

BUREAU OF LAW

MEMORANDUM

Unincorp. Bus. Tax Determin.

A - Z

Niles, Philip C. and
Katherine F.

TO: Commissioners Murphy, Palestin & MacDuff

FROM: Solomon Sles, Hearing Officer

SUBJECT: PHILIP C. NILES & KATHERINE F. NILES, his wife

Petition for a Redetermination of a Deficiency or for Refund of Unincorporated Business Taxes under Article 23 of the Tax Law for the year 1961.

File #2-4331600

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y. on January 8, 1964. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issues involved herein are: (1) whether the activities of the taxpayer in rendering services for a banking firm, consisting of advice pertaining to products and product development of certain companies in which the principal was interested, for the purpose of appraising the potential of such companies for investment purposes, constitutes the practice of engineering or any other recognized profession exempt from unincorporated business tax in accordance with paragraph (c), §703 of the Tax Law; and (2) whether the activities of the taxpayer, who holds a Bachelor of Science degree from Massachusetts Institute of Technology, but is not licensed as a professional engineer in this State or any other state, as a consultant for Harry Motson, Inc., involving the design of hydraulics, hydraulic motors and their application to all kinds of new drives, farm implement machines, hydraulic motors, pumps and transmissions to military vehicles, farm machinery and locomotives constitutes the practice of the profession of engineering exempt from unincorporated business tax in accordance with §703(c) of the Tax Law.

The taxpayer is not contesting the statement of audit changes imposing additional personal income taxes in the sum of \$703.42 for the year 1961, which have been paid.

Philip C. Niles and Katherine F. Niles, his wife, filed a joint New York State income tax resident return for the year 1961. The taxpayers reported their income on a cash basis. The taxpayer, Philip C. Niles, reported on Schedule C of his Federal return for the year 1961 total receipts in the sum of \$42,035.71 and net profit in the sum of \$14,388.33 from business as "engineer--advice in engineering and scientific matters" maintained at 52 Vanderbilt Avenue, New York City, N.Y. The income mentioned above was received from J.E. White & Co., a banking firm, and also included fees received from Harry Motson Inc. of Corinth, Miss., in the sum of \$7,714.26 for services rendered prior to 1961, over a period of years.

The taxpayer graduated from Massachusetts Institute of Technology with a Bachelor of Science degree in 1925. Subsequent to his graduation, the taxpayer was employed by Harris Forbes and Co., a banking house, which had an engineering department for its underwriting. The taxpayer was involved in the writing of engineering reports for this company's major industrial underwriting. Thereafter, the taxpayer was employed by the Metropolitan Life Insurance Company to evaluate public utility properties in which this company had large investments. During the period from 1935 until 1941, the taxpayer was employed by Atlas Corp. making studies of public utility properties for them for their own investments. The taxpayer has been self-employed since 1946.

The taxpayer is not licensed to practice engineering in the State of New York or in any other state. He maintained his sole office at 52 Vanderbilt Avenue, N.Y.C. He had no employees. The services rendered by the taxpayer for the two principals heretofore mentioned was as an independent contractor and not as an employee. He had no written contracts with the principals regarding the services he was to render or the compensation he was to receive therefrom. The taxpayer rendered no written reports. The fees the taxpayer received were "purely for advice only" (Minutes of Hearing, page 24).

The taxpayer's explanation of his activities for both of the principals involved is rather nebulous. The services that the taxpayer rendered to J.C. White & Co., a banking firm consisted of advice as to what he "thought the capabilities were both product-wise and research-wise with respect to the development of new products and processes" of certain companies in which this principal was interested (Minutes of Hearing, page 22). It appears that the banking firm (J.C. White & Co.) was interested in the potential of certain companies manufacturing mechanical and electrical products in order to appraise such potential for investment purposes.

The taxpayer's testimony at the hearing is rather vague as to the services rendered by him on behalf of Berry Motors Inc. He testified that he spent a good part of 4 to 5 years working with Mr. Berry of said company on the "design of hydraulics, hydraulic motors, their application to all kinds of new drives, farm implement machines, tool drives, automotive drives. This was all in the field of hydraulics." (Minutes of Hearing, page 19). In his petition, the taxpayer claims that the services consisted of the application of hydraulics, hydraulic motors, pumps and transmissions to military vehicles, farm machinery and locomotives.

It is to be noted that capital is not a material income-producing factor and that more than 80% of the gross income received by the taxpayer for the taxable year 1961 was derived from personal services actually rendered by him.

