L 9 (6-65)

Unincorp. Bus. Tax Determinations A-2

BUREAU OF LAW

MEMORANDUM

Rosenberg, Anna M. Associates

TO: The State Tax Commission

FROM: Alfred Rubinstein, Hearing Officer

SUBJECT: In the Matter of the Application of Anna M. Rosenberg, Irving Berezin and Thomas J. Rosenberg, Individually and as Co-Partners, d/b/u the Firm Name and Style of Anna M. Rosenberg Associates for Revision or Refund of Unincorporated Business Taxes under Article 16-A of the Tax Law for the Fiscal Years Ended February 28, 1957, February 28, 1958 and February 28, 1959.

A hearing in the above entitled matter was held before me on February 18, 1967 at 80 Centre Street, New York, New York. The appearances and exhibits were as noted on the transcript.

Taxpayer filed partnership returns for the fiscal periods involved, and submitted unincorporated business tax returns in blank, claiming on the face of the returns a prior determination of the State Tax Commission that its activities were exempt. For fiscal year ended February 28, 1957 the taxpayer's income was increased $8,450 by Federal audit changes. The Income Tax Bureau assessed unincorporated business taxes of $6,743.87 for fiscal year ended February 28, 1957 (No. B-795931) on taxpayer's income as adjusted by Federal changes; $11,083.89 for fiscal year ended February 28, 1958 (No. B-795932) on taxpayer's income as reported, and $8,846.27 for fiscal year ended February 28, 1959 (No. B-795933) on taxpayer's income as reported. All assessments were issued July 5, 1960, based on a finding that taxpayer's income was derived from the conduct of a business. Taxpayer filed timely applications for revision and demand for hearing.

The primary issue is whether the taxpayer's partnership activities as public relations and industrial relations consultants constituted the practice of an exempt profession, as contended by the taxpayer, who submits that numerous colleges give courses and degrees in these fields.

In addition, the taxpayer contends that (1) the partnership activities are identical to the activities of Anna M. Rosenberg, previously determined to be exempt, (2) that the assessment for 1957 was untimely, not having been made within three years of the filing of the return, and (3) that all three assessments were illegal and untimely, in that they were made solely to toll the

statute of limitations. These contentions raise subsidiary issues as to whether the prior determination of the exempt nature of the activities of Anna M. Rosenberg is determinative of the activities of the partnership, and as to the timeliness and legality of the assessments. Taxpayer conceded the propriety of the Federal changes increasing partnership income for 1957 by $5,450.

Taxpayer is a partnership composed of Anna M. Rosenberg whose propriety interest is 62 1/2%, Thomas J. Rosenberg, her son, whose propriety interest is 12 1/2% and Irving Berezin whose propriety interest is 25%. Anna M. Rosenberg was individually engaged in public relations and industrial relations counseling prior to World War II, and her activities for those years were held to be exempt from unincorporated business taxes by a determination of the State Tax Commission dated March 7, 1946 (Taxpayer's Exhibit "2"). Anna M. Rosenberg has been active in government service for many years. She has been a Regional Director of the N.R.A., a member of the War Manpower Commission, Regional Director of the Social Security Board, adviser to General Hugh S. Johnson, the Director of the W.P.A., Assistant Secretary of Defense, and she has served on numerous other Federal, New York State and New York City boards and agencies. Irving Berezin's background includes public and labor relations activities and service with the Social Security Administration. Thomas J. Rosenberg has taken professional courses and spent two years in public relations with a film company prior to joining the firm.

The partnership's activities consist of advising clients who have public relations, labor relations or similar problems. The clients are individuals, partnerships, corporations and institutions and a list of such clients is annexed to taxpayer's memorandum of law contained in the file. After preliminary consultation, the taxpayer will confer with the client and the client's legal counsel or advertising agency, depending on whether the problem is one of public relations or labor relations. Recommendations are based on research and surveys of the client's industry, media, customers, products, personnel or other factors relating to the client's problems. The client's public statements, speeches, position on legislative or other public matters may be analyzed to ascertain how the client's public image has been affected. A staff of assistants is employed for the clerical, survey and research functions, which may be of an in-plant nature, but their written reports are seldom made available to the clients. Taxpayer rarely engages directly in labor relations negotiations, and advice as to media is given with respect to financial reports and in a limited manner to general advertising policies. Taxpayer's services are usually rendered in oral form at conferences, and fees are negotiated on an annual retainer basis.

