

## BUREAU OF LAW

## MEMORANDUM

*Princip. Bus. Tax  
Determinations A-Z  
Philsan Company*

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: PHILIP SAHN, REBECCA SAHN and  
CLARA POMPER, individually and  
as co-partners d/b/u the firm  
name and style of:

**PHILSAN COMPANY**

Fiscal Year ending February 28, 1957  
Assessment No. B-779920

Article 16-A

Formal Hearing

The issue involved herein is whether the above-named co-partnership is entitled to an allocation of income to both within and without the State of New York in accordance with Section 386-g of the Tax Law.

The taxpayers are not contesting that portion of the assessment disallowing deductions for travel and entertainment, miscellaneous expenses, auto expenses and franchise tax deduction.

The co-partnership was formed on March 1, 1951 and maintained its principal place of business as a general contracting and construction firm at 152 West 42nd Street, New York City, N. Y.

On March 5, 1956, the co-partnership entered into a contract with the U. S. Corp of Engineers to perform flood control work in connection with the Hoosic River basin at Adams, Massachusetts. On April 16, 1956, the taxpayer co-partnership entered into an agreement with Philsan, Inc. (a corporation organized under the laws of the State of Massachusetts) as sub-contractor to furnish all material and all work, labor and services which the taxpayer co-partnership was obligated to furnish and perform pursuant to the terms and provisions of the contract entered into with the U. S. Corp of Engineers. The subcontractor under the terms of the agreement was required to rent from the contractor (the taxpayer co-partnership) all necessary machinery and equipment and in the event the contractor was unable to furnish any of the machinery or equipment required by the subcontractor to perform the contract, then the subcontractor could purchase, rent, lease or otherwise acquire such machinery or equipment from other sources.

The taxpayer co-partnership claims that it operated an office on the job site by using an office trailer in lieu of a field office; that connections were made to the trailer through electrical lines; that the trailer had electricity, toilet facilities and telephones. It is claimed that a girl and two engineers worked on behalf of the taxpayer co-partnership in the trailer. However, their salaries were allocable by the co-partnership to the State of New York. No taxes were paid by the co-partnership to the State of Massachusetts nor did the co-partnership file a certificate of doing business with any official in the State of Massachusetts. Unemployment insurance was not paid to the State of Massachusetts by the taxpayer co-partnership. The payroll was carried on the subcontractor's withholding tax number and unemployment insurance number in Massachusetts.

The taxpayers claim that the maintenance of the trailer constituted an "on the site" office of the co-partnership, so that its business was carried on both within and without the State of New York during the fiscal year ending February 28, 1957.

The term "business carried on without the State" is not defined in either Article 16 or Article 16-A of the Tax Law. However, the term "business carried on within the state" is defined in Article 415 of the Personal Income Tax Regulations as a business carried on by a non-resident when he "occupies, has, maintains, or operates desk room, an office, a shop, a store, a warehouse, a factory, agency or other place outside the State of New York where its affairs are systematically and regularly carried on except from its office within the State of New York."

I am of the opinion that the unincorporated business of the co-partnership was not regularly and systematically carried on outside of the State of New York; that since the co-partnership did not file a certificate of doing business with the State of Massachusetts, did not maintain payroll records or pay unemployment insurance on behalf of any employee to the State of Massachusetts and since it subcontracted all of its work to be performed within the State of Massachusetts, it cannot be said that the co-partnership was actually doing business within the State of Massachusetts. In addition, the co-partnership rented its equipment to the subcontractor which equipment was shipped from the State of New York. The base of operations of the co-partnership was New York and not Massachusetts. I am, therefore, of the opinion that the co-partnership is not entitled to an

allocation of business income carried on without the State of New York within the intent and meaning of Section 386-g of the Tax Law.

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

SOLOMON SIES  
Hearing Officer

SS:sc

Enc.

