L 9 (2-67)

Unincorp. Bus. Tax Determin.
A-Z

BUREAU OF LAW
MEMORANDUM

De Rose, Louis J. & Joan A.

TO: Commissioners Murphy, Macduff and Conlon

FROM: E. H. Best, Counsel

SUBJECT: Louis J. De Rose and Joan A. De Rose, his wife, Unincorporated Business Taxes, Article 16-A, 1959, Article 23, 1960 and 1961; Hearing Officer's Memorandum, July 11, 1966.

The proposed determination in the above matter is being resubmitted to the State Tax Commission for the reasons set forth in Mr. Schapiro's memorandum to me.

I agree that the isolated transaction herein does not constitute the carrying on of a business.

____
COUNSEL

EHB:as

July 19, 1967

BUREAU OF LAW
MEMORANDUM

TO: [illegible]

FROM: [illegible]

SUBJECT: [illegible]

[illegible]

L 9 (2-67)

BUREAU OF LAW
MEMORANDUM

TO: Commissioner Best

FROM: Martin Schapiro

SUBJECT: Louis J. De Rose and Joan A. De Rose, his wife unincorporated business taxes, Article 16-A, 1959, Article 23, 1960 and 1961; Hearing Officer's Memorandum, July 11, 1966

The above proposed determination had previously been approved by Mr. Hechelman and yourself and was forwarded to the State Tax Commission and received the approval of Commissioner Mudoff. Commissioner Palestin called me down and asked me to submit a memorandum with respect to a subordinate issue raised in this matter.

Commissioner Palestin was satisfied that the proposed resolution of the primary issue had been met. The primary issue is whether or not an instructor in Fordham University teaching business administration to personnel of various businesses was in the profession of teaching or in the business of management and business consultation. The finding of facts clearly indicates that the courses taught did not deal with specific problems of the firm involved but were general courses which were taught by him at Fordham University.

The hearing officer, Mr. Boylan, therefore, prepared a final determination holding that the primary item was from teaching and was therefore exempt as income derived from a profession.

The question raised by Commissioner Palestin concerns income received by the taxpayer as an arbitrator. The taxpayer was not generally engaged in the practice of arbitration and this appears to be only an isolated transaction. The questions raised by Commissioner Palestin are: (1) Whether arbitration is a business and (2) Whether or not the arbitration fees from one isolated transaction constitutes the carrying on of a business.

Mr. Boylan in his supplemental memorandum argues that the activities of arbitration regularly carried on is a business and not a profession but that one isolated transaction does not incur the imposition of unincorporated business taxes under the Tax Law. Although there may be some question as to whether the activities of arbitration are not really a profession, it is not necessary to decide this issue since it is clear that the one isolated transaction under the facts herein does not constitute the carrying on of a business. I must point out however that the cases relied on by the hearing officer (People ex rel. [illegible]

v. Graves, [illegible] N.Y. [illegible]; [illegible] v. Graves, [illegible], [illegible] App.Div. [illegible], [illegible] N.Y. [illegible]) with respect to isolated transactions subject to specific exemptions set forth in the statute. These exemptions concern the holding of real property and the purchase for one's own account set forth in section 386 of the Tax Law. No such exemptions are here in issue.

Section 281.2 of NYSTR unincorporated business tax regulations provides as follows:

> "Occasionally a border line case will present itself. When this occurs, consideration must be given to all of the facts and circumstances involved. Often the continuity, frequency and regularity of activities, as distinguished from transactions of an isolated or incidental nature, will be the factors which will determine whether or not the activities constitute the carrying on of an unincorporated business. Consideration must also be given to the amount of time, energy or thought devoted to the pursuit of a vocation or occupation."

Clearly in light of the regulation the mere existence of a single transaction would not automatically result in a finding that a taxpayer is not engaged in a business. If a single transaction is part of a vocation or occupation of the taxpayer, to which he may have devoted time and effort, the mere fact, that because of adverse economic or business conditions, only one transaction has resulted does not mean that the transaction is not part of his business activities. Furthermore, in addition to the frequency and regularity of the transaction, the duration thereof must also be considered. One transaction such as the construction of a building complex may take years. Here, however, the transaction was wholly isolated and incidental and not a regular part of his vocation of teaching. The taxpayer was not engaged as an arbitrator as a regular practice.