At the outset, the issues of the prior determination and legality and timeliness of the assessments should be disposed of. There is no prior determination of the Tax Commission, nor any prior findings of fact with respect to the activities of this taxpayer. Taxpayer's Exhibit "2" was determinative of the activities of Anna M. Rosenberg for the years 1937, 1938, 1939, 1940 and 1941, only. Neither this taxpayer, a partnership, nor either of two of its three partners (Thomas J. Rosenberg and Irving Berezin) were parties to such prior determination. With respect to Anna M. Rosenberg, such prior determination does not estop contrary findings for later years based on changes in status or new information, Marx v. Goodrich, 286 A.D. 513, nor is the Tax Commission estopped from changing an interpretation of statutes, Consolidated Edison v. State Tax Commission, 23 A.D. 2d 478. Consequently, this application must be examined in the light of the facts adduced at the hearing and the determination must be made in accord with present law and policy.

Taxpayer filed its partnership returns for fiscal year ended February 28, 1957 on October 8, 1957, pursuant to an extension of time granted; for fiscal year ended February 28, 1958 on August 11, 1958 pursuant to an extension of time granted; and for fiscal year ended February 28, 1959 on June 12, 1959. Unincorporated business tax returns submitted at the same time were completely blank except for the statement "AS PREVIOUSLY DETERMINED BY THE DEPARTMENT, ACTIVITIES DO NOT CONSTITUTE AN UNINCORPORATED BUSINESS." Section 373 of the Tax Law as then constituted required an assessment to be made within three years of the filing of the return, the date of filing being considered the last day prescribed for filing or the last day of any extension of time for filing; within five years of the filing of the return where an omission from income exceeded 25%; or at any time where no return was filed. In view of the fact that all returns including the earliest, were filed less than three years prior to the issue of assessments, it is unnecessary to consider the alternative limitations.

However, taxpayer's claim that all assessments were illegally made, solely for the purpose of telling the statute of limitations, in anticipation of the decision in Herman v. Murphy, 14 A.D. 2d 473, in which a determination of the State Tax Commission that labor and industrial relation consultants are not exempt professionals was confirmed, requires examination of the unincorporated business tax returns filed by the taxpayer. These returns were submitted completely in blank, containing no information whatsoever, except the statement, "AS PREVIOUSLY DETERMINED BY THE DEPARTMENT, ACTIVITIES DO NOT CONSTITUTE AN UNINCORPORATED BUSINESS."

Such filing is not sufficient to start the running of the statute of limitations, even though the information contained on the partnership return filed at the same time was practically identical to that required on the unincorporated business tax return, 1953 Op. Atty. Gen. 197. "There is a difference between a defective or incomplete return filed in good faith in an attempted compliance with the statute and the filing of no return at all." Merritt v. Bates, 297 N.Y. 244.

Brown v. New York State Tax Commission, 198 Misc. 249, aff'd 279 A.D. 837, aff'd 304 N.Y. 651, on which the taxpayer relies in claiming that the assessments were made solely to toll the statute of limitations, must be distinguished. In the Brown case the taxpayer sought a declaratory judgment and injunction, claiming that an assessment was arbitrary and illegal, not based on audit, examination or other information, and issued solely to toll the statute of limitations. A motion to dismiss the complaint for insufficiency was denied on the ground that complaint stated a cause of action. Brown claimed that the assessment was made just three days before expiration of the time to assess solely because of his refusal to consent to an extension of the statute of limitations. On denial of the Tax Commission's motion to dismiss an answer was interposed setting forth the basis for the assessment, and subsequently Brown discontinued his action and paid the assessment, without interest, pursuant to stipulation.

The holding in the Brown case, therefore, is limited to the issue raised therein, to wit: A motion addressed to the legal sufficiency of the complaint, prior to service of an answer. No decision was made by the court with respect to the propriety of the assessment, and it may well be that had a motion for summary judgment dismissing the complaint been made after joinder of issue such motion would have been granted.

This application contains none of the elements of the Brown case as litigated. Taxpayer's conclusory argument that the assessments issued were, "arbitrary, capricious and unreasonable" is unsupported by the facts. The partnership returns of this taxpayer (Tax Commission Exhibits "B", "C" and "D") were audited on June 22, 1960, on which audit the assessments were issued. The examiner's audit memorandum is annexed to each return. The blank unincorporated business tax returns were insufficient, as a matter of law, to start the statute of limitations running. If it was assumed by the taxpayer that the prior determination of the application of Anna M. Rosenberg fixed the exemption for the partnership such error byythe taxpayer cannot preclude the Tax Commission from making proper, timely assessments.

For the reasons stated above I am of the opinion that the Tax Commission is not barred from making a plenary determination of the substantive issues raised by this application.

Under section 386 of the Tax Law and Regulation 20 NYCRR 281.4, it is the professional activity itself which is exempt from the tax, and the relative stature or lack of stature of the practitioner neither creates or abates the exemption. The vocations of public relations counsel and industrial relations counsel have not, as yet, been included as recognized professions under the regulations. Consequently, the activities of the partnership and not the personal eminence of Anna M. Rosenberg must be examined in order to arrive at a determination of whether such consulting activities qualify for exemption. That colleges offer courses and degrees in labor and industrial relations is not sufficient reason to constitute such consulting activities an exempt profession, Herman v. Murphy, 14 A.D. 2d 473. So too with management consultants, Sheahan v. Murphy, 12 A.D. 2d 713, economic consultants, Backman v. Bates, 279 A.D. 115, and consultants, generally, who advise management on business or industrial affairs, McCormick v. Bragalini, 8 A.D. 2d 885.

The determination cancelling unincorporated business tax assessments against Anna M. Rosenberg for 1937, 1938, 1939, 1940 and 1941 (Taxpayer's Exhibit "2") contains no finding of fact, and the basis for the determination is unknown. Since the making of such determination in 1948, the courts have consistently declined to include consulting activities, including labor and industrial relations counseling activities, within the exemption granted professions under section 386. On the evidence adduced at the hearing, it cannot be said that taxpayer's public relations and industrial relations counseling activities entail the use of a professional knowledge of science or learning in such a manner as to qualify for exemption. It has been held by the courts in many cases that it was not the intent of the legislature to grant exemptions to consultants who give advice on business or industrial problems, nor does expertise in some subject constitute the practice of a profession, Sheahan v. Murphy, supra. The activities of the taxpayer are not readily distinguishable from the activities of advertising agencies and management consultants generally, and may be engaged in by corporations. Taxpayer's activities include advising clients on media, products, and advertising as well as labor relations and its clients include financial houses, publishers, retailers, brewers, manufacturers and other businesses. That its services are superior to its competitors'; that it is discriminating in accepting clients; and that it has achieved high status in public and industrial relations counseling are not sufficient reasons to classify the taxpayer's activities as professional.

For the reasons stated above, I am of the opinion that the assessments should be sustained. The determination of the Tax Commission should be substantially in the form submitted herewith.

/s/ ALFRED RUBINSTEIN
Hearing Officer

AR:pg

Enc.

November 9, 1967

12-15-67

Unincorp. Bus. Tax Determinations A-2
Rosenberg, Anna M., Associates

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION :

OF :

ANNA M. ROSENBERG, IRVING BEREZIN AND THOMAS J. ROSENBERG, INDIVIDUALLY AND AS CO-PARTNERS, D/B/A THE FIRM NAME AND STYLE OF ANNA M. ROSENBERG ASSOCIATES :

FOR REVISION OR REFUND OF UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 16-A OF THE TAX LAW FOR THE FISCAL YEARS ENDED FEBRUARY 28, 1957, FEBRUARY 28, 1958 AND FEBRUARY 28, 1959 :

Anna M. Rosenberg, Irving Berezin and Thomas J. Rosenberg, individually and as co-partners d/b/a the firm name and style of Anna M. Rosenberg Associates having applied for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the fiscal years ended February 28, 1957, February 28, 1958 and February 28, 1959 and a hearing having been held on February 16, 1967 at 80 Centre Street, New York, New York before Alfred Rubinstein, Hearing Officer of the Department of Taxation and Finance, at which hearing taxpayer, Anna M. Rosenberg appeared individually, and on behalf of the partnership, with counsel, Lillian L. Peses, Esq. and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed partnership income tax returns reporting income of $183,001.72 for fiscal year ended February 28, 1957, $297,472.23 for fiscal year ended February 28, 1958, and $244,531.65 for fiscal year ended February 28, 1959; that by Federal audit changes, the taxpayer's income for fiscal year ended February 28, 1957 was increased $6,450 to $189,451.72; that together with each partnership income tax return, the taxpayer submitted a blank unincorporated business tax return bearing the notation, "AS PREVIOUSLY DETERMINED BY THE DEPARTMENT, ACTIVITIES DO NOT CONSTITUTE

AN UNINCORPORATED BUSINESS"; that pursuant to an audit made June 22, 1960, assessments were issued on July 5, 1960 imposing unincorporated business taxes on the taxpayer in the amounts of $6,743.07 for fiscal year ended February 28, 1957 (No. B-795931) on taxpayer's income as adjusted by Federal changes, $11,863.88 for fiscal year ended February 28, 1958 (No. B-795932) on taxpayer's income as reported, and $8,948.27 for fiscal year ended February 28, 1959(No. B-795933) on taxpayer's income as reported.

