

BUREAU OF LAW

MEMORANDUM

11967 / Unincorp. Bus. Tax
Determinations A-2
Estrin, Helen &
Lazar I.

TO: Commissioners Murphy, Macduff & Conlon
FROM: Solomon Sies, Hearing Officer
SUBJECT: LAZAR I. & HELEN ESTRIN

Petition for Redetermination of a
Deficiency of Unincorporated Business
Tax Under Article 23 of the Tax Law
for the Years 1960, 1961 and 1962.

A formal hearing in connection with the above matter was held before me at the New York City office on February 21, 1966. The appearances and evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

✓ The primary issue is whether the taxpayer's activities as a consultant in the fields of banking and finance constitute the practice of a recognized profession exempt from unincorporated business taxes in accordance with Section 703(c), Article 23 of the Tax Law. The corollary issues are: (1) whether the taxpayer is entitled to a partial exemption as a "teacher" on the ground that a portion of his activities consisted of training personnel of one of the principals whom he represented; (2) whether fees received by the taxpayer from two corporations as a member of a Credit Committee and from another corporation as a member of the Board of Directors are exempt from unincorporated business tax.

The taxpayer Lazar I. Estrin received a Law Degree from the Imperial University of Moscow in 1914. He thereafter entered the field of banking with the Westminster Bank of London. He emigrated to the United States in 1916. He was employed in the International Division of the Irving Trust Company in New York City for 41 years, retiring in 1957 as Vice-President and Senior Loan Officer. Following his retirement, he lectured on "Problems of Risk Evaluation" in the Graduate Schools of Columbia University, Yale, Princeton, Vanderbilt and The American University of Washington, D.C. Since March, 1951, he has been self-employed as a consultant in the fields of banking and finance specializing in risk evaluation on a fee basis maintaining an office in his home.

In March, 1959, the taxpayer Lazar I. Estrin entered into an agreement with the American Express Company, Inc. which was reduced to writing by letter agreement dated March 18, 1959 (Tax Commission's Exhibit I) wherein the company engaged the services of the aforementioned taxpayer as a consultant with respect to financial and other matters commencing March 1, 1959 with the right to either

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party to terminate the arrangement by giving thirty days notice in writing, at a stipulated fee of \$1,666.66 per month to be billed at the end of each month in which the services are rendered. The agreement expressly provided that taxpayer shall be an independent contractor and not an employee of American Express. Pursuant to said agreement the taxpayer was required to advise the company on specific loan applications as well as on loan policy, procedures and techniques, establish and conduct an effective program for training branch office banking management and develop long range plans for expanding banking activities.

The taxpayer Lazar I. Estrin in addition to the fees received from American Express Company, Inc., also received fees from Amsterdam Overseas Corp., a financial company with international interests as a member of the Credit Committee for services in a consultative capacity (Min. of Hrg., p. 16); from New York Hanseatic Corp., for services as a member of its Board of Directors primarily rendering consultative advice involving international banking as well as promotion based upon his experience and knowledge (Min. of Hrg. p. 17); from the New York branch of Bank Leumi le-Israel, and a finance company associated with said bank known as Israel Foreign Trade Credit Corp. A fee was negotiated for both institutions pursuant to an oral agreement of \$5,000 per year which was divided between them for services in attending credit meetings and being consulted on credit risks (Min. of Hrg. pp. 17, 18). The services rendered by the taxpayer to Amsterdam Overseas Corp. and Israel Foreign Trade Credit Corp. as a member of the Credit Committee of said corporations and New York Hanseatic Corp. as a member of the Board of Directors were the same or similar to the services rendered by him to the other two principals as a consultant in the fields of banking and finance. The taxpayer spent three days a week attending to his principals in their respective offices and the balance of his work week was spent in his office at home where he maintains files and a reference library where he conducts his research. The taxpayer had no employees. He deducted business expenses in the amounts of \$2,751., \$4,744. and \$2,073. for the years 1960, 1961 and 1962, respectively which included rent, depreciation, stationery, postage and supplies, telephone, entertainment and travel expense. The taxpayer's activities as a banking and financial consultant particularly in the field of international banking and credit required the appraisal of elements of risk in its political, economic, social, cultural and ethical aspects.

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The taxpayer concedes that he was not an employee but an independent contractor of all of the principals he represented; that said principals did not deduct withholding taxes nor pay social security or unemployment insurance taxes on fees paid him. More than 80% of taxpayer's gross income was derived from the personal services actually rendered by him and that capital was not a material income producing factor.

