L 9 (8-68)

BUREAU OF LAW

MEMORANDUM

TO: State Tax Commission

FROM: Francis X. Boylan, Hearing Officer

SUBJECT: Eli Simon and Jerry Simon; Jewelry Sales, Co., a partnership; Unincorporated Business Tax, Article 16-A; 1957, 1958 and 1959

A hearing was held before me on the above-captioned matter on June 11, 1965 at New York, New York. A certified public accountant, Jack Schneider, testified in behalf of the taxpayer partnership. Mr. Schneider was not professionally acquainted with the business until 1961, but he had personally known the Simon brothers, the partners, since 1958, according to his testimony. The principal exhibits are this accountant's breakdown of sales and services according to States, and a letter from Sage Manufacturing Co., Inc. of Providence, Rhode Island, dated August 6, 1963; both exhibits were submitted in support of a claim for allocation of income to Rhode Island (under Tax Law Section 386-g).

The principal issue was this claim for the right of an allocation of part of the sales to Rhode Island. There was also, however, the suggestion that the portion of the partnership income which derived from services as a consultant to a manufacturer of costume jewelry in the Virgin Islands should not be subject to unincorporated business tax. The determination holds that all of the income from all sources was subject to unincorporated business tax and that the assessments made should be affirmed. Tax Law Sections 386, 386-g.

As to the services rendered as a consultant to the manufacturer in the Virgin Islands the contention was that services of this character are not subject to unincorporated business tax. This position is mistaken since any number of cases affirm that such services, if not professional, are subject to tax. There is no contention that the services were of a professional nature. The taxpayer was not a designer of costume jewelry but evidently was paid for information and intelligence in current fashion trends in the field of costume jewelry. The services were paid for by commissions to the partnership and it is acknowledged that an employee relationship did not exist, and although the services were rendered largely by one of the partners, it was not contended that the services were personal to him and not the income of the partnership. On the contrary, the income was considered that of the partnership. Further, the information which was of value to the Virgin Islands manufacturer arose out of the partnership's business. Consequently, there is no question but that the income from the Virgin Islands is subject to tax in common with the other income of the partnership.

The further contention was that the partnership was entitled to an allocation to Rhode Island of its sales made there. The determination held in effect that the evidence was inadequate to support a conclusion that the business was carried on in a regular and systematic way at Rhode Island, as the law requires.

The evidence as to the character of the accommodations afforded the partnership at Rhode Island is almost entirely limited to the letter from Sage Manufacturing Co., Inc. which simply states that the partnership occupied office and showrrom space without any amplification as to the amount or character of the space afforded. The partner's participated in trade shows of costume jewelry at Providence, Rhode Island, and were in Providence on other occasions. They did not, however, have any employee or other representative in Providence at other times and there was no indication that any sales records were dept there, or that in some other way the business was conducted there. Consequently, the proof falls short of that required to establish that they "carried on" the business from any site other than New York.

Tax Law Section 386-g provides for an allocation "if an unincorporated business is carried on both within and without the state." Tax Law Section 386-g; 20 NYCRR 287.1 et seq. The term "business . . . carried on without the state" is not defined in Article 16-A or in Article 16, but the concept of a business carried on within this State or without this State by a nonresident was governed by regulations in Personal Income Tax Regulations, former Articles 415, 455 and 456. By ruling dated August 3, 1942, the State Tax Commission indicated that the carrying on of a business outside the State is only established when the affairs of the business are systematically and regularly carried on at such place and the ruling indicated that the provisions of former Articles 415, 455 and 456 were to be considered applicable in principle to cases arising under the unincorporated business tax. These Articles, now 20 NYCRR 261.6, 263.5 and 263.6 dealing with the carrying on of a business by a nonresident, would indicate, (changing what must be changed so as to apply conversely to a resident business carried on outside the State) that a business of a resident is to be deemed to be carried on outside the State or partly outside the State when it occupies, has, maintains or operates desk room, an office . . . or other place where its affairs are systematically and regularly carried on; that a business is being carried on if it is present in a place with a fair measure of permanence and continuity; and that the entire income from a business carried on within the State is subject to tax even though services or sales are made outside the State. 20 NYCRR, 261.6, 263.5 and 263.6.

The taxpayers manifestly attempt to bring themselves within the holding in the case of Thompson v. Mealey, where it was held that the taxpayer, operating a roofing company, did

business outside the State where it had desk space, however modest, at the sites of the work outside the State, and had agents present, even if its agents were independent contractors. (Thompson v. Mealey, (1943) 290 NY 230.) Here, however, even apart from the unsatisfactory nature of the evidence as to the accommodations afforded, which was in the form of a letter without any direct testimony, the taxpayer in this instance had no personnel regularly stationed at Providence and had no other kind of continuity of operation there. The letter does not really establish much more than that the partners were provided with shelter at the offices of Sage Manufacturing Co., Inc., their principal, when they were in Providence. Consequently, the assessments were correct, it is concluded.

In these circumstances, imposition of unincorporated business tax for commissions received whether for orders to be shipped into New York or elsewhere was proper. Lummis v. Graves, 251 App. Div. 591.

Accordingly, it is recommended that the determination be substantially in accordance with the one submitted herewith.

