

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of :

HAROLD E. SUNDBERG :

Affidavit of Mailing
of Notice of Decision,
by Registered Mail

For a Redetermination of a Deficiency :
or a Refund of Unincorporated Business :
Taxes under Article(s) 23 of the Tax :
Law for the year(s) 1961, 1962, 1963 and :
1964

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, and that on the 7th day of July , 1969, she served
the within Notice of Decision (or of "Determination") by registered
mail upon Mr. Harold E. Sundberg

the petitioner in the within proceeding, by enclosing a true copy
thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Harold E. Sundberg, 121 Woodbridge Avenue, Buffalo, New York 14214
and by delivering the same at Room 214a, Building 8, Campus, Albany,
marked "REGISTERED MAIL" to a messenger of the Mail Room, Building
9, Campus, Albany, to be mailed by registered mail.

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

Sworn to before me this

7th day of July , 1969.

Grace E. Pritchard

Lynn Horodowich

U. B. T. Determinations
H-2
Sundberg, Harold E.

August 1, 1969

Harold E. Sundberg
121 Woodbridge Avenue
Buffalo, New York 14214

Re: In the matter of the Petition of Harold E. Sundberg
for a Re-determination of the Deficiency or a Refund
of Unincorporated Business Taxes under Article 23
of the Tax Law for the years 1961, 1962, 1963 & 1964.

Dear Mr. Sundberg:

Your letter of July 25, 1969 has been forwarded to me
for reply.

The contents of your letter have been noted. An applica-
tion to review the decision of the Tax Commission may be made
to the Supreme Court pursuant to the provisions of Section 690
of the Tax Law which provides that the application must be
made within four months after notice of the decision is sent
by certified or registered mail. The aforesaid section further
provides that unless before or at the time of making such
application the taxpayer has paid the deficiency or has de-
posited with the Tax Commission the amount of the deficiency
or in lieu thereof has filed a bond approved by a Justice of
the Supreme Court for the unpaid deficiency, interest or other
amount and all costs, the Commission may assess such deficiency.
Such deficiencies, as assessed, may then be collected in
accordance with the provisions of the Tax Law.

Very truly yours,

EDWARD H. BEST
Counsel

JS:j1

cc: Edward Rook
Deputy Commissioner Igoe
Edward J. Pidgeon

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
HAROLD E. SUNDBERG	:	DECISION
for Refund of Unincorporated Business	:	
Taxes under Article 23 of the Tax Law	:	
for the years 1961, 1962, 1963, and	:	
1964	:	

HAROLD E. SUNDBERG, the taxpayer, having filed petitions for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1961, 1962 and 1963, and a hearing having been held in connection therewith on August 1, 1966, at the office of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, before Vincent P. Molineaux, Hearing Officer, of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and testified; and the taxpayer having filed a petition for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1964, and on March 18, 1969, having consented by letter to combining the year 1964 with the other above stated years without a separate hearing; and the record having been duly examined and considered, the State Tax Commission hereby finds:

1. The taxpayer filed personal income tax returns under Article 22 of the Tax Law, and unincorporated business tax returns under Article 23 of the Tax Law, for each of the years 1961 through 1964, on which returns he reported income from his activities as a representative of four companies; namely, Philadelphia Gear Corporation, Orville Simpson Company, the Comtor Company and Palmer Instruments, Inc.; that the taxpayer listed his activities on such returns filed for the various years as sales engineer.

2. The taxpayer paid the unincorporated business taxes, at the time of filing the said tax returns, in the sum of \$294.35 for the year 1961; in the sum of \$577.14 for the year 1962; in the sum of \$640.16 for the year 1963; and in the sum of \$1329.03 for the year 1964.

