; that his sales territory covered all of New York State and parts of Pennsylvania, Chicago, St. Louis, Washington, D. C., Baltimore, Connecticut and Massachusetts; that the taxpayer claims that the principal maintained a showroom and office at 47 West 34th Street, New York City, furnished said office, signed the lease of said premises, paid the rent therefor but deducted same from the commissions paid the taxpayer; that the names of both the principal and the taxpayer appeared on the door; that both the named of the principal and the taxpayer appeared in the Manhattan telephone directory; that in connection with the operation of said office, the taxpayer employed and paid for the services of a secretary; that in addition to taking messages and handling correspondence, she also wrote orders; that the taxpayer deducted withholding and social security taxes from the salary paid to said secretary; that samples of shoes were kept in said sales office; that the taxpayer paid the rent, utilities and expenses of said office; that he also paid New York City occupancy and gross receipts tax in connection with the operation of said office and showroom; that the taxpayer participated in trade shows, set up exhibits on his own and incurred expenses in connection therewith; that the taxpayer was not reimbursed for any of his expenses by the principal.

(4) That the taxpayer deducted the following expenses in connection with his sales activities:

	<u>1960</u>	<u>1961</u>	<u>1962</u>
Insurance	\$ 506.55	\$ 787.07	\$ 610.90
Trade Shows & Exhibit Expense	2,887.05	3,028.40	2,604.95
Office Expense	956.72	817.60	849.56
Telephone	1,651.21	1,562.61	1,563.85
Payroll	4,345.00	3,900.00	2,145.00
Travel	3,357.16	2,565.01	1,525.40
Accounting	200.00	250.00	250.00
Entertainment	8,260.04	6,115.05	6,627.99
Auto	1,950.11	2,110.14	1,820.73
Miscellaneous	524.56	390.14	397.47
Payroll Taxes	288.51	403.66	132.52
Sales Promotion	3,424.80	1,750.05	1,308.64
Depreciation on Auto			1,725.00
Rent	1,088.13	1,156.40	
Electricity	74.66	246.23	
NYC Gross Receipts & Occupancy Tax		<u>150.83</u>	<u>216.88</u>
TOTALS	829,514.50	825,233.19	821,798.83

(5) That the principal did not deduct withholding or social security taxes from the commissions paid to the taxpayer.

(6) That the taxpayer on his Federal income tax returns for the years in issue deducted self-employment tax and New York State unincorporated business taxes.

(7) That the taxpayer sold ladies' shoes exclusively on behalf of one principal, Vogue Shoe, Inc. to retail shoe stores, department stores, and chain stores; that he developed his own accounts (Minutes of Hearing, page 13); that the principal suggested

that he call on certain customers on occasion; that the taxpayer testified that he developed a list of his own customers; that he further testified as follows: "I could contact anybody I wanted and I did * * * I picked my spots * * * I did what I felt I should do, but it was all my territory" (Minutes of Hearing, page 15); that the principal did not exercise control over the time spent or the manner or means in which the taxpayer was to effect sales on behalf of said principal.

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

DECIDES:

(A) That during the years 1960, 1961 and 1962, the taxpayer was an independent contractor and not an employee, carrying on an unincorporated business solely within the State of New York; that his income during such years constituted receipts from the conduct of an unincorporated business solely within the State of New York, within the intent and meaning of Section 703 of the Tax Law.

(B) That accordingly, the unincorporated business taxes paid by the taxpayer, Robert Gingold during the years 1960, 1961 and 1962 were correct and did not include any tax or other charge which could have been lawfully demanded; that the taxpayer's petition for redetermination of a deficiency or for refund of unincorporated business taxes for the years 1960, 1961 and 1962 filed with respect thereto be and the same are hereby denied.

DATED: Albany, New York this 12th day of March, 1963.

STATE TAX COMMISSION

/s/

Joseph H. Murphy
PRESIDENT

/s/

E. Bruce Manley
COMMISSIONER

/s/

Milton Koerner
COMMISSIONER