

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petitions
of
HAROLD E. SUNDBERG
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.

HEARING UNIT - File Copy
TAX U. B. T.
ART. 23 SECS. _____
KEY WORDS Manufacturers
Representative; Engineer Not
Practising his profession
CROSS REFS. _____
CASE LAW CITATIONS
21(AD 2) 703; 6 (NY 2) 705.
DECISION
THIRD HEARING ON THIS
ISSUE - SEE PRIOR HEARINGS
UPHELD ON APPEAL FOR
PRIOR YEARS - SAME ISSUE.

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.

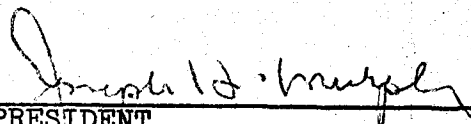
B. The taxpayer's activities failed to meet the usual concept of professional practice as comprehending services or disinterested advice for the benefit of the person served or advised; the taxpayer's advice to prospective customers and the application of professional knowledge to their problems was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

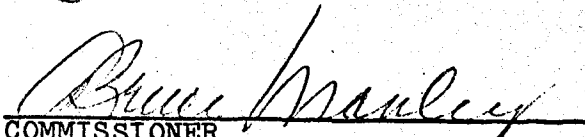
C. It was not shown that the application of the taxpayer's professional education, training and skill was essential to produce the income nor was it shown that the professional education, training and skill was so material to the production of the income that without them the taxpayer could not have 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.

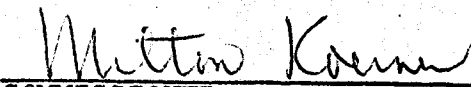
D. Accordingly, the unincorporated business taxes paid by the taxpayer for the years here involved, are correct and represent taxes legally due and owing and the taxpayer is not entitled to any refund of taxes under Article 23 of the Tax Law for the years 1961, 1962, 1963 and 1964.

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

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK
STATE TAX COMMISSION

file
Mr. Newman

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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

Joseph H. Murphy
PRESIDENT

Bruce Manley
COMMISSIONER

Mittin Korne
COMMISSIONER