3. The taxpayer filed claims for refund for each of the years unincorporated business tax returns were filed and taxes paid; and the Income Tax Bureau denied such applications for refund on the basis of the decision of the Appellate Division (Sundberg vs. Bragalini 7 A.D. 2nd, 15, Motion for Leave to Appeal to Court of Appeals denied, 6 N.Y. 2nd, 705), with respect to applications of this taxpayer for the three prior years of 1950, 1951 and 1952, and on the basis of the decision of the Appellate Division (Sundberg vs. State Tax Commission, 21 A.D. 2nd, 703, appeal dismissed 14 N.Y. 2nd, 949), for the eight prior years 1953 to 1959, and 1960.

4. The taxpayer admitted at the hearing that he carried on his activities during each of the years here involved for the same four companies and in the same form and manner as during the years 1950 through 1960, which were previously reviewed by the Courts; the taxpayer contends that he did not carry on his activities for his four principals during the years here involved as an independant contractor, the taxpayer further contends that his activities for such years on behalf of the Philadelphia Gear Corporation constituted the practice of the exempt profession of engineering.

5. The taxpayer is a graduate engineer and is licensed by the State of New York to practice professional engineering; the taxpayer did not hold himself out to the public during the years here involved as practicing the profession of engineering.

6. During the years involved, the taxpayer maintained his own office and business telephone; the taxpayer himself filed returns as a self-employed person for tax purposes; none of the four principals of the taxpayer, to wit, Philadelphia Gear Corporation, Orville Simpson Company, the Comtor Company, and Palmer Instruments, Inc., considered the taxpayer as an employee for social security purposes, or for group insurance purposes; the taxpayer was not required to work any specific portion of his time for anyone of his principals and there was no agreement or understanding to that effect; his principals did not exercise and did not have the right to exercise close supervision and control over the manner in which the taxpayer carried on his activities in their behalf.

7. The taxpayer was paid on a sales commission basis for rendering services to the four companies; the taxpayer agreed to promote the sales of the products of the four companies; although engineering knowledge was advantageous to the taxpayer, it was primarily used in order to be more able to convince the prospective purchaser that the products of his four principals were superior to that of the competitors.

8. The taxpayer has failed to prove that he was required to be a graduate or licensed engineer in order to become the sales representative of any one of his principals; other representatives of his principals were not licensed engineers.

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

DECIDES that:

A. The taxpayer carried on his activities on behalf of his four principals as an independant contractor rather than an employee

thereof; the activities of the taxpayer on behalf of his four principals were that of a salesman working on a commission basis; the activities of the taxpayer during the years involved, therefore, constituted the carrying on of an unincorporated business within the meaning and intent of section 703 of the Tax Law.

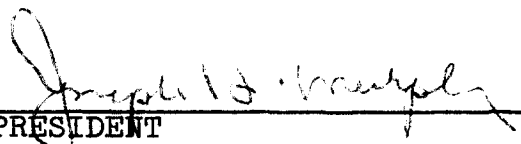
B. The taxpayer's activities failed to meet the usual concept of professional practice as comprehending services or disinterested advice for the benefit of the person served or advised; the taxpayer's advice to prospective customers and the application of professional knowledge to their problems was primarily to effect sales of machinery to the profit of the taxpayer and his principals.

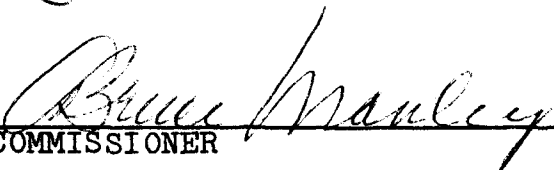
C. It was not shown that the application of the taxpayer's professional education, training and skill was essential to produce the income nor was it shown that the professional education, training and skill was so material to the production of the income that without them the taxpayer could not have profitably pursued the particular occupation under normal conditions of business and competition; therefore, even though the taxpayer did, at times, utilize to a certain extent a knowledge of engineering in connection with his activities as sales representative for his four principals, nevertheless, this activity did not constitute the practice of a profession pursuant to the provisions of section 703 of the Tax Law; the taxpayer's income from each of his four principals was includible in unincorporated business tax gross income pursuant to the provisions of section 705 of the Tax Law.