The taxpayer contends that he is entitled to an exemption from unincorporated business tax on the ground that he is engaged in business as a consulting engineer; that as such, his work does not involve the safe-guarding of life, health or property as required un-

TO:

Commissioners Murphy, Paley & MacCall

Page 3

RE:

PHILIP C. NILES & KATHERINE F. NILES, his wife

der subdivision 4 of Section 7201 of the Education Law and that, therefore, he is not required to be licensed as a professional engineer; that it is beyond the power of the Tax Commission to deny him exemption from the practice of a profession because of his failure to possess a license as a professional engineer; that the imposition of unincorporated business tax is arbitrary and discriminatory and in violation of the due process of law under both the Federal and state constitutions.

In the case of Matter of Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881, unincorporated business tax was assessed against one who described himself as "management engineer" and whose activities were connected with the functions of industrial management, who was not licensed to practice professional engineering in this State. In a memorandum decision, the Court, at page 886, stated, in part:

"It has been held in a number of cases that it was never the legislative intent and purpose of the exemption clause to create professional exemptions to consultants who undertook to advise management as to business or industrial affairs (Matter of Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881; Matter of Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881; Matter of Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881; Matter of Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881).

In the case of In re Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881, the Court stated that professional exemption should be granted where certain colleges and universities offer courses and degrees in such field of endeavor was answered by the Court as follows:

"While these factors may give some added prestige to the type of work, we have previously determined that the educational training and background and type of work performed in and of itself did not mandate the Tax Department to find that the individuals so engaged were practicing a 'profession'."

In the case of Matter of Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881, the Court, at page 135, stated:

"A long line of cases have consistently held that the exemption clause does not apply to those who undertake to advise management as to business or industrial affairs; (Matter of Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881; Matter of Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881; Matter of Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881; Matter of Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881; Matter of Macfarland v. Board of Taxation, 21 A.D. 2d 881, 104 N.Y.S.2d 881). Petitioner asserts that 'industrial engineering' is not the mere giving of advice to management as to business or industrial affairs."

TO:

Commissioners Murphy, Palestine & MacDuff

Page 4

RE:

PHILIP C. WILES & KATHERINE F. WILES, his wife

and that the above cited cases are inapposite to him. He states that not only is there a difference in academic background for the 'industrial engineer' but that the 'industrial engineer' is required to use scientific and engineering methods, not common in ordinary business advice. But this Court pointed out in Matter of Southern v. Braschini, 2 A.2d 84 15, 16, noting the issue in general stated in N.Y. 2d 100, the advantageous utilization of professional knowledge in a business does not of course, necessarily, constitute the practice of the profession."

In the case of Annihilation of Bachman, 272 App. Div. 115, affirmed 105 N.Y. 530, it was held that the activities of a university professor of economics as an economics consultant for private industry were carried on in the field of business and did not constitute the practice of some separate profession, and that the income received from such activities was subject to tax imposed upon net income of unincorporated businesses.

The attorney for the taxpayer, in his brief, has cited the cases of Bugal v. James Photo Products, Inc., 222 App. Div. 511, affirmed 231 N.Y. 615 and Latterman v. University of the State of New York, 231 N.Y. 615. In the Bugal case, it was held that Sections 1740 and 1745 of the Education Law providing for the licensing of engineers, were not applicable to the plaintiff's employment as a consulting engineer pursuant to written contract. In the Latterman case, it was held that the regulation of the practice of landscape architecture, a profession recognized in this State, was clearly related to public health and welfare and as such, constitutes a valid exercise of the police power and that Article 14-B of the Education Law relating to the licensing of landscape architects, was not unconstitutional.

I am of the opinion that with respect to the activities of the taxpayer on behalf of the banking firm of J.C. White & Co., although a knowledge of engineering may have been helpful and useful, the taxpayer's primary function was to advise said principal in areas of investments; that such activities do not appear to constitute the practice of engineering or any other recognized profession any more than the case of the sales engineer (Matter of Southern v. Braschini, supra) or that of the economic consultant to private industry (Annihilation of Bachman, supra); that the aforementioned activities of the taxpayer in advising the banking firm as to the potential of certain companies with respect to their products does not constitute the practice of a recognized profession within the intent and meaning of 4(c), §705 of the tax law.

TO: Commissioners Murphy, Palestine & MacGuff **Page 3**
RE: PHILIP C. NILES & KATHERINE F. NILES, his wife

With respect to the unlicensed activities of the taxpayer on behalf of Berry Motors, Inc., it is necessary to resort to the provisions of the Education Law and the Regulations of the Commissioner of Education, pertaining to the licensing of professional engineers. Subdivision 4, §7201 of the Education Law provides as follows:

"4. A person practices professional engineering, within the meaning and intent of this article, who holds himself out as able to perform, or who does perform any professional service, such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction or operation, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects, wherein the safe-guarding of life, health or property is concerned or involved, when such professional service requires the application of engineering principles and data."

