

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Douglas E. & Cynthia Ferguson : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1968 - 1972. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of January, 1982, he served the within notice of Decision by certified mail upon Douglas E. & Cynthia Ferguson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Douglas E. & Cynthia Ferguson
528 Bellwood Ave.
No. Tarrytown, NY 10591

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
29th day of January 1982.

Annice A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of :
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State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of January 1982, he served the within notice of Decision by certified mail upon Gregory H. Doherty the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gregory H. Doherty
115 Kelburne Ave.
N. Tarrytown, NY 10591

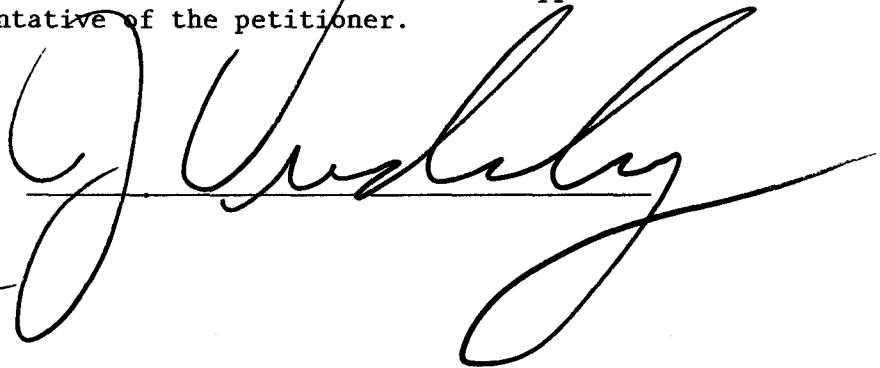
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
29th day of January 1982.



Commissioner



Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

January 29, 1982

Douglas E. & Cynthia Ferguson
528 Bellwood Ave.
No. Tarrytown, NY 10591

Dear Mr. & Mrs. Ferguson:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Gregory H. Doherty
115 Kelburne Ave.
N. Tarrytown, NY 10591
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DOUGLAS E. FERGUSON and CYNTHIA K. FERGUSON : DECISION
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Years 1968, :
1969, 1970, 1971 and 1972. :
:

Petitioners Douglas E. Ferguson and Cynthia K. Ferguson, 528 Bellwood Avenue, North Tarrytown, New York 10591, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1968, 1969, 1970, 1971 and 1972 (File No. 13174 and 13175).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 21, 1980 at 2:45 P.M. Petitioner Douglas E. Ferguson appeared with Gregory H. Doherty, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Ellen Purcell, Esq., of counsel).

ISSUE

Whether petitioner Douglas E. Ferguson's activities as a Chartered Financial Analyst constituted the practice of a profession exempt from the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Petitioners, Douglas E. Ferguson and Cynthia K. Ferguson, timely filed New York State combined income tax returns for the years 1968, 1969, 1970 and 1972. Subsequent to filing their 1970 return as stated, petitioner's changed election and filed an amended joint New York State Income Tax Resident

Return for said year. For the year 1971, petitioners filed a joint New York State Income Tax Resident Return. On all stated returns filed, Douglas E. Ferguson (hereinafter petitioner) reported business income from "Investment Advisory" activities. Petitioner did not file unincorporated business tax returns for any of said years at issue.

2. On March 25, 1972, the Audit Division issued a Statement of Audit Changes to petitioners wherein unincorporated business tax was imposed on the net profit derived from petitioner's business activities for the years 1968, 1969 and 1970, on the ground that "Investment advising is not recognized as a profession by the Tax Commission". Accordingly, a Notice of Deficiency was issued against petitioners on May 21, 1973 asserting unincorporated business tax of \$1,186.86, plus interest of \$172.09 for a total of \$1,358.95. Said total was then reduced by an overpayment of personal income tax for 1970 of \$270.72 as computed on petitioners' amended return, resulting in a total due of \$1,088.23.