/s/ FRANCIS X. BOYLAN
Hearing Officer

FXB:ldd

January 20, 1969
Sent to Commission 1/22/69

STATE TAX COMMISSION

STATE OF NEW YORK

IN THE MATTER OF THE APPLICATION

OF

ELI SIMON AND JERRY SIMON

INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS JEWELRY SALES COMPANY, A PARTNERSHIP, FOR REVISION OR REFUND OF UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 16-A OF THE TAX LAW FOR THE YEARS 1957, 1958 AND 1959

Eli Simon and Jerry Simon, the taxpayers, partners in Jewelry Sales Company, a partnership, having filed an application for revision or refund of unincorporated business taxes assessed for the years 1957, 1958 and 1959 and such application having been denied, and a hearing having been held at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on June 11, 1965 before Francis X. Boylan, Hearing Officer; and Jack Schneider, C.P.A. of Valley Stream, New York, having appeared in behalf of the taxpayers and having testified, and the record having been duly examined and considered

The State Tax Commission hereby finds that:

(1) By notices of additional assessment numbered B815243, B815244 and B815245, all dated October 10, 1960, the State Tax Commission assessed unincorporated business taxes against Jewelry Sales Company, the taxpayer partnership and against Eli Simon and Jerry Simon, the partners, for the respective fiscal tax years ending March 31, 1957, March 31, 1958 and March 31, 1959 assessing unincorporated business tax against the net income reported by the partnership for each of those years, on which normal income tax was reported but no return of unincorporated business tax was made. For the year 1957 net income from business in the amount of $15,930.76 was reported and unincorporated business tax in the net

amount of $274.78 was assessed, and with penalties and interest charges the total amount due as of the date of the assessment was $343.48. As to the fiscal year 1958 net income in the amount of $15,629.99 was reported and unincorporated business tax in the amount of $285.15 was assessed; after penalties and interest the amount due as of the date of the assessment was $315.54. As to the fiscal year 1959, net income from business was reported in the amount of $12,518.24 and unincorporated business tax in the amount of $175.47 was assessed; after penalties and interest the amount due as of the date of the assessment was $198.27.

By a notice of additional assessment number BTF820076, dated January 19, 1961, a further additional assessment of unincorporated business tax as to the fiscal year 1958 was made in the amount of $38.40, by reason of a report of a Federal audit, increasing, by $1,200.00, the amount of the net income from business.

(2) The partnership was engaged as a sales representative, selling a line of costume jewelry entirely or almost entirely for Sage Manufacturing Company, Inc. of Providence, Rhode Island, to accounts in New York and Rhode Island. In the year 1957 sales were made in New York and to a lesser extent in Rhode Island. In 1958 the Company made some sales in Ohio also; and in 1959 to a limited extent in a number of other states as well; but in all years principally in New York and Rhode Island. The partnership was paid by commissions for the sales it made.

Additionally, according to the testimony of its accountant, the partnership, during the years under consideration, fiscal 1957, 1958 and 1959, functioned as a consultant to a certain manufacturer of costume jewelry located in the Virgin Islands identified as International Glass Company. Jerry Simon, one of the partners, traveling regularly to the site of that Company's premises in the Virgin Islands, advised the Company concerning new

trends and new designs in costume jewelry.

It was not claimed that Jerry Simon was an employee of International Glass Company, and it is found that he was not an employee.

All of the income of the partnership from all sources was shared in equally by the two partners.

(3) The contention of the taxpayer was that the services rendered in the Virgin Islands were not such as are subject to unincorporated business tax; and that the net income from Rhode Island was entitled to an allocation to that State and was not subject to unincorporated business tax here.

(4) In connection with the partnership's sales in Rhode Island, the partners, according to the testimony, participated in trade shows put on from time to time at a hotel in Providence, Rhode Island. A letter from Sage Manufacturing Company, Inc. of Providence, Rhode Island, dated August 6, 1963, stated that Jewelry Sales Company occupied office and showroom space in its building in Providence during a period beginning in 1954 and continuing through 1960.

(5) The partnership did not have any employee or agent stationed in Providence, Rhode Island or elsewhere in Rhode Island during the years under consideration, and did not have any personnel at the premises of the Sage Manufacturing Company except at such times as one or both of the partners were present there for limited periods, it is found; and the partnership did not otherwise systematically and regularly conduct its business from the premises of Sage Manufacturing Company, Inc., or at Providence, Rhode Island, or from any premises outside the State of New York, as it is found.

(6) The partnership did not make any returns of unincorporated business tax for the years under consideration prior to the assessments made, and did not thereafter make any returns or amended returns of unincorporated business tax for the said years so as to set forth definitely its asserted claim for allocation of income

outside the State for the years under consideration.

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

DETERMINES:

(A) That the taxpayer partnership during the fiscal years under consideration, 1957, 1958 and 1959, was conducting an unincorporated business as defined in Tax Law Section 386.

(B) That its business was carried on within this State and no part of such business was conducted without the State of New York within the meaning of the language of Tax Law Section 386-g which provides for an allocation of net income when a business is conducted in part without the State; and the partnership was liable for unincorporated business tax on its entire net income for the said years without the right of allocation of any portion of such net income.

(C) That the additional assessments numbers B815243, B815244, B815245 and BTF820076 set forth in paragraph (1) of this determination were lawful and correct, and are affirmed subject to further interest from the dates thereof, and to further lawful penalties if any.

Dated at Albany, New York, this 24th day of Jan., 1969.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

COMMISSIONER