Taxpayer contends that his activities as a consultant in the fields of banking and finance constitute the practice of a profession exempt from the imposition of unincorporated business tax. He further claims, as an alternative, a partial exemption as a teacher since 20% of his activities on behalf of American Express consisted of teaching and training personnel of said company. He further contends that the fees received as a member of Board of Directors from Hanseatic and as a member of credit committee of two other principals was for attendance at meetings and therefore not includible for unincorporated business tax purposes.

In the case of Matter of McCormick v. Bragalini, 8 A.D. 2d 885, the Court in its memorandum decision, at page 886, stated in part:

✓ "It has been held in a number of cases 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 its business or industrial affairs (Matter of Pennicke v. Meally 266 App. Div. 888; Matter of Dewey v. Browne 269 App. Div. 887; Matter of Booz v. Bragalini, 2 A.D. 639 motion for leave to appeal denied 2 N.Y. 2d 705)."

In the case of People ex rel. Dewey v. Browne, 269 App. Div. 887, 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 tax.

In the case of Moffett v. Bates 267 App. Div. 38, affirmed 301 N.Y. 597, certiorari denied, 340 U.S. 865, it was held that where a consultant in matters of corporate finance and reorganization served as a director and officer of certain corporations by which he was retained as a consultant, the Tax Commission properly found that compensation from such employment constituted receipts from his regular business subject to unincorporated business tax.

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I am of the opinion that the activities of the taxpayer Lazar I. Estrin during the years in issue did not constitute the practice of a recognized profession within the intent and meaning of Section 703(c) of the Tax Law; that such activities constitute the carrying on of an unincorporated business within this State so as to subject the income derived therefrom to unincorporated business tax in accordance with the provisions of Section 703, Article 23 of the Tax Law; that the institution of a training program for management and other personnel of American Express was merely incidental to and in furtherance of taxpayer's functions as a consultant for said company and did not constitute the profession of teaching; that the fees for attending meetings of Credit Committee & Board of Directors of the corporations heretofore mentioned was primarily for services as a consultant integrated with his business income as such.

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

JAN 30 1967

Salomon L. Liss
Hearing Officer

Martin Schapiro
Approved

Saul Fickelman
Approved

SS:rms 4-6-67

**STATE OF NEW YORK
STATE TAX COMMISSION**

**.....
IN THE MATTER OF THE PETITION**

OF

LAZAR I. & HELEN ESTRIN

**FOR A REDETERMINATION OF A DEFICIENCY OR
FOR REFUND OF UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW FOR
THE YEARS 1960, 1961 AND 1962.
.....**

The above named taxpayers 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 years 1960, 1961 and 1962, and a hearing having been held in connection therewith at the office of the State Tax Commission at 60 Centre Street, New York, N. Y. on February 21, 1966 before Solomon Sles, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer Lazar I. Estrin appeared personally and testified, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers Lazar I. & Helen Estrin filed joint New York State Personal Income Tax Resident Returns for the years 1960, 1961 and 1962; that the taxpayer Lazar I. Estrin reported on Schedule C (for 1960) and on Schedule A (for 1961 and 1962) net profit from business as "consultant"; that the taxpayer Lazar I. Estrin did not file any unincorporated business tax returns for the years 1960, 1961 and 1962 upon the ground that he claims that his activities as "banking consultant" constitute the practice of a profession exempt from unincorporated business tax; that on May 10, 1965, the Department of Taxation and Finance issued a Statement of Audit Changes against the

taxpayers imposing unincorporated business tax upon the income derived by the taxpayer Lazar I. Estrin as banking consultant upon the ground that such activities constitute the carrying on of an unincorporated business in accordance with the provisions of Section 703(c), Article 23 of the Tax Law and issued a notice of deficiency therefor in the sum of \$2,006.75.

(2) That the taxpayer Lazar I. Estrin received a Law Degree from the Imperial University of Moscow in 1914; that he thereafter entered the field of banking with the Westminster Bank of London; that he emigrated to the United States in 1916; that he was employed in the International Division of the Irving Trust Company in New York City for 41 years, retiring in 1957 as Vice-President and Senior Loan Officer; that following his retirement, he lectured on 'Problems of Risk Evaluation' in the Graduate Schools of Columbia University, Yale, Princeton, Vanderbilt and the American University of Washington, D.C.; that since March, 1959, taxpayer has been self-employed as a consultant in the fields of banking and finance, specializing in risk evaluation, on a fee basis, maintaining an office in his home.