In examining the problem of isolated, incidental or occasional transactions, reference may be made to other laws. The New York City General Business and Financial Tax Law, for example, imposed a tax on businesses or vocations carried on for a profit whether or not the vocations were professional or otherwise. The Internal Revenue Code permits deductions for business bad debts, business expenses, business losses or gains and requires a determination as to whether there is a carrying on of a trade or business. The word trade or business as used in the Internal Revenue Code does not distinguish between a

business or a profession. Accordingly, an examination of either the City or Federal statutes does not resolve such issue. However, both under the City and Federal laws it is evident that isolated transactions do not constitute a trade or business or profession as a general rule. (See New York City General Business and Financial Tax Regulation, Article 121, with respect to isolated fiduciary activities including that of a trustee, whether or not court appointed, and Federal tax cases, [illegible] 25 T.C. 978 and [illegible], [illegible] T.C. [illegible] allowance of business expenses.)

In light of the above discussion, I am resubmitting the proposed determination to the Commission.

/s/ MARTIN SCHAPIRO

[illegible]

MS:pmd

July 19, 1967

L 9 (6-65)

BUREAU OF LAW

MEMORANDUM

TO: Commissioners Murphy, Palestin and Macduff

FROM: Francis X. Boylan, Hearing Officer

SUBJECT; Supplementary memorandum;
Louis J. De Rose and Joan A. De Rose, his wife,
unincorporated business taxes, Article 16-A,
1959, Article 23, 1960 and 1961; Hearing officer's
Memorandum, July 11, 1966.

In a memorandum to me dated August 10, 1966 Mr. Schapiro states that Commissioner Palestin in discussion with him indicated that my memorandum of July 11, 1966, which stated that the fee earned by the taxpayer, Louis J. De Rose, for serving on a single occasion as an arbitrator was not subject to unincorporated business tax, where all his other income was professionally exempt should be amplified on this point, and should also discuss whether income earned by an arbitrator is not generally subject to tax under the unincorporated business tax law.

Commissioner Palestin also wanted the history of the additional assessments, the payments of taxes and the original disposition of the applications for revisions or refund of taxes for the three years under consideration to be stated more concisely. This has been done, and paragraph 1 of the Determination has been rewritten more briefly.

Information about the taxpayer's earnings as an arbitrator appeared only in a written report by a certified public accountant of all of the taxpayer's income in the years under consideration, set forth according to date and source, which was mailed to the Department with a letter of transmittal dated February 11, 1963 and which is an exhibit in evidence. This report indicates that in 1959 the taxpayer received $674.79 as payment for his expenses in serving as an arbitrator in an arbitration between Chance Vought (Corporation) and Twin Coach Co. (Inc.), at Dallas, Texas; and that his services were engaged for by one William Jack, a lawyer of that City. In 1961 he received the further amount of $5,152.73 as a fee, and for expenses in the same matter. It is clear, therefore, that the taxpayer served only once as an arbitrator in the years under consideration.

It may be noted that the application as to 1959 was withdrawn so that there is no question as to the taxpayer's income on account of his expenses in the arbitration which he received in 1959. As to 1961 the income from arbitration in the amount of $5,152.00 included amounts paid out by the taxpayer as expenses which presumably were deductible; further the taxpayer was entitled to an allowance for his personal services; and $5,000.00 pursuant to statutory provision was not subject to tax. (Tax Law sections 706; 708(a); 709(1)) Consequently there would not be any taxes actually payable by the taxpayer on this amount of income.

The determination and the original memorandum indicated that the receipt of a single fee as an arbitrator is to be considered as casual income and does not constitute the conduct of a business as an arbitrator.