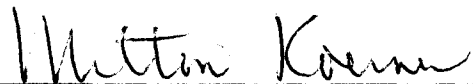
D. Accordingly, the unincorporated business taxes paid by the taxpayer for the years here involved, are correct and represent taxes legally due and owing and the taxpayer is not entitled to any refund of taxes under Article 23 of the Tax Law for the years 1961, 1962, 1963 and 1964.

Dated: Albany, New York this 30th day of June 1969.

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

DEPARTMENT OF TAXATION AND FINANCE

MEMORANDUM

TO: Mr. Rook
FROM: Lawrence A. Newman
SUBJECT: Harold E. Sundberg
Decision based on Hearing by Mr. Molineaux
Unincorporated Business Tax-1961 through 1964

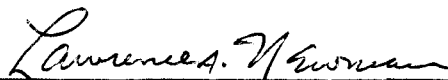
DATE June 19, 1969
OFFICE Hearing Unit

The taxpayer claims to be practicing the profession of engineering, or in the alternative to be an employee of four distinct principals, who manufacture machinery and parts for sale through area representatives.

The identical state of facts were considered by the courts, on two separate appeals from previous hearings, concerning this taxpayer's taxable years of 1950 through 1960. The Appellate Division, on both occasions sustained the determination of the Commission that the taxpayer was engaged in an unincorporated business. Further appeals to the Court of Appeals were denied or dismissed.

The taxpayer renews his contentions for the years 1961 through 1964 based on the identical facts. Although a hearing was held by Mr. Molineaux on August 1, 1966, covering only the years 1961, 1962 and 1963, the taxpayer has consented in his letter of March 18, 1969 to have the year 1964 considered as well on the same facts.

I offer my draft of the decision, which denies the taxpayer's petitions for refund, for the approval of the Commission.



LAWRENCE A. NEWMAN
Hearing Officer

(Copy of decision to be placed in file)

June 18, 1969

Mr. Harold E. Sundberg
121 Woodbridge Avenue
Buffalo, New York 14214

Dear Mr. Sundberg:

Governor Rockefeller has asked me to reply to your letter of February 10, 1969, regarding your hearing relative to the Unincorporated Business Tax.

Mr. Molineaux, the Hearing Officer for your case to whose attention you addressed your letter of August 14, 1968, is no longer with this Department. I note, however, that as a result of your letter to him of February 10, Mr. Best replied to you as of February 19.

The record of the hearing has been turned over to a new Hearing Officer with the request that he expedite the determination.

Because the matter will shortly be before me as one of the members of the Tax Commission, I feel it would be inappropriate for me to comment on your views concerning the Unincorporated Business Tax Law.

Very truly yours,

JOSEPH H. MURPHY
Commissioner

ER:CEP

Sundberg file
located on Mrs.
Schapero's desk.

PATCH T (FILE A)



To _____

Date _____ Time _____

WHILE YOU WERE OUT

Mr. Al Rubinstein

of _____

Phone 5619

TELEPHONED		PLEASE CALL HIM	
CALLED TO SEE YOU		WILL CALL AGAIN	
WANTS TO SEE YOU		RUSH	

Message _____

1969 JUNE 1969							WEDNESDAY							1969 JULY 1969								
S	M	T	W	T	F	S										S	M	T	W	T	F	S
1	2	3	4	5	6	7												1	2	3	4	5
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29	30															27	28	29	30	31		

Old Admin. Bld.

Harold Sandberg

unlocatable

Molineaux

12/7/75

6/11/69

162

WEDNESDAY, JUNE 11, 1969

203

3/21/69

From **JOSEPH H. MURPHY** Commissioner

Forward original and duplicate of this form with attachments

TO: **Mr. Edward Rook**BUREAU
OR OFFICE

FOR:

1. ☐ Your Information
2. ☐ Written Comments
3. ☒ Reply for J.H.M. signature
4. ☐ Your Attention And Reply Direct To Correspondent
5. ☐ Discussion With J.H.M.

Material From The Governor's Office:

6. ☐ Reply for J.H.M. signature and forward original and 4 copies to Commissioner's Office
7. ☐ Suggested reply for use by the Governor's Office and forward original and 3 copies to Commissioner's Office

Name of Correspondent

Mr. Edward Igoe

Address

Director
Income Tax Bureau

correspondence to Governor from:
 RE: Mr. Harold E. Sandberg, 121
 Woodbridge Avenue, Buffalo, NY

DATE: 3/26/69

Please prepare an original and 3 copies of all written material forwarded to this office except as otherwise noted. Also, kindly return original copy of this memo with any material forwarded in regard to the matter in upper right box.

OTHER INFORMATION:

Joseph H. Murphy

DEPARTMENT OF TAXATION AND FINANCE

MEMORANDUM

TO: Commissioner Murphy

OFFICE Income Tax

FROM: Mr. Igoe

DATE March 21, 1969

SUBJECT: Harold E. Sundberg

(Letter dated February 10, 1969
addressed to Governor Rockefeller)

W. P. Igoe
CM 71

I am returning Mr. Sundberg's letter of February 10, 1969 and the attached copy of a letter sent to Mr. Vincent P. Molineaux, Hearing Officer, on August 14, 1968 which you referred to me with a Form AD-1 because I do not believe the Income Tax Bureau is in a position to prepare a reply to the questions submitted to Governor Rockefeller.

The "general comment" referred to in Governor Rockefeller's March 13, 1969 letter to Mr. Sundberg relates to a request Mr. Sundberg apparently has submitted to Speaker Duryea and Assemblyman Long for legislation eliminating the so-called "professional exemption" from section 703 of the unincorporated business tax law. I understand that the Speaker's Office has asked our Research & Statistics Bureau to furnish certain information regarding the revenue implications of the situation. In view of the fact that we do not know what information has been supplied and do not know what position the Tax Commission wants to take on the policy question involved I feel the reply to this portion of the inquiry should be handled by Dr. Slater's Office.

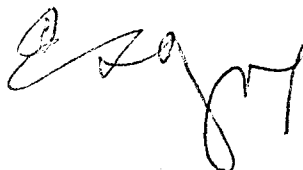
The "specific case problem" of the taxpayer concerns his own status under the Unincorporated Business Tax Law. The taxpayer holds a New York State license as a Professional Engineer. However his actual occupational activities consist of acting as an agent or representative of a number of manufacturers of industrial machinery and equipment. Initially the taxpayer claimed that his activities constituted the practice of an exempt profession and on two occasions between 1957 and 1964 he instituted Article 78 Proceedings in which the imposition of the Unincorporated Business Tax was sustained by the Appellate Division on the ground that the activities were those of a salesman or sales agent. (The Court of Appeals denied leave to appeal on one occasion.)

Commissioner Murphy

- 2 -

The present proceeding involving Mr. Sundberg apparently is a section 689 Petition to the Tax Commission for the years 1961, 1962 and 1963 on which a Formal Hearing was held on August 1, 1966 and on which no Tax Commission Decision has as yet been made. It would appear from the August 14, 1968 letter addressed to Mr. Molineaux that the taxpayer now contends that his activity qualifies for exemption under the special "sales representative" provision of Section 703(f) of Article 23. Since we have no access to the hearing record and do not know what evidence was adduced at the hearing I believe the Law Bureau Hearing Unit should handle this aspect of the matter.

If you feel we should work with one of the other bureaus on the matter we will of course be pleased to do so.

A handwritten signature in dark ink, appearing to be 'E. J. G.', is located in the lower right quadrant of the page.

