

BUREAU OF LAW
MEMORANDUM*Unincorp. Bus. Tax*
Determinations A-2
Wasserberger, Herman,
& Co.

TO: State Tax Commission

FROM: Evelyn King, Hearing Officer

SUBJECT: HERMAN WASSERBERGER & CO.

Petition for a redetermination of a deficiency or for a refund of unincorporated business taxes under Article 23 of the Tax Law for the fiscal year ending June 30, 1963.

A hearing on the above matter was held before me at 80 Centre Street, New York, N. Y. on August 9, 1967. The taxpayer did not appear. His accountant, who testified he was familiar with the facts, testified.

The issue involved is whether the activities of the taxpayer partnership acting as agent or solicitor of an insurer doing a bail bond business constituted the practice of a recognized profession exempt from unincorporated business taxes.

The taxpayer, with three partners, filed a partnership return for the fiscal year ending June 30, 1963, describing its business as that of "Bail Bondsmen." The taxpayer maintained an office at Kew Garden Hills, Queens, N. Y.

Neither the partnership, nor any of its members, was licensed by the Department of Education.

No testimony was given as to the educational background of any of the three partners except the statement that each partner had passed the prescribed examination appropriate to the doing of a bail bond business; that Mr. Wasserberger, one of the partners, had been in the business well over thirty years.

The taxpayers did not write bail bond insurance on their own behalf. It was written on the policy of the Continental Casualty Company. The taxpayers did not execute as surety any bail bond. All collateral received by the taxpayers was put into a special escrow account together with the premium for the bond. One hundred percent of this account belonged to the insurance company and was turned over to the insurance company after deduction of commissions earned by taxpayers. The insurance company, in this case, the Continental Casualty Company, was responsible to the Court and wrote the bond.

The taxpayers were not doing a bail bond business under Section 331(1) of the Insurance Law, but were licensed as agents or solicitors of an insurer doing a bail bond business under Section 331(3) of the Insurance Law. See photostat of license issued to individual partners under Section 331 of the Insurance Law.

The taxpayers were not professional bondsmen under Section 554(b) of the Code of Criminal Procedure. Said section in effect provides that "any person, firm or corporation in any court having criminal jurisdiction or in any criminal action or proceeding who shall for another deposit money or property as bail or execute as surety any bail bond who within a period of one month prior thereto shall have made such deposit or given such bail in more than two cases not arising out of the same transaction shall be deemed to be doing a bail bond business and doing an insurance business as defined in Article IV of the Insurance Law." Said section further sets forth the other requirements imposed upon those engaged in the business of giving bail.

Although this section is captioned "Professional Bondsmen," there is nothing in the entire section or in Section 331 of the Insurance Law which would indicate that a "Bail Bondsman" is required to have a knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction or study. The licensee is required to take a written examination prepared by the Superintendent of Insurance which "may inquire into the applicant's knowledge of the pertinent provisions of the Code of Criminal Procedure and the pertinent rules and practices of the courts and district attorneys' offices within the area of the applicant's proposed operations."

It is to be noted that in the case of People ex rel. Tower v. State Tax Commission (1940) 282 N.Y. 407 licensed custom house brokers were also required to possess a knowledge of custom law and procedure, and fitness to render valuable service to exporters and importers, satisfactory to the Treasury Department.

I am of the opinion that the activities of the taxpayer partnership, Herman Wasserberger & Co., during the fiscal year 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 said activities constitute the carrying on of an unincorporated business, the income of which is subject to unincorporated business tax pursuant to Section 703 of the Tax Law. People ex rel. Tower v. State Tax Commission (1940) 282 N.Y. 407. See also Recht v. Graves (1939) 257 App. Div. 889 wherein it was held that life

insurance agents were engaged in the conduct of a business and not in the practice of a profession.