Tax Law section 703(a) defines an unincorporated business to include any business or occupation "conducted" or "engaged in" by an individual, etc. and the earlier provision of the law (Tax Law section 386) similarly stated that the words unincorporated business meant any business or occupation "conducted" or "engaged in" by an individual, etc. This language on its face indicates that some continuity of endeavor is necessary to constitute conducting or engaging in a business, and for example, a single purchase of real or personal property and the resale thereof at a profit would not constitute conducting a business. (See Reg. 281.2 question 21) Consequently it may be concluded comparably that the receipt of a fee and expenses for serving as an arbitrator on a single occasion, considered in itself, does not constitute the conduct of a business.

Similarly, under case law it was held that an owner of real property held for income does not conduct a business where he engages only in such activity of buying and selling as is proper to an owner's status, and the day-to-day management of the property is handled by an agent; and this would be so also in the case of ownership of personal property such as a portfolio of shares of stock held for income. People ex rel Hanna v. Graves, 283 N.Y. 383; Voelkel v. Browne, [illegible], 268 App Div 596, aff'd 294 N.Y. 834. See also Regs. 281.2 questions 15 et seq.

No doubt if the taxpayer received income on a regular basis for the activities as an arbitrator such activity would be subject to tax as the conduct of a business, quite as the regulations indicate that the receipt of income from a business unrelated to his profession by a lawyer would be subject to tax. (Regulation 281.2 question 37) It would seem, however, that question 37 would not mean to indicate that a lawyer who received a fee acting as a real estate broker without being regularly so engaged, would be held to be liable for tax on such casual earnings even if they were not regarded as being an extension of his law practice and so not entitled to the professional exemption.

In view of the firmly established concept that extensive education related to the particular endeavor is essential to the according of a professional status and other restrictions on according such professional status, the function of an arbitrator is no doubt not to be regarded as the practice of a profession in itself and so would amount to the conduct of a business where it is engaged in regularly.

The function of an arbitrator is quasi judicial and somewhat singular, so that it would seem to be doubtful that it is to be regarded as an extension of any other profession, or an activity closely related to the conduct of any other business.

In this case it may be concluded that the earnings do not in themselves constitute the conduct of a business because they do not result from a regularly conducted activity, and the taxpayer did not carry on any other business. The earnings as an arbitrator are clearly not an extension of the profession of teaching and do not come under that professional exemption.

Probably such earnings are not to be regarded as the extension of any other profession (including law) or as closely related to and integrated with any other principal occupation; but those questions are not presented here.

I have not been able to find any cases on arbitration as an unincorporated business either in the law reports or in our files.

/s/ FRANCIS X. BOYLAN
Hearing Officer

FXB:bdg

August 23, 1966

APPROVED

APPROVED

L 9 (2-67)

BUREAU OF LAW
MEMORANDUM

TO: Commissioners Murphy, Macduff and Conlon

FROM: Francis X. Boylan, Hearing Officer

SUBJECT: Louis J. De Rosa and Jean A. De Rosa, his wife, unincorporated business taxes, Article 16-A, 1959, Article 23, 1960 and 1961

A hearing was held in this matter before me on May 5, 1965. The taxpayers were represented by counsel, and Louis J. De Rosa was present and testified in his own behalf. Five numbered exhibits were introduced and a schedule of the taxpayer's earnings previously submitted was also considered to be in evidence.

The application as to the year 1959 was untimely and was withdrawn.

The determination holds that the taxpayer's principal income was derived as a teacher and was professional and exempt, that his other incidental income, earned as a writer, was also of a professional character, and exempt. His further earnings from two fees, one in 1959 and one in 1961, for serving as an arbitrator were not received from the conduct of an unincorporated business. Consequently, the determination makes the appropriate refunds.

For the year 1960, the taxpayer paid unincorporated business taxes in the amount of $640.37 of which he asked a refund. As to that year there was an additional assessment of normal income tax in the amount of $102.46 which was unpaid, so that in the determination it is offset against the refund held to be due. In the year 1961, the taxpayer computed and paid unincorporated business taxes in the amount of $399.48 and thereafter asked a refund in that amount. He paid further unincorporated business taxes for that year in the amount of $159.79 in consequence of his having under-calculated the rate of tax.

