

10-1-1955

Taxation—Unincorporated Business Tax

Richard C. Wagner

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Taxation-State and Local Commons](#)

Recommended Citation

Richard C. Wagner, *Taxation—Unincorporated Business Tax*, 5 Buff. L. Rev. 94 (1955).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol5/iss1/44>

This The Court of Appeals Term is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

BUFFALO LAW REVIEW

In a taxpayer's proceeding to review a tax assessment which the taxpayer contended was erroneous because of overvaluation and inequality, Special Term entered an order in favor of the taxpayer, based upon the findings of an Official Referee. The Court of Appeals, speaking through Judge Fuld, unanimously reversed Special Term and the Appellate Division on the grounds that the evidence was insufficient to sustain findings of inequality, excessiveness or overvaluation.⁶

The reference of the issues to the referee was stipulated by the parties. Once they have thus waived the statutory procedure, they cannot later, on appeal, claim that the reference was unauthorized.⁷

In a proceeding to review assessment, a comparison of the assessment of the subject property with the assessments of other properties, unaccompanied by evidence of their full value, cannot furnish the basis for a finding of inequality. The proper procedure is to compare the rate of assessment of the subject property with the rates of a fair sampling of property in the tax district.⁸ In order to obtain relief, a taxpayer must prove his property to be over-assessed, rather than the under-assessment of neighboring property. He must show that the inequality of which he complains would subject him to the payment of more than his just proportion of the aggregate tax.⁹

Unincorporated Business Tax

Article 16-A of the Tax Law¹⁰ imposes an Unincorporated Business Tax, which is designed to levy upon various types of non-corporate enterprise competing with corporations in the state.¹¹ In order to be exempt from this tax an individual or partnership must: (1) be engaged in the practice of a profession; (2) derive more than 80% of his gross income from services rendered by himself personally, and (3) not have capital as a material income-producing factor.¹²

In *Voorhees v. Bates*,¹³ the appellant was engaged in conducting the orchestra on "The Telephone Hour" and "Cavalcade of America" radio broadcasts. He listed as income the gross amount paid to him by the sponsors of the programs, and

6. *Wolf v. Assessors of the Town of Hanover*, 308 N. Y. 416 126 N. E. 2d 537 (1955).

7. *Pawley v. Dorland Building Co.*, 281 N. Y. 423, 24 N. E. 2d 109 (1939).

8. Tax Law, § 293.

9. *People v. Carter*, 109 N. Y. 576, 17 N. E. 222 (1888).

10. Tax Law, §§ 386-386k.

11. Corporations are required to pay a corporate franchise tax, measured by net income. Tax Law, §§ 180-207a.

12. Tax Law, § 386.

13. 308 N. Y. 184, 124 N. E. 2d 273 (1954).

THE COURT OF APPEALS, 1954 TERM

as deductions the amount paid by him to the arrangers and members of the orchestra. The State Tax Commission determined him liable for the Unincorporated Business Tax.

The Court of Appeals in reversing (4-3) the Commission and the Appellate Division *held*: (1) that Mr. Voorhees' occupation as musician and orchestra conductor constituted a "profession" within the exclusion clause of the statute; (2) that income reported by him on his tax return included income not his own, and (3) that 80% of his true gross income came from personal services.

The court had previously defined "profession" as requiring knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study.¹⁴ It was felt by the Court that Mr. Voorhees' training and experience in the field of music entitled him to recognition as a professional musician.¹⁵ Judge Froessel, speaking for the majority, also held that the money paid Mr. Voorhees by his sponsor over and above his own fixed guest fee was a "wash" transaction and not part of his true income.

The dissenters, speaking through Judge Dye, felt that the findings of the State Tax Commission ought not be disturbed unless shown to be "clearly erroneous" and so lacking in support by the evidence as to be "arbitrary and capricious."¹⁶ In the instant case, however, the facts were not in dispute, thereby laying the question open for judicial review.¹⁷

The decision of the majority seems to effectuate the policy of the taxing statute *i. e.*, to exempt that type of activity which is incapable of being carried on in corporate form; Mr. Voorhees' occupation seems clearly to fall within this category.

Sales Tax

The Administrative Code of the City of New York, ch. 41, tit. N, imposes a local retail sales tax on the purchaser, but makes the vendor, the trustee of the city for its collection and liable therefor.¹⁸ As the incidence of the tax is intended to be placed upon the ultimate consumer, provision is made for resale

14. *People ex rel. Tower v. State Tax Commission*, 282 N. Y. 407, 26 N. E. 2d 955 (1940).

15. *People v. Kelly*, 255 N. Y. 396, 175 N. E. 108 (1931) held the teaching of singing or music to be a profession for purposes of the zoning law.

16. *Calder v. Graves*, 261 App. Div. 90, 24 N. Y. S. 2d 797. (3rd Dep't. 1941), *aff'd*. 288 N. Y. 643, 36 N. E. 2d 688 (1941).

17. *Good Humor Corp. v. McGoldrick*, 289 N. Y. 452, 46 N. E. 2d 881 (1943).

18. Administrative Code, § N 41-2.0.