

STATE OF NEW YORK
STATE TAX COMMISSION

HEARING UNIT - File Copy

TAX UBT
ART. 23 SECS. 122
KEY WORDS _____

CROSS REFS. _____

CASE LAW CITED _____

DECISION _____

REMARKS _____

In the Matter of the Petition :
of :
BRUNO and ELLA BIEDERMAN :
for Redetermination of a Deficiency or :
for Refund of Unincorporated Business :
Taxes under Article 23 of the Tax Law :
for the years 1961 and 1962 :
:

Mr. Bruno Biederman, and his wife Mrs. Ella Biederman, filed claims for refund of Unincorporated Business Taxes for the years 1961 and 1962.

A formal hearing was held in the offices of the State Tax Commission in the city of New York on October 28, 1969, before Lawrence A. Newman, Hearing Officer. The claimants appeared through Jacob L. Simon, CPA and the Income Tax Bureau was represented by Edward H. Best, Esq. (Albert J. Rossi, Esq. of counsel).

FINDINGS OF FACT

1. The claimants, Bruno and Ella Biederman, filed New York State Income Tax resident returns for the years 1961 and 1962 but did not file Unincorporated Business Tax returns.

2. On March 14, 1966, a notice of deficiency was issued by the Income Tax Bureau under filed numbered 2-6146073. The notice contained a statement of tax deficiency of \$434.92 for the year 1961, and \$251.40 for the year 1962, plus statutory interest. The Income Tax Bureau contended that the income from the business activities of Mr. Bruno Biederman was subject to the Unincorporated Business Tax.

3. The claimants paid the amounts of the deficiencies and timely filed claims for credit or refund for the years 1961 and 1962.

4. At the specific request and instruction of Schmidt and Koch, an importing firm located in West Germany, Mr. Biederman would report and advise on the purchase of heavy equipment from American manufacturers for export to Europe. Mr. Biederman was paid a commission by Schmidt and Koch based upon the value of the purchases without any deductions for income taxes or social security. In addition, Schmidt and Koch reimbursed Mr. Biederman for certain categories of travel expenses. The firm did not, however, restrict his movements nor dictate the companies and locations that Mr. Biederman could visit. Schmidt and Koch made the ultimate decision on equipment purchases based upon Mr. Biederman's findings.

5. The claimants included Schedule C, profit from business or profession, as part of their federal income tax returns for the years 1961 and 1962. Mr. Biederman's activities were described as "traveling foreign sales representative." The receipts were similarly listed as business income on the corresponding New York State income tax returns.

Business deductions were claimed for expenses such as accounting services, gifts, travel, stationery and office expense (portion of residence).

6. The evidence and the testimony of the petitioner's accountant have failed to prove that the principals, Schmidt and Koch, exercised a degree of direction and control, consistent with an employment relationship, over the activities of Mr. Biederman.

The testimony offered has failed to establish that Mr. Biederman's activities were exclusively on behalf of his principals, Schmidt and Koch.

7. Mr. Bruno Biederman was not an employee of the firm of Schmidt and Koch, and was engaged in an unincorporated business during the years 1961 and 1962.

DECISION

A. The net income from the business activities of Mr. Bruno Biederman for the years 1961 and 1962 is subject to the Unincorporated Business Tax.

B. The claims for refund of Bruno and Ella Biederman for the years 1961 and 1962 are denied.

Dated: Albany, New York, this *24th* day of *March* 1970.

STATE TAX COMMISSION

Norman Gallman
PRESIDENT

Charles Mawley
COMMISSIONER

Milton Koenig
COMMISSIONER