The applications for refund were made on the grounds that the income was derived from professional activities "from teaching, lectures and consultation." The applications for refund, originally recommended to be approved by the examiner on informal hearing, were denied because it was concluded that the activities were those of a management-consultant, and in effect that they were too closely related to business ends to be considered as professional activities.

A schedule submitted to the examiner and received February 14, 1963 showed that by far the larger part of taxpayer's income in the years under consideration was received as fees for preparing business courses and for lecturing on matters of business administration and for conducting classes of that nature. These lectures and courses were delivered to the personnel of various industrial companies including IBM and General Electric, on company premises. The courses were about the same as he had taught earlier in his career as a teacher at Fordham University School of Business. He had extensive education in this field. The materials used in his courses may be seen in the exhibits one through five. A small portion of the taxpayer's income was received from articles on subjects in this field which he sold for publication; and he has also received a fee in 1961 for serving as an arbitrator in an industrial, or a labor, dispute.

It may be pointed out that although the Education Law requires a license or "certificate" to teach in a public school (Education Law, Section 3000; 8 NYCRR 80 et seq.) the taxpayer did not need a license, and evidently did not have one, for the teaching that he did. When a license is required for the practice of a particular profession, failure to have such a license precludes according such a person professional status for unincorporated business tax purposes; but a person is not the less engaged in the practice of a profession, because no license is required to do so. *Teague v. Graves*, 1941, 261 App. Div. 652.

The taxpayer was not in the position of a person who has a professional background but whose income is derived from activities immediately connected with the furthering of business ends as was the case in *Application of Bachman* where a professor of Economics acting as a consultant to business was held not to be practising the profession of an economist. The taxpayer, as a teacher, taught courses in business administration which were not specifically related to the practical administration of the particular business of any of the companies which engaged for his services. Cf. *Application of Bachman*, (1952) 279 App. Div. 1115, Compare Gerald H. Freeman and Mildred B. Freeman, d/b/a Freeman Business School memorandum of November 20, 1962.

Teaching, of course, is a recognized profession and there is not any question but that the income from fees for teaching was derived entirely from personal services, and that capital was not important in the production of such income. Regulation 20 NYCRR 281.4.

The other income that the taxpayer earned as a writer was also entitled to the professional exemption.

The fee he received in 1961 (and also in 1959) as an arbitrator, which came to over $5,000, was nevertheless casual income and not from the conduct of a business. There was no evidence that this income was from any services other than as an arbitrator.

The accounting in the proposed Determination of the amounts to be refunded should be verified by the Income Tax Bureau.

It is therefore recommended that the Determination be substantially in the form submitted herewith.

/s/ FRANCIS X. BOYLAN
Hearing Officer

/s/ MARTIN SCHAPIRO
APPROVED:

/s/ SAUL HECKELMAN
APPROVED:

FXB:afw
Enc.

July 11, 1966

(July 19, 1966)

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION AND PETITION

OF

LOUIS J. DE ROSE AND JOAN A. DE ROSE

For revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the year 1959; and, under Article 22, for the year 1960; and for a redetermination of a deficiency, and for refund under Article 22, for the year 1961

Louis J. De Rose and Joan A. De Rose, his wife, having filed applications for revision or refund of personal income taxes for the years 1959, 1960 and 1961, and such applications having been denied, and a hearing having been held thereon at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on May 5, 1965 before Francis X. Boylan, Hearing Officer, and the taxpayers having appeared by Philip B. Brandt, Esq. of New York, New York, by Daniel Gutenplan, Esq. of counsel, and the taxpayer, Louis J. De Rose, having been present, and the record having been duly examined and considered,

The State Tax Commission hereby finds that:

(1) The Department of Taxation and Finance by a notice of additional assessment dated September 22, 1962 assessed additional unincorporated business taxes against the taxpayers in the amount of $40.00 which the taxpayers thereafter paid. They had already paid income taxes for the year which included $806.71 for unincorporated business taxes.

