

STATE OF NEW YORK  
STATE TAX COMMISSION

HEARING UNIT - File Copy

TAX UBT

ART. 23 SECS. 722

FILE NO.

GROSS INCOME

CASE LAW CITATIONS

**DECISION**

REMARKS

In the Matter of the Petition :  
of :  
OTTO and FANNY TELTSCHER :  
For a Redetermination of a Deficiency :  
or for Refund of Unincorporated Busi- :  
ness Taxes under Article 23 of the :  
Tax Law for the years 1962 and 1963 :

The taxpayers having filed a petition pursuant to Sections 722 and 689 of the Tax Law for a redetermination of a deficiency under date of November 22, 1965, of unincorporated business taxes imposed by Article 23 of the Tax Law for the years 1962 and 1963 and a hearing thereon having been duly held before Nigel G. Wright, Hearing Officer, and the record having been duly examined and considered, the State Tax Commission hereby

**FINDS:**

1. The sole question in this case is whether the taxpayer is exempt from the unincorporated business tax by reason of being an employee. The amounts of the asserted deficiencies, otherwise due, are not in dispute.

2. The deficiencies asserted are in the amount of \$292.65 for 1962 and \$329.47 for 1963 both with interest.

3. Mr. Teltscher is, and has been since 1954, a salesman for only one principle - the Reproducta Company, Inc. of 11 East 26th Street, New York City, New York, a publisher of greeting cards and Christmas cards.

4. Taxpayer sells to retailers, jobbers and church goods dealers in Manhattan, Staten Island, Westchester, Connecticut, Delaware, Maryland, Washington D. C., and Philadelphia.

5. He is on a straight commission basis. He was not reimbursed for his expenses.

6. The company does not deduct income tax withholding or social security taxes. It files a Federal form 1099 on taxpayer's commissions. Taxpayer pays Federal Self-Employment Tax and files and pays estimated tax.

7. The taxpayer uses a desk at home for his business which he used to write up orders and reports and has access to empty desks on the company premises. He does not have business stationery but uses the company's letterhead.

8. Taxpayer gets most new customers through referrals from the company. The company advertises in trade magazines and business shows.

9. The nature of the business requires regular trips to cover customers so as to meet seasonal needs for Christmas and Easter. The company wishes taxpayer to visit wholesalers to get large orders for this seasonal business before he visits retailers. The greatest frequency of visits to one customer would be once a month.

10. The company and taxpayer communicate on changes in the product line -- slow items which are to be pushed and discontinued items. The frequency of taxpayer's trips depends upon the needs of the customers.

11. A contract in the form of a letter written to taxpayer included the following terms: The taxpayer is to get full commissions on reorders. The contract is subject to cancellation on thirty days notice. The taxpayer is "always subject to our direction and control... You are to travel at your own expense and risk in every respect..." and are not to represent competing companies. Representation for other lines of the company will be "negotiated" at another time. A letter contract in August 1955 included the

following terms: "Your contract of employment...shall be deemed amended.... During the term of your employment, you shall have the exclusive representation of (certain lines)....". A further letter dated January 1958 stated "you are subject to the direction and control of Reproducta to solicit business... You are to be deemed as an independent contractor. You are to travel at your own risk and expense... You are to cover your territory and call upon the firms and accounts therein regularly and sufficiently to cover all seasonal buying."

Upon the foregoing findings and all the evidence in the case the State Tax Commission hereby

DECIDES:

A. The taxpayer was an employee of Reproducta Company, Inc. during the taxable years in question and is exempt from the unincorporated business tax.

B. The notice of deficiency is erroneous in its entirety and is cancelled in full.

DATED: Albany, New York

March 24, 1970.

STATE TAX COMMISSION

Norman Gallman  
PRESIDENT

Bruce Manley  
COMMISSIONER

Milton Kren  
COMMISSIONER