

## BUREAU OF LAW

## MEMORANDUM

*Unincorp. Bus. Tax*  
*Determinations A-2*  
*Ostberg, Dorothy & Ralph*

TO: Commissioners Murphy, Macduff and Conlon

FROM: Francis V. Dow, Hearing Officer


SUBJECT: In the matter of the application of Ralph & Dorothy Ostberg for revision or refund of unincorporated business taxes under Article 16-A, of the Tax Law for the year 1959

A hearing was held before me with reference to the above matter on January 17, 1967. The appearance and exhibits produced were as shown on the stenographic minutes submitted herewith. The issue involved in this matter is whether the activities of the taxpayer, Ralph Ostberg, as an industrial consultant, constitute the practice of a profession exempt from unincorporated business taxes. The taxpayer filed a resident tax return for the year 1959. An assessment (Assessment No. B-836629) was issued for that year assessing unincorporated business taxes in the amount of \$295.20 on the basis that the taxpayer's activities constituted the carrying on of an unincorporated business subject to the unincorporated business tax.

The taxpayers contend that their income derived from activities as an industrial consultant was subject to being taxed either under the unincorporated business tax or as personal income tax but was not subject to both taxes. Prior to his retirement, the taxpayer, Ralph Ostberg, was employed by Olin Mathieson Chemical Corporation as vice president in charge of production. His formal education extended to obtaining a Bachelor of Business Administration degree from Boston University. Subsequent to the taxpayer's retirement, he acted as an industrial consultant from September 1, 1956 through October 31, 1959. During 1959 he acted as a consultant for Republic Aviation Corporation only. His work for Republic Aviation Corporation consisted in searching for the diversified products for it. He contacted various electronic companies to interest them in joining with Republic Aviation Corporation in a joint venture by way of merger or investment to allow Republic to diversify. The taxpayer was paid the sum of \$1,632.50 a month for his services. He was reimbursed for his traveling and living expenses. He was not reimbursed for his other expenses which included telephone service, answering services, materials and supplies, office rent, depreciation of office equipment and expenses for promotion of new clients.

It is my opinion that the activities of the taxpayer dealt with the conduct of business and do not constitute the practice of a profession as defined by section 386 of the Tax Law. (See McCormick v. Bragalini, 8 A D 2d 885; Booz v. Bragalini, 2 A D 2d 693, appeal denied 2 A D 2d 716.) Since the unincorporated business tax is imposed in addition to the personal income tax and is not a substitute or alternate tax, the taxpayers' income derived from activities of industrial consultant were subject to the unincorporated business tax and the personal income tax.

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

  
Hearing Officer

FVD:am  
Encl. 3-2-67  
February 28, 1967

**STATE OF NEW YORK**  
**STATE TAX COMMISSION**

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**IN THE MATTER OF THE APPLICATION**  
**OF**  
**RALPH AND DOROTHY OSTBERG**  
**FOR REVISION OR REFUND OF UNINCORPORATED**  
**BUSINESS TAXES UNDER ARTICLE 16-A OF THE**  
**TAX LAW FOR THE YEAR 1959**  
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The taxpayers herein having duly filed an application for revision or refund of personal income taxes or unincorporated business taxes under Articles 16 and 16-A of the Tax Law for the year 1959, and a hearing having been held in connection therewith at the office of the State Tax Commission, State Campus, Albany, New York on January 17, 1961 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer, Ralph A. Ostberg, appeared and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers filed a New York resident tax return for the year 1959; that an assessment (Assessment No. B-836629) was issued on February 15, 1961 assessing unincorporated business tax in the amount of \$295.25 on the basis that the taxpayer's, Ralph A. Ostberg's, activities constitute the carrying on of an unincorporated business subject to unincorporated business tax.

(2) That the taxpayers contended that their income from services as an industrial consultant was subject either to normal tax under Article 16 of the Tax Law or unincorporated business tax under Article 16-A of the Tax Law but was not subject to both taxes.

(3) That prior to the year in issue, taxpayer Ralph A. Ostberg was employed by Olin Mathieson Chemical Corporation as vice president in charge of production; that his formal education included his obtaining a Bachelor of Business Administration degree from Boston University.

(4) That from September 1, 1956 to October 1, 1959 the taxpayer was engaged as an industrial consultant for Republic Aviation Corporation; that during 1959 and prior thereto the taxpayer, Ralph A. Ostberg, was not an employee of the aforesaid corporation; that he was paid the sum of \$1,632.50 a month for his services for the aforesaid corporation; that he was reimbursed for his travel and living expenses in connection with such services; that the taxpayer was not reimbursed for other expenses which he listed on his return as telephone service, answering services, materials and supplies, office rent, depreciation of office equipment and expense for promotion of new clients.

(5) That the taxpayer's, Ralph A. Ostberg's, services as an industrial consultant consisted of contacting various electronic companies throughout the United States, to interest them to engage in a joint venture with Republic Aviation Corporation through merger or investment to allow the Republic Aviation Corporation to diversify its products.

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

**DETERMINES;**

(A) That the taxpayer, Ralph A. Ostberg, conducted an unincorporated business since he was engaged in the occupation of rendering services as an industrial consultant for a business corporation as an independent contractor and not as an employee.

(B) That the services of the said taxpayer as an industrial consultant dealt with the conduct of business and industrial affairs and did not constitute the practice of a profession exempt from unincorporated business taxes under Section 386 of the Tax Law.

(C) That, accordingly, the entire net income derived from the activities of industrial consultant was subject to the unincorporated business tax under Section 386-a of Article 16-A of the Tax Law.

(D) That the taxpayers' income from the operation of a business was also subject to personal income taxes in accordance with the provisions of Sections 351 and 359 of Article 16 of the Tax Law.

(E) That the assessment (Assessment No. B-834629) issued against the taxpayers for the year 1959 was properly and timely issued; that the additional taxes assessed for such year were correct and legally due and owing, and that the taxpayers are not entitled to any further revision or refund of such taxes for the year 1959, and that the taxpayers' application for revision or refund of personal income taxes or unincorporated business taxes for the year 1959 is hereby denied.

Dated: Albany, New York the 13th day of March 1967.

**STATE TAX COMMISSION**

/s/

**JOSEPH H. MURPHY**

**President**

/s/

**JAMES R. MACDUFF**

**Commissioner**

/s/

**WALTER MACLYN CONLON**

**Commissioner**