3. On January 28, 1974, the Audit Division issued a Statement of Audit Changes to petitioner wherein his net business income derived from his investment advisory activities for the years 1971 and 1972 was held subject to the imposition of unincorporated business tax. Accordingly, a Notice of Deficiency was issued against petitioner under the same date asserting unincorporated business tax of \$508.73, plus interest of \$38.81, for a total due of \$547.54.

4. During the years at issue, petitioner was a financial analyst. As such, his activities consisted of financial analysis involving investment research, portfolio management and the supervision of investment funds. For these services petitioner received an annual investment management fee based on a percentage of assets.

5. During the latter part of 1969 petitioner earned the designation of "Chartered Financial Analyst" (C.F.A.). Such designation is obtained from the Institute of Chartered Financial Analysts (the institute) subsequent to meeting necessary requirements, which include five years experience in a primary capacity with the occupation of financial analyst and passing a comprehensive examination.

6. The Chartered Financial Analyst examination is given to qualified candidates in three parts over a three year period and covers five basic subject-matter areas, namely; accounting, economics, financial analysis, portfolio management and ethical standards. In order to be eligible to take this examination, the institute requires that "A candidate should have a bachelor's degree from an accredited academic institution. In the absence of a degree, other educational training or work experience may be accepted for C.F.A. candidacy." Said examination is given by the Institute in order to "recognize with the professional designation Chartered Financial Analyst, persons who have met the standards established by the Institute for the professional practice of financial analysis".

7. Petitioner holds a Bachelor of Arts degree from Columbia College where he majored in economics.

8. During the years at issue, petitioner was a member of the Institute of Chartered Financial Analysts, the New York Society of Security Analysts and the Financial Analysis Federation (F.A.F.). As a member of F.A.F., petitioner was bound by its code of ethics and standards of professional conduct.

9. In 1974 the New York Department of Education and the Board of Regents supported a "draft bill" in the Legislature to establish a "Professional Security Analyst" designation, for which the chief test of competence was to

be the passing of the first part of the C.F.A. examination. This bill was to be submitted to the Legislature, contingent upon only one factor, namely, that the membership of the two F.A.F. affiliates in New York approve it. In a special poll of the membership, the draft bill was rejected in favor of a self-regulatory program sponsored by the F.A.F. It was strongly felt that any regulation should be administered on a national, rather than statewide basis.

10. In a letter dated May 7, 1980, Philip C. Loomis, Director of the Office of Securities Markets Policy, Department of the Treasury, stated that: "the C.F.A. designation is recognized as the highest professional level, and is equivalent in standing to the C.P.A. professional designation in accounting".

11. More than 80 percent of petitioner's gross income for the taxable years at issue was derived from or directly attributable to personal services actually rendered by him.

12. Capital was not a material income producing factor in petitioner's business.

CONCLUSIONS OF LAW

A. That the activities engaged in by petitioner as a Chartered Financial Analyst during the years 1970, 1971 and 1972 required a professed knowledge of several departments of learning, gained by a prolonged course of specialized instruction and study which was used in its practical application to the affairs of others. Accordingly, such activities constituted the practice of a profession exempt from the imposition of unincorporated business tax within the meaning and intent of section 703(c) of the Tax Law.

B. That the activities engaged in by petitioner as a financial analyst during the years 1968 and 1969, prior to obtaining his Chartered Financial Analyst designation, did not constitute the practice of a profession within

the meaning and intent of section 703(c) of the Tax Law. Accordingly, the income derived from such activities is subject to the imposition of unincorporated business tax.

C. That the petition of Douglas E. Ferguson and Cynthia K. Ferguson is granted to the extent provided in Conclusion of Law "A", supra, and that said petition is in all other respects denied.

D. That the Audit Division is hereby directed to modify the Notice of Deficiency dated May 21, 1973, for the years 1968, 1969 and 1970 to be consistent with the decision rendered herein.

E. That the Notice of Deficiency dated January 28, 1974 for the years 1971 and 1972 is hereby cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 29 1982

PRESIDENT

Frank R. Koenig

COMMISSIONER

Mark J. ...

COMMISSIONER

*Present
James W. ...*