

Opinion No. 63-91

August 6, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Charles C. Brunacini Commissioner of Revenue Bureau of Revenue Santa Fe, New Mexico

QUESTION

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1. What types of businesses may be included in the term "person engaging in the practice of any profession, or any business in which the service rendered is of a professional, technical, or scientific nature" under N.M.S.A., 72-16-4.9?
2. May independent insurance claims adjustment firms be included among those taxable under N.M.S.A., 72-16-4.9?

CONCLUSIONS

1. See Analysis.
2. No.

OPINION

{*197} ANALYSIS

N.M.S.A., 72-16-4.9, provides:

"72-16-4.9. Privilege taxes -- Professional services. -- The tax shall be computed at an amount equal to three percent (3%) of the gross receipts of any person engaging or continuing in the practice of any profession or of any business in which the service {*198} rendered is of a professional, technical or scientific nature and is paid for on a fee basis, or by a consideration in the nature of a retainer."

Section 72-16-4.9 taxes two categories of taxpayers: (1) persons in the business of furnishing professional services on a fee basis or retainer, and (2) persons in the business of furnishing services of a professional, technical or scientific nature on a fee basis or a retainer.

At common law there were only three professions: theology, law, and medicine. **People v. Garlock**, 11 NY S.2d 82, **U. S. v. Laws**, 163 U.S. 258 (1895). As our society has progressed, the courts have included many fields of endeavor besides those mentioned

above in the classification of professions. We believe that the legislature in passing Section 72-16-4.9 intended to include under the classification of people performing professional services not only those people engaged in the historical professional occupations, but also those persons who are engaged in what are now thought to be technical, scientific or professional pursuits.

The question which has always perplexed the courts and which is now presented to this office for an answer is what test must be used for determining whether a particular "business" is a profession, or of a professional nature. Licensing by the state and the supervision of activities are unsatisfactory standards by which to classify the nature of an occupation. Few fields of business are free from supervision, and the licensing of liquor dealers, undertakers, plumbers, and electricians do not make these vocations professions, **Teague v. Graves**, 27 NY S. 2d 762 (1941). Mere experience and excellence in an occupation do not necessarily make the person performing the service a professional person, **Abbot v. U. S.**, 151 F. Supp. 929 (1957).

In the case of **U. S. v. Laws**, 163 U.S. 258 (1895) the United States Supreme Court said that a profession is a vocation in which the professed knowledge of a science is used by its practical application to the affairs of others, either in advising, finding or teaching them, or in serving their welfare in the practice of an art founded on the professional person's specialty. Following this definition of profession, New York adopted a test, which in our opinion is the test which the Bureau of Revenue should adopt. This test is -- Does the specialty require a knowledge of an advanced type in a given field of science or learning gained by a **prolonged course of specialized instruction and study**? See **Traub v. Goodrich**, 143 NY S.2d 334 (1955); **Teague v. Graves**, 38 N. E. 2d. 222. Following this test it has been held that management consultants, **Booz v. Braslini**, 151 NY S.2d 957, economic consultants, **Backman v. Bates**, 112 NY S.2d 365, efficiency experts, **McCormick v. Braslini**, 186 NY S. 2d 851, insurance agents, **Recht v. Graves**, 12 NY S.2d 159, business executives, **Pennicke v. Mealey**, 42 NY S.2d 884, non-lawyer practioner before the ICC, **Traub v. Goodrich**, 143 NY S.2d 334, insurance brokers, **Otis v. Graves**, 20 NY 2nd 426, undertakers and embalmers, **O'Reilly v. Eolaryer**, 95 NY S. 760, are not engaged in professional occupations. Listed among those occupations which are classified as professions are landscape architects, **Geiffert v. Mealy**, 59 N.E. 2d 222, music teachers, **People v. Kelly**, 175 N.E. 108, and chemists, **U.S. v. Laws**, 163 U.S. 258.

{*199} While insurance claims adjusters are often highly educated experts in their field, as are many of the persons listed above, it is our opinion that they should not be classified as persons performing a professional service. We know of no college or university with a department which offers a degree in insurance claims adjustment, nor are we aware of any formal branch of learning (except for some short company offered course and trade schools courses) which deals with insurance claims adjustment. Expertness in the business of insurance claims adjustment is not gained through a prolonged course of formally supervised instruction and study in the field of insurance claims adjustment but is gained from experience. Compare **Abbott v. U. S.**, 151 F. Supp. 929. We must therefore advise that insurance claims adjusters should not be

classified under N.M.S.A., 72-16-4.9 as persons performing a professional service, but should be classified under N.M.S.A., 72-16-4.10 as persons performing a business service.

We note in passing that the test which we have proposed for determining whether a person performing a service is a professional person is a test which has been used for making a determination for the purpose of taxation. A person who is classified as a person performing a professional service for the purpose of taxation may not necessarily be classified a professional person for some other purpose. Compare **Village of Riverside v. Kuhne**, 82 N.E. 2d 500 (zoning classification), **Cambell v. Honaker's Heirs**, 166 S.W. 74 (classification for purpose of exemption from execution), **Cornelius v. Industrial Commission**, 7 N.W. 2d 596 (classification under Workmen's Compensation Act), **People v. Maggi**, 33 N.E. 2d 925 (Unemployment Compensation), **Stoor v. City of Seattle**, 267 P. 2d 902 (job classification) with the line of tax cases cited above.

In summation, it is the opinion of this office that for school tax purposes whether a service is a professional service or service of a professional nature should be determined by applying the test set forth above. An application of this test will indicate that insurance claims adjusters are not includable within the term "persons in the business of performing a professional service" or a "service of a professional, technical or scientific nature".

To the extent that this opinion conflicts with Opinion of the Attorney General No. 59-117, that opinion must be deemed overruled.

By: Joel M. Carson

Assistant Attorney General