Article IX of the Regulations of the Commissioner of Education, §79, subsection 2, 4th with respect to the scope of the examination for professional engineer, provides that:

"Part II embraces the practical application of the basic engineering sciences, including: hydraulics--steam flow, flow in pipes, hydraulic power and machinery; thermodynamics--heat transfer, boilers, prime movers and power equipment; machine design--generators and motors, transmission and distribution of electrical energy, electrical control and protection."

Although the taxpayer contends that the engineering services rendered by him did not involve the safe-guarding of life, health or property in accordance with subdivision 4, §7201 of the Education Law, that section refers to "public or private utilities, structures, buildings, machines, equipment, processes, works or projects". The regulations of the Education Department, specifically, Article IX, section 79, quoted above, indicate that part of the examination for license as a "professional engineer" includes the application of the basic engineering sciences including the field of hydraulics. It would appear, therefore, that with respect to such unlicensed activities, the taxpayer was engaged in a field of engineering in which a license is required and that it would be contrary to public policy to grant him an exemption therefor.

For the reasons stated above, I recommend that the deter-

TO:

Commissioners Murphy, Palestin & MacGuff

Page 6

RE:

PHILIP G. NILES & KATHERINE F. NILES, his wife

mination of the Tax Commission in the above matter be substantially
in the form submitted herewith.

MAR 13 1966

SOLOMON SIES

Hearing Officer

/s/

MARTIN SCHAPIRO

Approved

/s/

S. HECKELMAN

Approved.

SS:ts

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

PHILIP C. NILES & KATHERINE F. NILES,
his wife

FOR A DETERMINATION OF A DEFICIENCY OR
FOR REFUND OF UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW
FOR THE YEAR 1961.

The taxpayers herein, having filed a petition for a redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the year 1961 (File No. 2-4331600), and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, N.Y. on the 8th day of January, 1963, before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and was represented by Montross & Brewer, Esqs., by Mann Brewer, Esq., 188 East Post Road, White Plains, New York, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers Philip C. Niles and Katherine F. Niles, his wife, filed a joint personal income tax return for the year 1961; that they reported total income (from line 9 of Federal return) in the sum of \$38,065.63; that on Schedule A, line 5 of said return (Profit or loss from business, profession or farming) the taxpayer Philip C. Niles reported net profit as engineer in the sum of \$34,384.33; that the taxpayer Philip C. Niles did not file any unincorporated business tax return for the year 1961; that on October 17, 1962, the taxpayers submitted a copy of their joint Federal Income Tax Return for 1961; that on Schedule C thereof, the taxpayer Philip C. Niles reported his principal business activity as "engineer—advice in engineering and scientific matters" at an office maintained at 52 Vanderbilt Avenue, New York City, N.Y., total receipts \$42,035.71, business deductions

including rent, depreciation and other business expenses of \$7,649.38 or a net profit of \$34,386.33; that on May 27, 1961 the Department of Taxation and Finance issued a statement of Audit changes and a notice of deficiency of personal income tax due against the taxpayers for the year 1961 in the sum of \$593.32 under Article 22 of the Tax Law based upon adjustment as per audit and unincorporated business taxes due in the sum of \$1,264.00 under Article 23 of the Tax Law, on the ground that the business income received by Philip C. Niles was derived from an unincorporated business and subject to unincorporated business tax in accordance with Article 23 of the Tax Law; that the taxpayers are not contesting the notice of deficiency with respect to normal income tax under Article 22 of the Tax Law; that same has been paid; that the net business income reported by the taxpayer Philip C. Niles included fees received by him from J.C. White & Co., a banking firm and from Berry Motors, Inc., of Corinth, Miss.; that the said taxpayer reported his business income on a cash basis; that the fees received by the taxpayer Philip C. Niles from Berry Motors, Inc. in the sum of \$7,714.26 represented services rendered to said corporation prior to 1961, over a period of years.

(2) That the taxpayer, Philip C. Niles, graduated from Massachusetts Institute of Technology with a Bachelor of Science degree in 1925; that subsequent to his graduation, the taxpayer was employed by Harris Forbes and Co., a banking house, which had an engineering department for its underwriting; that the taxpayer was involved in the writing of engineering reports for this company's major industrial underwriting; that, thereafter, the taxpayer was employed by Metropolitan Life Insurance Company to evaluate public utility properties in which this company had large investments; that during the period from 1935 until 1941, the taxpayer was employed by Atlas Corp., making studies of public utility properties for them for their own investments; that the taxpayer has been self-employed since 1946 on a fee basis; that the taxpayer was not and is not licensed to practice professional engineering in this State or any other state.