As to the year 1960, by notice of additional assessment, ASIT 318725, dated November 30, 1962, the Department assessed unincorporated business taxes in the amount of $270.88 and also assessed additional personal income taxes in the amount of $182.94. These additional assessments were not paid but the taxpayers earlier had paid income taxes for the year 1960 which included $640.37 for unincorporated business taxes.

As to the year 1961 by notice and demand for payment of income taxes due, dated October 14, 1963, the Department demanded additional unincorporated business taxes in the amount of $159.79, including interest to the date of demand. Taxpayers paid this additional amount, and they had already paid unincorporated business taxes in the amount of $399.48.

By three applications for revision or refund, each dated December 6, 1962 the taxpayers asked for refunds of unincorporated business taxes for the years 1959, 1960 and 1961 in the respective amounts of $834.71, 640.37 and 399.48. The application as to the year 1959 was denied as untimely made and was withdrawn by the taxpayers at the hearing herein.

The taxpayers in their applications for revision or refund set forth as the grounds therefor that the taxpayer's (Louis J. De Rosa's) income was earned from teaching, and from fees for lecturing and for consultation, and that it was exempt as derived from the practice of a profession. The Department denied the applications as to 1960 and 1961 on a finding that the income was not derived from professional activity as a teacher.

(2) The taxpayer, Louis J. De Rose, had an adequate educational background to engage in teaching, as it is found. He held a degree of Bachelor of Science of Business Administration from Fordham University, and a degree of Master of Business Education from the New York University School of Business, and had also completed further courses at the said School of Business. For several years in the period earlier than the years under consideration he taught courses in business administration in the School of Business at Fordham University, and when he left such employment he held the position of Assistant Professor and Chairman of the Department of Management.

(3) In the years, 1960 and 1961, under consideration, the taxpayer's gross income was derived mostly from fees received from various industrial companies for giving general courses in business administration and similar subjects to their personnel on their premises. These courses were essentially the same as he had been teaching at Fordham's School of Business and were not in the nature of instruction for specific positions in the businesses of the several companies which engaged for his services. Taxpayer's income was derived also to a small extent from fees from the sale of articles for publication on subjects related to business administration. In 1961 his income also included $5,152.75 received as a fee, and for expenses, in serving as an arbitrator in an industrial or labor dispute.

(4) The taxpayer's gross income in the years 1960 and 1961 under consideration was derived principally from the practice of a profession as a teacher and from earnings as a writer, also a professional endeavor, and more than 80 per cent of the earnings from both these sources was derived from personal professional activities, and capital was not a material income-producing factor in the production of such income.

Taxpayer's further income in 1961 as an arbitrator was not earned in the conduct of any business.

Upon the foregoing facts and findings and all the evidence herein, the State Tax Commission hereby

DETERMINES:

(A) That the application as to the year 1959, having been barred by the provision of the Tax Law Section 374 setting time limitations for making such an application, and having been withdrawn by the taxpayers, is dismissed.

(B) That pursuant to Tax Law Section 703(c) stating that the practice of certain named professions and of any profession other than those named, but in which capital is not a material income-producing factor and in which more than 80 percentum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual is not to be deemed an unincorporated business, and pursuant to Regulation NYCRR 281.4 stating that teaching is such an other profession, the income of the taxpayer in 1960 and 1961 derived from teaching was not derived from conducting an unincorporated business.

(C) That taxpayer's income as a writer is also held as exempt.

(D) That taxpayer's further incidental income received as a fee and for expenses in serving as an arbitrator was not subject to unincorporated business tax.

(E) That, accordingly, the additional assessments of unincorporated business tax for the years 1960 and 1961 are cancelled and the payments thereof which were made, are to be refunded, with interest, as follows:

1960:

Unincorporated business tax paid	$640.37	
Less additional personal income tax assessed and unpaid, offset	($102.96)	
Refund		$537.41

1961:

Unincorporated business tax paid by cash and credit	$399.48	
Add: Additional unincorporated business tax assessed and paid	$132.72	
Refund		$530.27

And It Is So Ordered.

DATED: Albany, New York this day of , 1966.

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER