

STATE OF NEW YORK  
STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION OF  
HERMAN SCHERR AND RALPH WEXLER, INDIVIDUALLY  
AND AS CO-PARTNERS D/B/U THE FIRM NAME AND  
STYLE OF: HERMAN SCHERR  
FOR REVISION OR REFUND OF UNINCORPORATED  
BUSINESS TAXES UNDER ARTICLE 16-A OF THE  
TAX LAW FOR THE YEAR 1959  
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HEARING UNIT - File Copy  
TAX Unincorporated Business Tax  
ART. 16A SECS. 350(1), 386  
KEY WORDS UNLICENSED ENGINEERS  
NOT PRACTISING A PROFESSION  
CROSS REFS. § 7-09 Education Law  
CASE LAW CITATIONS \_\_\_\_\_  
REMARKS \_\_\_\_\_

Herman Scherr and Ralph Wexler, individually and as co-partners doing business under the firm name and style of Herman Scherr (hereinafter referred to as the partnership), having duly filed an application for revision or refund of unincorporated business taxes under Article 16-A of the Tax Law for the year 1959, and a hearing having been held in connection therewith at which the partner Herman Scherr appeared and testified, and the matter having been duly examined and considered, the State Tax Commission hereby finds:

1. That Herman Scherr and Ralph Wexler filed a partnership information return of income for the year 1959 under Article 16 of the Tax Law; that such return stated that the partnership was formed January 1, 1959; its activities were those of "Professional Engineers"; its business address was given as 18 John Street, New York, New York, and its total net income as reported in the amount of \$21,892.34 was shown as distributable 50% to the partner Herman Scherr, and 50% to the partner Ralph Wexler.

2. That the partnership did not file an unincorporated business tax return under Article 16-A of the Tax Law for the year 1959.

3. That on audit of the partnership information return filed as aforesaid under Article 16 of the Tax Law, the Income Tax Bureau held that the activities carried on by the partnership during the year 1959 constituted the carrying on of an unincorporated business and that the income therefrom was subject to the unincorporated business tax under Article 16-A of the Tax Law as only one member of the partnership (namely, Herman Scherr) was licensed by the New York State Education Department as an engineer; that in accordance

with such audit, the unincorporated business taxes of \$465.55 here at issue were levied against the partnership on January 20, 1961 under assessment number B-831465.

4. That the partnership contends that the professional tax exemption under Article 16-A of the Tax Law should be granted to the partnership despite the fact that one of the partners is not a licensed engineer as such unlicensed partner is, as a result of his education, training, and experience, an engineer; that in the alternative the partnership contends that the income of the partnership, to the extent allocable to the activities and services of the licensed partner engineer (namely, at least 50% of the partnership income) should be exempt from the unincorporated business tax.

5. That the partnership was formed pursuant to a written partnership agreement between Herman Scherr and Ralph Wexler whereby the partners contributed in equal shares the necessary capital and each partner had equal shares in the business and in the profits derived therefrom.

6. That the partner Herman Scherr has been licensed as an engineer by the New York State Education Department at all times since 1953.

7. That the partner Ralph Wexler has never been licensed, either as an engineer or as an architect, by the New York State Education Department or by any department or agency of any other state.

8. That the partner Ralph Wexler studied architectural technology for two years at Mechanics Institute. He studied heating and air conditioning design for one year at New York Technical Institute and he studied heating and air conditioning application for six months at New York University.

9. That the principal work of the partnership is the design of mechanical equipment in buildings, including the design of the heating, air conditioning, ventilation, plumbing, and electrical equipment for use in private, commercial, and public buildings; that such work was done on a fee basis; that the partner Herman Scherr testified at the hearing that more than 80% of the gross income of the partnership was derived from personal services rendered by the two partners; and that he further testified that at least 50% of the partnership income was derived from his own services;

10. That the record does not show that more than 80% of the gross income of the partnership was derived from personal services rendered by the

partner Herman Scherr who was the only partner of the partnership who was licensed in this state as a professional engineer.

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

DETERMINES:

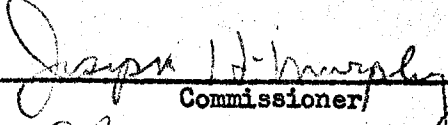
That the activities of the partnership as above described (from which the income here in question was derived) were carried on for tax purposes by Herman Scherr and Ralph Waxler (the two partners) as a partnership (Finding No. 5 above) under the provisions of Section 350, subdivision 11 of the Tax Law (made applicable to Article 16-A of the Tax Law by Section 386 of the Tax Law); that the said partnership was not authorized to practice professional engineering in this state under Section 7209 of the Education Law, which requires all the partners of a partnership practicing professional engineering to be individually licensed; that since both partners during the period here involved were not so licensed to practice professional engineering in this state (Findings Nos. 6 and 7 above), the said partnership was, therefore, not engaged in the practicing of a profession within the meaning and intent of the tax exemption provisions of Section 386 of the Tax Law; that in any event not more than 80 per centum of the gross income of the partnership in 1959 was derived from the personal services actually rendered by the partner Herman Scherr, the licensed partner (Paragraph No. 10 above) ; so that the entire income of the partnership is subject to the unincorporated business taxes pursuant to Section 386-a of the Tax Law; accordingly, the partnership is not entitled to any revision or refund of unincorporated business taxes assessed and/or paid under Article 16-A of the Tax Law for the calendar year 1959.


Dated: Albany, N. Y.,

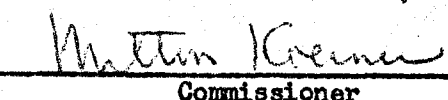
May 12,

1969.

THE STATE TAX COMMISSION

  
Commissioner

  
Commissioner

  
Commissioner