(3) That during the year 1961 the taxpayer, Philip C. Niles, maintained his sole office at 52 Vanderbilt Avenue, New York City; that

he had no employees; that he had no written contracts with the principals whom he represented regarding the services to be rendered by him or the compensation he was to receive therefrom; that the taxpayer rendered no written reports; that the services rendered by the taxpayer Philip C. Miles for the two principals heretofore mentioned was as an independent contractor and not as an employee; that the services rendered by the taxpayer during the year 1961 consisted of furnishing advice to J.C. White & Co., a banking firm, in "many scientific and engineering areas of product and product development in which outside help was sought" (Minutes of Hearing, page 24); that the service that the taxpayer rendered to said banking firm consisted of giving advice to the aforementioned principal as to what he "thought the capabilities were both product-wise, research-wise and so on of that particular company", (that is, the company that the principal was particularly interested in at the time) (Minutes of Hearing, page 22); that the advice furnished by the taxpayer to said principal was for the purpose of assisting the latter in appraising such potential for investment purposes.

(4) That the activities of the taxpayer Philip C. Miles with respect to the services rendered by him for Berry Motors Inc., consisted of the "design of hydraulics, hydraulic motors, their application to all kinds of new drives, farm implement machines, tool drives, automotive drives. This was all in the field of hydraulics" (Minutes of Hearing, page 15); that in his petition the taxpayer claimed that the services rendered to the said principal (Berry Motors Inc.) consisted of the application of hydraulics and hydraulic motors, pumps and transmissions to military vehicles, farm machinery and locomotives.

(5) That more than 80% of the gross income of the taxpayer, Philip C. Miles, for the taxable year in question, was derived from personal services actually rendered by him and capital was not an income producing factor.

(6) That subdivision 4, §7201 of the Education Law defines "professional engineering" as follows:

"4. A person practices professional engineering, within the meaning and intent of this article, who holds himself out as able to perform, or who does perform any professional service, such as

consultation, investigation, evaluation, planning, design, or responsible supervision of construction or operation, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects, wherein the safeguarding of life, health or property is concerned or involved, when such professional service requires the application of engineering principles and data.";

that subdivision 1, §7202 of the Education Law provides, in part, as follows:

"* * * It shall be unlawful for any person to practice or to offer to practice professional engineering or land surveying in this state or to use the title engineer or surveyor or any other title, sign, card or device in such manner as to tend to convey the impression that such person is practicing professional engineering or land surveying or is a professional engineer or land surveyor, unless such person is duly licensed under the provisions of this article." * * * ;

that Article IX of the Regulations of the Commissioner of Education, §79, subsection 2, (Special Requirements), paragraph "e", Part II, with respect to the scope of the examination for professional engineer, provides, in part, that:

"Part II embraces the practical application of the basic engineering sciences, including: hydraulics--steam flow, flow in pipes, hydraulic power and machinery; thermodynamics--heat transfer, boilers, prime movers and power equipment; machine design--mechanical movements, stresses in machine parts; electrical equipment--generators and motors, transmission and distribution of electrical energy, electrical control and protection."

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

DETERMINES AND DECIDES:

(A) That during the year 1961, the activities of the taxpayer, Philip C. Hiles, and the services rendered by him on behalf of J.G. White & Co., a banking firm, which consisted of furnishing advice as to the capabilities and potentialities of certain companies, both product-wise and research-wise, in which said principal was interested, in order to appraise such potential for investment purposes, as more fully set forth in Finding (3) did not constitute the practice of engineering or any other profession exempt from the imposition of unincorporated business tax; that the aforementioned activities of the taxpayer during the year 1961 constituted the carrying on of an unincorporated business within the State of New York and that the income derived therefrom was subject to the imposition of unincorporated

business tax in accordance with the intent and meaning of paragraph (c), §703, Article 23 of the Tax Law.

(E) That the unlicensed activities of the taxpayer, Philip C. Miles, with respect to the services rendered by him for his principal, Berry Motors Inc., as more fully set forth in Finding (4) above, to the extent that the same consisted of work sometimes performed by licensed professional engineers was not conducted as a profession as authorized by the Education Law of the State of New York and does not constitute the practice of a profession within the intent and meaning of paragraph (c), §703 of the Tax Law; that said activities constituted the carrying on of an unincorporated business within the State of New York and that the income derived therefrom was subject to the imposition of unincorporated business tax in accordance with the intent and meaning of paragraph (c), §703, Article 23 of the Tax Law.

(C) That, accordingly, the statement of audit charges and notice of deficiency for the year 1961 are correct; that said notice of deficiency included no tax or other charge which could not have been lawfully demanded and that the taxpayers' petition for redetermination or refund with respect thereto be and the same is hereby dismissed.

DATED: Albany, New York, on the 24th day of March, 1966.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

IRA J. PALESTIN

Commissioner

Commissioner