From **JOSEPH H. MURPHY** Commissioner

Forward original and duplicate of this form with attachments

To **Mr. Edward Igoe**BUREAU
OR OFFICE

Income Tax Bureau

FOR:

1. ☐ Your information
2. ☐ Written Comments
3. ☐ Reply for J.H.M. signature
4. ☐ Your Attention And Reply Direct To Correspondent
5. ☐ Discussion With J.H.M.

Material From The Governor's Office:

6. ☒ Reply for J.H.M. signature and forward original and 4 copies to Commissioner's Office
7. ☐ Suggested reply for use by the Governor's Office and forward original and 3 copies to Commissioner's Office

Name of Correspondent

3/13/69

The Honorable Nelson A. Rockefeller

Address Governor of New York

State Capitol

Albany, New York

RE:

Mr. Harold E. ~~Sunberg~~

121 Woodbridge Avenue

Buffalo, New York 14214 DATE: 3/20/69

Please prepare an original and 3 copies of all written material forwarded to this office except as otherwise noted. Also, kindly return original copy of this memo with any material forwarded in regard to the matter in upper right box.

OTHER INFORMATION:

Joseph H. Murphy

121 Woodbridge Ave.,
Buffalo, N.Y. 14214
February 10, 1969

The Honorable Nelson A. Rockefeller.
Governor of New York
Albany, New York 12224

Dear Governor Rockefeller:

Due to the large crowd at Kleinhans Music Hall on Friday I was sorry I could not get the microphone but welcomed meeting you at the end of the meeting.

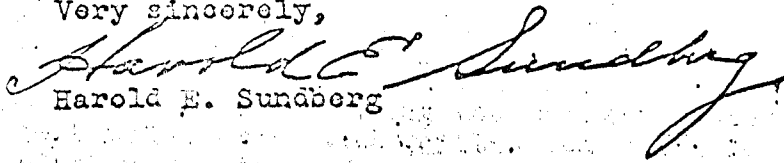
Firstly, I wish to discuss the Unincorporated Business Tax as it applies to me. I have paid this for several years. A revision was enacted in 1953 but I have not been able to get consideration on the basis of this change. I had a hearing on August 1, 1966 and followed it with a letter on August 14, 1968 (copy attached), but have had no reply. I feel certain that, if the State adhered strictly to the five specific points brought up I would receive a favorable decision. I would appreciate what you can do in the matter.

Secondly, although I am phasing out of my occupation and will be liable to little or no tax shortly, I feel strongly that this tax is unjust and intend to pursue its correction. I am fully aware of the reasoning back of it, in that a group of sixteen occupations were arbitrarily selected as professions and exempted because, by statute, they cannot incorporate. To paraphrase Justice Earl Warren in his famous decision on segregation, "It connotes something unequal."

Last week Justice Warren stated: "The United States is reaping the whirlwind of its failure to extend fully to all citizens the principles of equality in the Declaration of Independence. Frankness should compel us to admit that our stop-and-go applications of these equitable principles has built up an explosive condition from which we are now reaping the whirlwind."

You can readily see that the Unincorporated Business Tax which, thru faulty logic, has provided a caste system and ranked the small businessman as a second rate citizen. I have asked Assemblyman Lloyd J. Long and Speaker Perry B. Duryea, Jr. to initiate a bill to change this law to include all of those who have been exempted. If all of these groups were included everyone would pay a fraction of what the average now is with resultant equity. Some of the professional people in the Legislature will object but it is hoped that most will see the fairness and go along. However, I am sure that this will die in committee unless a proposal comes from you. I solicit your help.

Very sincerely,


Harold E. Sundberg

Attachment

121 Woodbridge Ave.,
Buffalo, N.Y. 14214
August 14, 1968

State of New York
Department of Taxation and Finance
State Campus
Albany, N.Y. 12226

Attention: Mr. Vincent P. Molineaux, Hearing Officer

Re: Matter of the Petition of Harold E. Sundberg for
Refund of Unincorporated Business Taxes under
Article 23 of the Tax Law for the Years 1961,
1962 and 1963.

