

*Reconsideration A-2*  
*Crosby, Everett N.*

Commissioners Murphy, Palestin & Macduff

Solomon Sies, Hearing Officer

Everett N. Crosby

1955 Assessment #B-400284

Article 16

A hearing with reference to the above matter was scheduled before me at 80 Centre Street, New York, N. Y. The taxpayer and his representative defaulted in appearance at such hearing. However, the attorneys for taxpayer sent a letter to the effect that:

"We have been unable to gather additional testimony and a determination of the case may be made on the record as it is presently constituted."

The issue involved herein is whether the activities of the taxpayer as a business agent constituted the carrying on of an unincorporated business subject to unincorporated business tax in accordance with Article 16-A of the Tax Law. A corollary issue is whether the taxpayer's activities constitute the practice of a recognized profession pursuant to §386 of the Tax Law.

On the joint return filed by the taxpayer and his wife for the year 1955, he reported income from Bing Crosby Enterprises, \$165,974.68; Estate of Wilma Crosby, \$8,679.75; other commissions and miscellaneous income, \$1,870.69, total income, \$176,525.12. He deducted expenses in connection with the aforesaid income in the sum of \$13,083.98 and reported a loss from farm operations in the sum of \$73,651.52. In addition, he deducted business loss of his wife in the sum of \$3,542.34. The Income Tax Bureau imposed additional unincorporated business tax against the taxpayer, Everett N. Crosby in the sum of \$5,995.95 on the basis of net income from business as per return in the sum of \$159,898.80, on the ground that the taxpayer's activities constituted the carrying on of an unincorporated business. It appears that taxpayer was not credited with the loss from his farm operations.

In its notice of denial of the taxpayer's application for revision or refund dated May 20, 1959, the Income Tax Bureau recomputed the above mentioned assessment excluded from total business income the amount received from the Estate of Wilma Crosby and

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further excluded the business loss of the wife in the sum of \$3,542.34. The taxpayer was allowed the full deduction of the farm loss claimed by him. The amount of unincorporated business as recomputed amounted to \$2,868.39 plus statutory charges in the sum of \$358.42, or a total amount due as of May 15, 1959 of \$3,226.81. Accordingly, a partial cancellation of unincorporated business tax due in the sum of \$3,127.56 was issued on May 6, 1959.

The taxpayer contends that he is entitled to a professional exemption under §386 of the Tax Law; that he maintained no office and that his fees were earned for personal services rendered chiefly outside the State of New York; that he was an employee and therefore not subject to unincorporated business tax under Art. 16-A of the Tax Law.

The former representative for the taxpayer at the preliminary hearing stated that the taxpayer's activities on behalf of Bing Crosby Enterprises constituted that of business agent or manager of the business affairs of his brother, Bing Crosby; that he maintained an office at his home in connection with said business activities at Hopewell Junction, New York; that he did not have a permanent and continuous place of business of his own in California; that he was not treated as an employee by Bing Crosby; that he was not subject to any detailed control by Bing Crosby as to how he should perform his day-to-day duties; that his compensation was determined on a percentage or commission basis upon what he produced for Bing Crosby Enterprises (Minutes of Preliminary Hearing, pages 3 & 4).

The term "professional" as applied to services rendered, under §386 of the Tax Law, exempting income from professional services from unincorporated business tax, implies requirement of knowledge of an advanced type in a given field of science or learning gained by a recognized course of specialized instruction and study. People ex re. Tower v. State Tax Commission, 282 N.Y. 407, People ex rel. Moffet v. Bates, 276 App. Div. 38, 93 N.Y.S. 2d 313, Aff'd 301 N.Y. 597, certiorari denied, 340 U.S. 865.

The facts in the instant case appear to be analogous to those in the case of People ex rel. Dewey v. Brown, 269 App. Div. 887, 56 N.Y.S. 2d 255, where it was held that a person engaged in the business of consultant on investments was not entitled to a professional status, but was subject to assessment of unincorporated business taxes.

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Since it is conceded that the taxpayer was not treated as an employee either for Social Security or withholding tax purposes or for any other purpose and that he was not subject to any control by his principal as to the manner or method in which he should perform his duties and since he conducted his activities from an office maintained by him at his home at Hopewell Junction, New York and deducted expenses in the sum of \$13,083.98 in connection with such business activities on behalf of the principal, I am of the opinion that such activities constituted the carrying on of an unincorporated business within the intent and meaning of §386, Article 16-A of the Tax Law and that such business was carried on within the State of New York.

For the reasons stated above, I recommend that the determination of the Tax Commission in the above matter be substantially in the form submitted herewith.