(2) That taxpayer filed timely applications for revision or refund on August 8, 1961; that taxpayer's applications were denied on October 5, 1961; that taxpayer filed a timely demand for hearing on October 27, 1961.

(3) That the taxpayer is a partnership formed in 1948 and composed of Anna M. Rosenberg, whose proprietary interest is 62 1/2 per cent, Thomas J. Rosenberg, whose proprietary interest is 12 1/2 per cent and Irving Berezin, whose proprietary interest is 25 per cent; that taxpayer is engaged in the occupation of public relations and industrial relations counsel; that the taxpayer's activities consist of advising clients with respect to their public relations, labor relations and similar problems; that taxpayer's clients are individuals, partnerships and corporations engaged in commercial, industrial, financial, institutional and other fields of endeavor; that taxpayer does research and makes surveys of clients' industries, media, customers, products, personnel and other factors relating to the clients' activities, including public statements, speeches, positions on legislative or other public matters which may affect the client's public image; that the taxpayer's services are rendered by way of consultation; that the taxpayer's remuneration consists of annual fees negotiated in advance.

(4) That Anna M. Rosenberg was individually engaged in public relations and industrial relations counseling during the years 1937, 1938, 1939, 1940 and 1941; that by a determination of the State Tax Commission dated March 7, 1946, the activities of Anna M. Rosenberg for such years were held to be exempt from the provisions of Article 16-A of the Tax Law as then constituted; that the taxpayer in this proceeding, a partnership of which Anna M. Rosenberg is a partner, is not the same entity as the taxpayer in the prior proceeding relating to the application of Anna M. Rosenberg which resulted in the determination dated March 7, 1946; that neither the taxpayer partnership, Anna M. Rosenberg Associates, nor either of two of its partners, Thomas J. Rosenberg and Irving Berenzin, were parties to such prior proceeding.

(5) That the assessments issued against the taxpayer for the fiscal years ended February 28, 1957, February 28, 1958 and February 28, 1959 were based on an audit made June 27, 1960; that said assessments issued against the taxpayer on July 8, 1960 were issued within three years of the last day prescribed for filing of taxpayer's partnership returns and within three years of the date such partnership returns were filed and submission of unincorporated business tax returns in blank.

(6) That the taxpayer concedes the propriety of the Federal audit changes increasing the partnership's income by $6,450 for 1957.

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

DETERMINES:

(A) That during the fiscal years ended February 28, 1957, February 28, 1958 and February 28, 1959, the taxpayer's income from its activities of public relations and industrial relations counseling

was derived from the conduct of a business within the meaning of section 386 of the Tax Law; that the taxpayers are consultants whose activities consist of giving advice on business and industrial affairs; that taxpayer's activities during such fiscal years did not constitute the practice of a profession within the intent and meaning of section 386 of the Tax Law.

(B) That the taxpayer did not file unincorporated business tax returns nor pay unincorporated business taxes for fiscal years ended February 28, 1957, February 28, 1958 and February 28, 1959; that no prior or previous determination was ever made by the State Tax Commission of the issues raised by the application of the taxpayer; that the assessments issued by the Income Tax Bureau imposing unincorporated business taxes on the taxpayer for fiscal years ended February 28, 1957, February 28, 1958 and February 28, 1959 were not unreasonable, capricious or arbitrary; that said assessments were timely, issued within the limitations of time imposed by section 373 of the Tax Law as then constituted.

(C) That the taxpayer's income for fiscal year ended February 28, 1957 was $189,451.72 as determined by the Treasury Department.

(D) That, accordingly, the assessments imposing unincorporated business taxes on the taxpayer in the sum of $6,785.87 for fiscal year ended February 28, 1957, $11,083.89 for fiscal year ended February 28, 1958 and $8,946.27 for fiscal year ended February 28, 1959 are correct; that the amounts set forth therein are due and owing together with interest, if any, and other statutory charges; that said assessments do not include any taxes or other

charges which could not have been lawfully demanded and that taxpayer's application for revision or refund with respect thereto be and the same is hereby denied.

DATED: Albany, New York this 17th day of January, 1958.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

COMMISSIONER