March 5, 1969

**STATE OF NEW YORK**

**STATE TAX COMMISSION**

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**IN THE MATTER OF THE APPLICATION**

**OF**

**PHILIP SAHN, REBECCA SAHN and  
CLARA POMPER, individually and  
as co-partners d/b/a the firm  
name and style of:**

**PHILSAN COMPANY**

**FOR REVISION OR REFUND OF UNINCORPORATED  
BUSINESS TAXES UNDER ARTICLE 16-A OF THE  
TAX LAW FOR THE FISCAL YEAR ENDING  
FEBRUARY 28, 1957.**  
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The taxpayers herein having filed an application for revision or refund of unincorporated business tax under Article 16-A of the Tax Law and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York City, N. Y. on the 27th day of January, 1957 before Solomon Sles, hearing officer of the Department of Taxation and Finance, at which hearing the taxpayer, Clara Pomper, appeared personally and testified and the taxpayers having been represented by Ira Marshall of the firm of Marshall & Marshall, Certified Public Accountants, the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That at all of the times hereinafter mentioned, the taxpayers, Philip Sahn, Rebecca Sahn and Clara Pomper, were and still are co-partners doing business under the firm name and style of Philsan Company, which co-partnership was formed on March 1, 1951 and maintained a principal place of business as a general contracting construction firm at 152 West 42nd Street, New York City, N. Y.

(2) That on March 5, 1956, the co-partnership of Philson Company entered into a contract with the U. S. Corp of Engineers to perform flood control work in connection with the Hoosic River basin at Adams, Massachusetts; that on April 16, 1956, the co-partnership entered into an agreement with Philson, Inc. (a corporation organized under the laws of the State of Massachusetts) to furnish all material and all work, labor and services which the contractor (the taxpayer co-partnership) was obligated to furnish and perform pursuant to the terms and provisions of the contract entered into by the contractor and the U. S. Corp of Engineers; that the subcontractor under the terms of the agreement was required to rent from the contractor (the taxpayer co-partnership) all necessary machinery and equipment and in the event the contractor was unable to furnish any of the machinery or equipment required by the subcontractor to perform the contract, then the subcontractor could purchase, rent, lease or otherwise acquire such machinery or equipment from other sources.

(3) That the taxpayer co-partnership claims that it operated an office on the job site by using an office trailer in lieu of a field office; that connections were made to the trailer through electrical lines; that the trailer had electricity, toilet facilities and telephones; it is claimed that a girl and two engineers worked on behalf of taxpayer co-partnership in the trailer; that the salary of the girl was paid by the subcontractor Philson, Inc. (Minutes of Hearing, page 17); that the salaries of the engineers were allocable by the co-partnership to the State of New York; that no taxes were paid by the co-partnership to the State of Massachusetts nor did the co-partnership file a certificate of doing business with any official in the State of Massachusetts; that unemployment insurance was not paid to the

State of Massachusetts by the co-partnership; that the payroll was carried on the subcontractor's (Philson, Inc.) withholding tax number and unemployment insurance number in Massachusetts.

(4) That on May 12, 1960, the Department of Taxation and Finance made an assessment against the taxpayers herein for the fiscal year ending February 28, 1957 (Assessment No. B-779920) disallowing an allocation claimed by the taxpayers and further disallowing deductions for travel and entertainment, miscellaneous expenses, auto expenses and franchise taxes; that the taxpayers are not contesting that portion of the assessment disallowing deductions for travel and entertainment, miscellaneous expenses, auto expenses and franchise tax deductions.

(5) That during the fiscal period ending February 28, 1957, the taxpayer co-partnership did not occupy, have, maintain or operate desk room, an office, a shop, a store, a warehouse, a factory, agency or other place outside the State of New York where its affairs were systematically and regularly carried on; that the taxpayer co-partnership did not actually engage in doing business within the State of Massachusetts during the fiscal period ending February 28, 1957; that during the fiscal year ending February 28, 1967 the sole place of business of the taxpayer partnership was located at 152 West 42 Street, City and State of New York.

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

**DETERMINE:**

(A) That the taxpayers, therefore, were not entitled to an allocation of net income for business alleged to have been carried on without the State of New York during the fiscal year ending February 28, 1957 within the intent and meaning of Section 386-g of the Tax law as amended by Chapter 97 of the Laws of 1951, then in effect.

(B) That, accordingly, the assessment (Assessment No. B-779920) for the fiscal year ending February 28, 1957 is correct; that said assessment does not include any tax or other charge which could not have been lawfully demanded and that the taxpayers' application for revision or refund with respect to the above mentioned assessment be and the same is hereby denied.

DATED: Albany, New York on the 12th day of March , 1969.

**STATE TAX COMMISSION**

/s/

Joseph H. Murphy  
**PRESIDENT**

/s/

A. Bruce Manley  
**COMMISSIONER**

/s/

Milton Koerner  
**COMMISSIONER**