AUG 9 - 1965

SOLOMON SIES

Hearing Officer

/s/ M. SCHAPIRO

Approved

/s/ E. H. BEST

Approved

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION

OF

EVERETT H. CROSBY

FOR REVISION OR REFUND OF PERSONAL INCOME  
TAXES UNDER ARTICLE 16 AND UNINCORPORATED  
BUSINESS TAXES UNDER ARTICLE 16-A OF THE  
TAX LAW FOR THE YEAR 1955.  
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The taxpayer Everett H. Crosby having filed an application for revision or refund of income taxes and unincorporated business taxes under Article 16-A of the Tax Law for the year 1955; that a notice of hearing having been mailed on June 7, 1965, to the taxpayer and his duly appointed representatives, pursuant to power of attorney executed and filed by him, scheduling a formal hearing to be held at 60 Centre Street, New York, N. Y., before Solomon Sles, Hearing Officer of the Department of Taxation and Finance on the 12th day of July, 1965; that the taxpayer's attorneys, Shlomo & Littman, Esqs. having submitted a letter dated July 12, 1965 advising that: "We have been unable to gather additional testimony and a determination of the case may be made on the record as it is presently constituted"; and the record having been duly examined and reviewed,

The State Tax Commission hereby finds:

(1) That the taxpayer and his wife, Florence Crosby filed a joint resident personal income tax return for the year 1955 in which the taxpayer reported income from Bing Crosby Enterprises, \$165,974.68; Estate of Wilma Crosby, \$8,679.75; other commissions and miscellaneous income, \$1,870.69, total income, \$176,525.12; that he deducted

expenses in connection with the aforesaid income in the sum of \$13,083.98 and in addition deducted business loss of his wife in the sum of \$3,542.34 so that net income reported by him for said year from business was reported as \$159,898.80; that in addition, he reported a loss from farm operations in the sum of \$73,651.52; that no unincorporated business tax return was filed by the taxpayer; that on March 10, 1959, the Department of Taxation and Finance made an additional assessment against the taxpayer, Everett M. Crosby, (Assessment #B-400284) for the year 1955, imposing additional unincorporated business tax in the sum of \$5,995.95 on the basis of net income from business as per return in the sum of \$159,898.80, on the ground that the taxpayer's activities constituted the carrying on of an unincorporated business; that no credit was allowed the taxpayer on the farm loss operations claimed by him on his return.

(2) That in its notice of denial of the taxpayer's application for revision or refund dated May 20, 1959, the Department of Taxation & Finance recomputed the tax due and modified the above mentioned assessment by excluding from total business income the amount received from the Estate of Wilma Crosby and the business loss of the wife in the sum of \$3,524.34 so that total business income was recomputed in the sum of \$167,845.37 less business deductions of \$13,083.98, less farm loss of \$73,051.52, less salary credit and exemption for unincorporated business tax purposes totalling \$10,000.00 so that the balance amounting to \$71,709.87 subject to unincorporated business tax at 4% was recomputed to be due in the sum of \$2,868.39 plus statutory charges in the sum of \$358.42, for a total amount due in the sum of \$3,226.81 as of May 15, 1959; that, accordingly, a cancellation of unincorporated business tax due in the sum of \$3,127.56 was issued on May 6, 1959.

(3) That during the year 1955, the taxpayer, Everett M. Crosby, was business agent or manager of Bing Crosby Enterprises, which comprised the business ventures in which his brother, Bing

Crosby, was interested; that in connection with said activities the taxpayer, Everett M. Crosby, maintained an office at his home at Hopewell Junction, New York and deducted on his income tax return business expenses in connection with said activities in the sum of \$13,683.98; that his compensation was determined on a percentage or commission basis dependent upon the profit produced by him for Bing Crosby Enterprises; that the taxpayer, Everett M. Crosby, was not treated by his principal, Bing Crosby Enterprises as an employee for payroll purposes or for any other purpose; that the principal Bing Crosby Enterprises did not exercise sufficient supervision or control over the duties of the taxpayer as business agent or manager in connection with the aforementioned activities so as to constitute an employer-employee relationship; that the taxpayer was not an employee but an independent contractor carrying on an unincorporated business within the State of New York.

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

**DETERMINES:**

(A) That the taxpayer's activities during the year 1955 as more fully described and set forth in Finding #3 above did not constitute the practice of a profession so as to exclude the income derived therefrom from the imposition of unincorporated business tax within the intent and meaning of §386 of the Tax Law; that the activities of the taxpayer during the aforementioned year constituted the carrying on of an unincorporated business within the intent and meaning of §386, Article 16-A of the Tax Law and that said unincorporated business was carried on wholly within the State of New York.

(B) That, accordingly, the assessment for the year 1955 (Assessment #B-400284) except as recomputed and modified, as more

fully set forth in Finding #2 above is correct; that said assessment does not include any tax or other charge which could not have been lawfully demanded and that the taxpayer's application for revision or refund with respect to said assessment be and the same is hereby denied.

DATED: Albany, New York, on the 29th day of December , 1965.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**President**

/s/

IRA J. PALESTIN

**Commissioner**

**Commissioner**