Dear Mr. Molineaux:

On August 1, 1968 you held a formal hearing in Buffalo.
To date I have heard nothing further and would like to review the
matter briefly.

Originally I was compelled to pay the tax for the years
1950, 1951 and 1952. Subsequently a revision to the law was made.
Reference is made to the N.Y. State Legislature Manual of 1953:

" Unincorporated business tax, exemption A.I. 1569, Pr.
3527, Lupton 725"

The resultant revision of 1953 became effective:

"A person shall not be deemed to be engaged in an unin-
corporated business solely because of selling goods,
wares and merchandise for more than one person, firm
or corporation unless he maintains an office or employs
one or more assistants or otherwise regularly carries
on a business."

This gave clarification to the case of multi-line salesmen
but these facts were never applied to my own situation. The citizen is
entitled to a definitive law and I would like to analyze the above:

(1) Did I sell for more than one company? Yes.

(2) Did I maintain an office? No. Webster describes an office as a
room for the transaction of business. For 20 years I rented space
in the office of Blair & Co. My name was on the door merely for
the direction of mail but there was nothing to indicate what my
occupation was. Mr. Sharpe of Blair & Co. made a sworn affidavit
that, in 20 years, not one person came to transact business with me.
It would be utterly impossible for a person to sell for one or more
companies without a desk to receive and write letters and take phone
calls. It is obvious, therefore, that it was not the purpose of this
revision to exclude the multi-line salesman and then turn around and
completely negate the revision by rejecting the minimum requirement
of a phone and desk to handle verbal and written communication. All
I had was this very minimum requirement.

August 14, 1968

(3) Did I employ any assistants? No.

(4) Did I otherwise regularly carry on a business? No. In order to carry on a business a person must buy or sell goods or services. To use the words of the State, he must be an independent contractor. Some representatives buy and stock goods and invoice the customers. They are thus independent contractors. Webster describes "independent" as: Not dependent; not subject to control of others. I have furnished my employment contracts to the State and it will be noted that the companies originated the contracts which are uniform with their other representatives. They made the rules and dictated the action. How could I possibly be an independent contractor when I could not even sign a letter to the customers of my principals? It had to be under the name of the principal who received a copy of all correspondence. I could not make a contract independently.

As for freedom of time, it is assumed that the sales representative, in full conscience, will put in a fair day's work whether he starts at 8 or 9 AM or goes to one place or another does not mean that he has complete independence. He should be available for service during the normal working hours. Many salesmen, working for one company on a commission basis, have the same freedom of hours. This is common knowledge. Furthermore, there is nothing in the Tax Law regarding this.

(5) Finally, what does constitute carrying on a business? The crux of the whole matter is whether the salesman invoices. It is impossible to transact business without the handling of money. No discussion of this point has ever been made and it is on this premise more than anything else that I request a refund. Again, I wish to emphasize this in the strongest terms.

Several years ago I was approached by the Schutte and Koerting Co. of Philadelphia regarding representation. Not being interested, I referred the late Mr. Eugene D. Murphy of 735 Starin Ave., Kenmore, N.Y. to them. As the result, Mr. Murphy resigned his position and started to represent Schutte and Koerting. Later he added representation of another company. Mr. Murphy operated exactly as I did. He established a separate room in his home with a business phone and listing. Your records will bear this out. Mr. Murphy was notified to pay the Unincorporated Business Tax but the State subsequently absolved the payment. In the light of this situation, with which I am well familiar, I see no reason why I should not be given the same treatment. The purpose of his room was exactly the same as mine. Doctors and lawyers operate from their homes as well as from rented quarters. This does not change the purpose of their work.

I cannot help but feel that my earlier payment of the tax before the revision of 1953 has prejudiced my case. I have shown, by careful analysis of the law that I conform precisely to the letter and purpose of the revision of 1953. There should be no technical or legal impediment to the establishment of justice. Thus, I request that you review each point carefully and I look for your favorable decision.

Very truly yours,

Harold E. Sundberg