

## BUREAU OF LAW

## MEMORANDUM

*Unincorporated Business Determinations A-Z*  
*Krikun, Eli*

TO: Commissioners Murphy, Palestin and Macduff

FROM: Martin Schapiro, Hearing Officer

SUBJECT: Eli Krikun, petition for redetermination of a deficiency of unincorporated business taxes for the year 1962

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N. Y., on February 26, 1965. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issue raised herein is whether the taxpayer who maintains an employment agency engaged in the placement of engineering personnel is in the practice of a profession and hence exempt from unincorporated business taxes.

The taxpayer, a nonresident, operates an employment agency in New York City and does not have any assistance other than a full-time clerical employee. As set forth in the proposed determination, the taxpayer's duties consist of advertising, interviewing and securing persons with experience in various fields of engineering for ultimate placement with engineering firms. A file card system is maintained on each applicant in which the applicant's experience and field of education is listed. The applicants are interviewed by the taxpayer, and in numerous instances, the taxpayer reviews engineering designs submitted by them, and assesses the personality and appearance of such applicants. The taxpayer is not a graduate engineer. The taxpayer, however, has had experience in engineering design of electrical equipment and urges that in interviewing various engineering personnel his knowledge of engineering is a required skill in the successful operation of an engineering employment agency, together with his ability to assess a job applicant's appearance and personality.

Article 11 of the General Business Law provides for the licensing of every employment agency either by the Mayor in New York City or by the Industrial Commissioner in the rest of the State. No special course of study, skills or ability is required except as provided under section 174 of such law, which are that the taxpayer be of good character and has had at least two years of experience as a placement employee, vocational counsellor or in related activities. There is no differentiation as to technical or specialized employment agencies other than

theatrical employment agencies or nurses registries. In such instances experience in the specialized field is required. Clearly, therefore, the operation of an employment agency which requires no more than two years experience in such field and does not require knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instructional study is not a profession within the intent and meaning of the Tax Law nor even in common understanding of that term. The taxpayer urges, however, that the operation of a technical engineering placement agency removes it from the ordinary classes of employment agencies and is thus a professional activity. Such argument was also urged by the taxpayer in the case of Sundberg v. Bragolini, 1958, 7 A D 2d 15, 179 N.Y.S. 2d 903. In that case the court sustained the unincorporated business tax assessments on the ground that the taxpayer was a salesman of engineering equipment and not an engineer even though a knowledge of engineering principals was involved. Therefore, I am of the opinion that while knowledge of engineering principal and design and ability to assess personality is useful in the taxpayer's activities, the same does not constitute a profession. Accordingly, I have prepared a proposed decision affirming the determination assessing unincorporated business taxes.

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

/s/

MARTIN SCHAPIRO

Hearing Officer

/s/

E. H. BEST

Approved

MS:ca  
Enc.

STATE OF NEW YORK

STATE TAX COMMISSION

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: IN THE MATTER OF THE PETITION :  
: :  
: OF :  
: :  
: ELI KRIKUN :  
: :  
: FOR A REDETERMINATION OF A DEFICIENCY :  
: OR FOR REFUND OF UNINCORPORATED BUSINESS :  
: TAXES UNDER ARTICLE 23 OF THE TAX LAW :  
: FOR THE YEAR 1962 :  
: :  
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Eli Krikun, the taxpayer herein, having filed a petition for redetermination of deficiency (file No. 2-4382635 dated August 17, 1964) of unincorporated business taxes under Article 23 of the Tax Law for the year 1962 and a hearing having been held in connection therewith at the office of the State Tax Commission, 30 Centre Street, New York, New York on February 26, 1965 before Martin Schapiro, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That during the taxable year 1962, the taxpayer filed a nonresident personal income tax return in which the taxpayer reported income from the operation of a technical employment agency, which agency was located in New York City; that the taxpayer failed to file any unincorporated business tax returns, and the aforesaid determination was issued against the taxpayer on the ground that the taxpayer's activities did not constitute the practice of a profession.

(2) That during the year 1962, the taxpayer operated

an employment agency under the name AAA Engineering Personnel Agency in an office at New York, New York taking the lease in his own name and operating the office personally without any assistance except that of a full-time clerical worker hired by the taxpayer; that the activities of the taxpayer consisted of advertising, interviewing and securing persons with experience in the various fields of engineering for immediate or ultimate placement with engineering firms; that the taxpayer received requests from various engineering firms for draftsmen, graduate engineers whether licensed or unlicensed, and engineering administration personnel; that the taxpayer himself advertised for such persons in accordance with the requirements set forth by the hiring engineering firms; that the applicants would submit their qualifications to the taxpayer; that the taxpayer would interview the same, and in many instances examine the designs prepared by such applicants; that where there was more than one applicant for the same position, the taxpayer would recommend to the hiring firm the person he believed suitable; that the criteria used by the taxpayer were education, experience, the designs submitted, and personal factors of personality and appearance when considered to be of importance by the hiring firms; that in the case of a rare and unique type of work with few applicants, such applicant would be immediately referred to the hiring firm; that the taxpayer maintained a file card system on all applicants listing thereon the nature of the applicant's engineering specialty and his experience; that depending upon the type of personnel commissions were received either by the employer or the employee.

(3) That the taxpayer had obtained degrees in the field of education, but does not have any degree in engineering; that

the taxpayer's education in the field of engineering consisted of several New York technical courses in a New York technical institute and courses in the University of Tampa, Florida while a member of the armed forces, for which the taxpayer received a certificate in engineering; that the taxpayer was employed by an engineering firm which designed and constructed oil refineries and chemical plants for a period of 12 years being initially employed as a draftsman in the electrical department and then as a designer in the electrical engineering department; that during the course of his work and in conjunction therewith, the taxpayer familiarized himself with other aspects of engineering, including civil and chemical engineering.

(4) That section 174 of the General Business Law provides in part that a license to maintain an employment agency shall not be granted by the industrial commissioner of the State of New York.

"If . . . the applicant is not a person of good character or responsibility; or that he or the individual who will actually direct and operate the placement activities of the agency has not had at least two years experience as a placement employee, vocational counsellor, or in related activities, which similarly tend to establish the competence of such individual to operate the placement activities of the agency . . .";

that there are no requirements of education, experience or skill other than set forth above.

(5) That more than 80% of the taxpayer's income was derived from his own services; that capital was not a material producing factor.

Upon the foregoing findings, the State Tax Commission hereby

DECIDES:

(A) That although the taxpayer's knowledge of engineering

principals and design was useful to the taxpayer in his operation of an employment agency placing engineering personnel, the taxpayer's activities did not constitute the practice of a profession as intended by section 703(c) of Article 23 of the Tax Law.

(B) That, accordingly, the determination of the State Tax Commission is hereby affirmed and that the amount of unincorporated business tax assessed thereunder is correct and does not include any taxes or charges not lawfully due and owing.

DATED: Albany, New York on this 19th day of August , 1965.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY  
President

Commissioner

/s/

JAMES R. MACDUFF  
Commissioner