(3) That in March, 1959, the taxpayer Lazar I. Estrin entered into an agreement with the American Express Company, Inc, which was reduced to writing by letter agreement dated March 18, 1959 (Tax Commission's Exhibit I) wherein the company engaged the services of the aforementioned taxpayer as a consultant with respect to financial and other matters commencing March 1, 1959 with the right of either party to terminate the arrangement by giving thirty days notice in writing, at a stipulated fee of

\$1,666.66 per month to be billed at the end of each month in which the services are rendered; that the agreement expressly provided taxpayer shall be an independent contractor and not an employee of American Express; that pursuant to said agreement the taxpayer Lazar I. Estrin was required to advise on specific loan applications as well as on loan policy, procedures and techniques and risk evaluation; that taxpayer was not restricted from engaging as a consultant for other organizations.

(4) That, in connection with his activities on behalf of American Express Company, the taxpayer was also required to establish an effective program for training branch office and management personnel for the purpose of advising them on loan policy and risk evaluation in connection therewith; that the taxpayer conducted such training programs in which he employed teaching methods and techniques.

(5) That the taxpayer Lazar I. Estrin during each of the years 1960, 1961 and 1962 in addition to the fees received from American Express Company, Inc., also received fees from Amsterdam Overseas Corp., a financial company with international interests, and as a member of the Credit Committee for services in a consultative capacity (Min. of Hrg. p. 16); from New York Hanseatic Corp., for services as a member of the Board of Directors primarily rendering consultative advice involving international banking as well as promotion based upon his experience and knowledge (Min. of Hrg. p. 17); from the New York branch of Bank Leumi le-Israel, and a finance company associated with said bank known as Israel Foreign Trade Credit Corp.; that a fee was negotiated for both institutions, pursuant to an oral agreement, of \$5,000 per year which was divided between them.

for services in attending credit meetings and being consulted on credit risks (Min. of Hrg., pp. 17, 18); that the services rendered by the taxpayer to Amsterdam Overseas Corp. and Israel Foreign Trade Credit Corp. as a member of the Credit Committee of said corporation and New York Hanseatic Corp. as a member of the Board of Directors was the same or similar to the services rendered by him to the other two principals as a consultant in the fields of banking and finance.

(6) That the taxpayer deducted business expenses in connection with his activities and the maintenance of his office, none of which was reimbursed by his principals; that he had no employees; that more than 80% of taxpayer's gross income during the years in issue was derived from the personal services actually rendered by him and that capital was not a material income producing factor.

Upon the foregoing findings and all of the evidence presented herein,

The State Tax Commission hereby

DECIDES:

(A) That the compensation received by the taxpayer from all of his principals, as more fully set forth in Finding (5) above, constituted receipts from his regular business as a consultant in the fields of banking and finance subject to unincorporated business tax and not compensation as an employee.

(B) That the conducting by the taxpayer of a training program applying teaching methods and techniques on behalf of American Express were merely incidental to his activities as a consultant for such firm in the fields of banking, finance and credit risks and in furtherance thereof and do not constitute the practice of teaching as a profession.

(C) That during the years 1960, 1961 and 1962, the activities of the taxpayer Lazar I. Estrin as an independent consultant in the fields of banking, finance and credit risks for the various corporations and banks whom he represented, although requiring special knowledge and experience, did not constitute the practice of a profession exempt from the imposition of unincorporated business tax in accordance with Section 703(c) of the Tax Law; that such activities during the aforementioned years constituted the carrying on of an unincorporated business within the State of New York and that his income derived therefrom was subject to unincorporated business tax in accordance with the intent and meaning of Section 703, Article 23 of the Tax Law.

(D) That, accordingly, the Statement of Audit Charges and Notice of Deficiency for the years 1960, 1961 and 1962 are correct; that the same do not include any taxes or other charges which could not have been lawfully demanded and that the taxpayer's petition for redetermination of a deficiency or for refund of unincorporated business taxes filed with respect thereto, be and the same is hereby denied.

DATED: Albany, New York, on the 25th day of April 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

JAMES R. MACDUFF

Commissioner

/s/

WALTER MACLYN CONLON

Commissioner