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

January 26, 1968

3-7-68

Gladys King
Hearing Officer

STATE OF NEW YORK

STATE TAX COMMISSION

.....X

IN THE MATTER OF THE PETITION :

OF :

HERMAN WASSERBERG & CO., :

FOR A REDETERMINATION OF A DEFICIENCY :

OR FOR A REFUND OF UNINCORPORATED :

BUSINESS TAXES UNDER ARTICLE 23 OF THE :

TAX LAW FOR THE FISCAL YEAR ENDING :

JUNE 30, 1963. :

.....X

Herman Wasserbarger & Co., having filed a petition for redetermination of a deficiency or for a refund of unincorporated business taxes under Article 23 of the Tax Law for the fiscal year ending June 30, 1963, and a hearing having been held at the office of the State Tax Commission, 80 Centre Street, New York, N. Y., on August 9, 1967 before Dwight King, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer was represented by Leon M. Chelbin, Senior Partner of Chelbin & Fishbe, Certified Public Accountants, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Herman Wasserbarger, Myron Wilman and Sheldon Chelbin, individually and as co-partners 2/3/1/3 the firm name and style of Herman Wasserbarger & Co., filed a New York State Income Tax Partnership return for the fiscal year commencing July 1, 1962 ending June 30, 1963; that the taxpayer partnership did not file any unincorporated business tax return for said fiscal year on the ground that it was claimed that the activities of the taxpayer constituted the practice of a recognized profession.

(2) That on June 7, 1963 the Department of Taxation and Finance issued a Statement of Audit Charges against the taxpayers

holding the business activities of the taxpayers constituted the carrying on of an unincorporated business subject to unincorporated business tax and, accordingly, issued a Notice of Deficiency in the sum of \$496.50, including interest.

(3) That during the fiscal year ending June 30, 1963 the taxpayers maintained, and still maintain, an office at New Garden Hills, Queens, N. Y. for the purpose of writing and selling bail bond insurance; that the taxpayers did not write any bail bond insurance either on behalf of their firm or on their own behalf; that the bail bond insurance was written solely on the policies of the Continental Casualty Company; that all collateral received by the taxpayers was put into a premium account, described by the representative of the taxpayers as an escrow account; that, similarly, all premium money received was put into this premium account; that 100% of this premium account belonged to the insurance company; that checks were drawn weekly from the premium account to cover the commissions of the taxpayers on insurance written; that all monies received by the taxpayers, including any collateral, was deposited in the taxpayers' premium account and turned over to the insurance company which was responsible to the Court; that collateral of a nature which could not be so deposited, such as a mortgage, was deposited with the insurance company.

(4) That, although requested, no testimony was given as to educational background of any of the three partners or as to any specialized instruction or study received or pursued by any of the three partners, except the statement that each partner had passed the prescribed written examination appropriate to the doing of a bail bond business, which required a knowledge of the pertinent provisions of the Code of Criminal Procedure and the pertinent rules and practices of the courts and district attorneys' offices within the area of the applicant's proposed operations.

(5) That each of the partners, Sheldon C. Cheviase, Myron A. Vilson and Herman Wasserman, were licensed by the Insurance Department under Section III of the Insurance Law to act as agents for Continental Casualty Company, Chicago, Illinois in the writing of bail bond insurance.

(6) That taxpayers have failed to establish that their activities required knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study.

Based upon the foregoing findings and all of the evidence presented herein,

The State Tax Commission hereby

DECEDES:

(A) That although the taxpayers during the fiscal year in issue utilized in their activities a knowledge of the pertinent provisions of the Code of Criminal Procedure and the pertinent rules and practices of the Courts and district attorneys' offices within the area of the taxpayers' operations, the taxpayers' activities as agents of Continental Casualty Company, an insurer doing a bail bond business did not constitute the practice of a recognized profession; that taxpayers' income derived therefrom for the fiscal year in issue was derived from a business carried on by them solely within the State of New York, subject to unincorporated business taxes under Section 703 of the Tax Law.

(B) That, accordingly, the Notice of Deficiency for the fiscal year ending July 1, 1943 was properly issued and that the tax and interest stated therein are correct and are due and owing together with any other lawful interest and statutory charges; that the taxpayers' petition for a re-determination of a deficiency or for a refund of unincorporated business taxes under Article 23

of the Tax Law for the fiscal year ending June 30, 1963 be and the same hereby is denied.

Dated: Albany, New York, on this 25th day of March, 1963.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

/s/

A. BRUCE MANLEY

/s/

SAMUEL E. LEPLER