

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-H-80-(521)-I
Income Tax
March 2, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I800811A

On August 8, 1980 a Petition for Advisory Opinion was received from Aaron Spiegel, 41 West 83rd Street, New York, N.Y. 10024.

The issue raised is whether Petitioner's activities, consisting of the management of real property owned by others, constitutes the practice of a profession so as to exempt the income derived therefrom from the New York State Unincorporated Business Income Tax imposed under Article 23 of the Tax Law.

Petitioner's firm is Cinshar Management Associates, a sole proprietorship all of whose income is derived from real estate management fees. Petitioner is an officer in two corporations and a partner in two partnerships for which corporations and partnerships Petitioner's firm manages certain real property. Petitioner's duties in this regard consist of the collection of rents, arranging for the maintenance of the buildings, handling landlord-tenant court matters, drawing up and signing service contracts, negotiating and drawing up leases, and handling records pertaining to income and expenses.

Section 703(c) of the Tax Law provides that the practice of law, medicine, dentistry, or architecture, and the practice of any other profession in which capital is not a material income producing factor and in which more than eighty percent of the unincorporated business gross income for the taxable year is derived from personal services rendered by the individual engaged in the practice of the profession involved, shall not be deemed an unincorporated business.

The Unincorporated Business Income Tax Regulations defines the term "other profession" to include "...any occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study, is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interests or welfare in the practice of an art or science founded on it. The word profession implies attainments in professional knowledge as distinguished from mere skill and the application of knowledge to uses for others as a vocation. The performing of services dealing with the conduct of business itself, including the promotion of sales or services of such business and consulting services, does not constitute the practice of a profession even though the services involve the application of a specialized knowledge."

The meaning of the term "other profession" has been the subject of much litigation in the course of which the courts have enunciated a set of factors to be considered in determining whether an activity constitutes the practice of a profession within the meaning of section 703 of the Tax Law. These include "... long-term educational background generally associated with a degree in an advanced field of science or learning; the requirement of a license; control of the occupation by standards of conduct, ethics and malpractice liability; and the existence of a barrier to carrying on the occupation as a corporation". Matter of Rosenbloom v. State Tax Commission, 44 AD 2d 69, mot Iv app den 34 NY2d 518. It has also been held that in addition to the foregoing factors the activity in question should constitute one "devoted to public service in the traditionally professional sense..." involving "...something more than the type of services generally performed by those in the broader category of trade, business or occupation." Matter of Koner v. Procaccino, 45 AD2d 551, affd 39 NY2d 258; Matter of Joseph Costa v. State Tax Commission, 67 AD2d 1074.

JAMES H. TULLY, JR., COMMISSIONER LOUIS M. JACOBSON, DEPUTY COMMISSIONER
FRANK J. PUCCIA, DIRECTOR

TSB-H-80-(521)-I
Income Tax
March 2, 1981

It is clear in the present instance that Petitioner's activities do not constitute the practice of a profession within the meaning of the applicable statute. Petitioner has failed to demonstrate compliance with any of the factors set forth in the quoted judicial opinions and regulations. Indeed, the management of the real property of others has consistently been held to constitute the operation of a business subject to tax under the Unincorporated Business Income Tax. Matter of Elkind v. State Tax Commission, 63 AD2d 789; Matter of Swid-Pearlman Management v. Tully, 67 AD2d 1022; Matter of Arbesfeld v. State Tax Commission, 62 AD2d 627; Matter of Schirrmeister v. Bragalini, 8 AD2d 180.

Petitioner suggests that inasmuch as he manages properties of two corporations of which he is an officer and of two partnerships of which he is a partner his activities do not constitute engaging in an unincorporated business. Petition is presumably referring to sections 703(b) and 703(e) of the Tax Law. Section 703(b) provides that the performance of services performed by an individual as an officer of a corporation is not deemed to constitute the carrying on of an unincorporated business, "...unless such services constitute part of a business regularly carried on by such individual." Section 703(e) provides that an owner or lessee of real property is not deemed to be engaged in an unincorporated business solely by reason of managing such real property. While Petitioner does manage properties of corporations of which he is an officer, and of partnerships of which he is a partner, he does not do so in his capacity as an officer or partner but rather through his sole proprietorship, Cinshar Management Associates. Hence, sections 703(b) and (e) of the Tax Law are not applicable to Petitioner's activities. Matter of Swid-Pearlman Management v. Tully, *supra*; Matter of Elkind v. State Tax Commission, *supra*; Matter of Schirrmeister v. Bragalini, *supra*.

Accordingly, Petitioner's activities as described herein do not constitute the practice of a profession, but rather the carrying on of an unincorporated business the income of which is subject to tax under Article 23 of the Tax Law.

DATED: November 10, 1980

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau