

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

GEORGE FORTUNATO

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of ~~Personal Income and~~ :
~~Unincorporated Business~~ :
Taxes under Article(s) 22 and 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1968 through 1972

State of New York
County of Albany

John Huhn , 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 13th day of December , 1978, ~~he~~ served the within
Notice of Decision by (certified) mail upon George Fortunato


(~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Mr. George Fortunato
2822 Brigham Street
Brooklyn, New York 11235

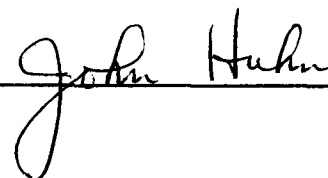
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

13th day of December , 1978.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

GEORGE FORTUNATO

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of ~~Personal Income and~~ :
~~Unincorporated Business~~ :
Taxes under Article(s) 22 and 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1968 through 1972

State of New York
County of Albany

John Huhn , 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 13th day of December , 1978, he served the within
Notice of Decision by (certified) mail upon John R. Serpico

(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: John R. Serpico, Esq.
186 Joralemon Street
Brooklyn, New York 11201

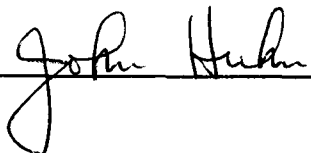
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

13th day of December , 1978







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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

December 13, 1978

**Mr. George Fortunato
2822 Bringham Street
Brooklyn, New York 11235**

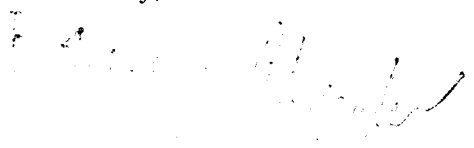
Dear Mr. Fortunato:

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) **690 and 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


**Michael Alexander
Supervising Tax
Hearing Officer**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GEORGE FORTUNATO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of the	:	
Tax Law for the Years 1968 through 1972	:	

Petitioner, George Fortunato, 2822 Brigham Street, Brooklyn, New York 11235, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1968 through 1972 (File No. 00363).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 23, 1977 at 2:45 P.M. Petitioner appeared by John R. Serpico, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner's income received as fees, as a workmen's compensation representative, was subject to unincorporated business tax for the years 1968 through 1972.

II. Whether petitioner had reasonable cause for his failure to file unincorporated business tax returns for the years 1968 through 1972.

FINDINGS OF FACT

1. Petitioner, George Fortunato, and his wife timely filed New York State combined income tax returns as New York residents for each of the years 1968 through 1972. He did not file a New York State unincorporated business tax return for any of said years.

2. On all of the returns, petitioner, George Fortunato, listed his occupation as being a compensation representative. On the 1972 income tax return only, petitioner listed an employer who paid him wages of \$20,000.00 and who withheld Federal and State income taxes.

3. On March 25, 1974 and on May 20, 1974, the Income Tax Bureau issued notices of deficiency, imposing unincorporated business taxes for 1968, 1969, 1970, 1971 and 1972. This was done on the ground that the income received from petitioner's activities as a compensation representative was subject to unincorporated business tax. The notice of deficiency delineated the amounts due as follows:

<u>YEAR</u>	<u>DEFICIENCY</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1968	\$ 394.08	\$ 98.52	\$ 116.90	\$ 609.50
1969	6,062.46	177.37	1,434.62	8,843.92
		1,169.47		
1970	2,330.69	21.51	411.69	3,533.58
		769.69		
1971	1,499.03	532.15	188.61	2,219.79
1972	2,404.66	709.38	197.64	3,311.68
TOTAL	<u>\$12,690.92</u>	<u>\$3,478.09</u>	<u>\$2,349.46</u>	<u>\$18,518.47</u>

The deficiencies included additional personal income taxes assessed for 1969 and 1970.

Penalties were assessed under sections 685(a), 685(a)(1) and 685(a)(2) of the Tax Law for failure to file unincorporated business tax returns and for failure to pay the tax required to be shown due on the unincorporated business tax returns for the years in question. A penalty for negligence in connection with the deficiencies of personal income tax was also assessed under section 685(b) of the Tax Law.

3. Petitioner, George Fortunato, timely filed a petition for redetermination of the deficiencies, requesting a formal hearing on the issue of his liability for unincorporated business tax.

4. Petitioner, George Fortunato, did not appear personally at the hearing. His attorney did not object to the admission into evidence of the report of a conference dated October 26, 1973, in which petitioner had stated that he held no college degrees and had not obtained an education at an accredited institution of higher learning.

5. Petitioner, George Fortunato, represents claimants for compensation before the Office of Workers' Compensation Programs (OWCP) of the United States Department of Labor. The OWCP was established under authority of 5 U.S.C. 8145, 8149; Secretary of Labor's Order No. 13-71, 36 FR 8155; and amended

by Employment Standards Order No. 2-74, 39 FR 34722. Representation of claimants before OWCP is now governed by 20 CFR, sections 10.142 and 10.143. Any claimant may appoint an individual to represent his or her interest in any proceeding for determination of a compensation claim, so long as it is done in writing or on the hearing record. Other than an admitted attorney in good standing, section 10.143 states:

"Other person. Any other person with the approval of the Office may be appointed as a representative so long as that person is not, pursuant to any provision of law, prohibited from acting as a representative."

6. Petitioner, George Fortunato, produced no proof that he is licensed to practice law, or that he has a license to practice before the OWCP as a compensation representative.

7. The field of activity which petitioner, George Fortunato, earned fees as a claims' representative is within the specialized branch of the law generally referred to as "workers' compensation" and has its own particularized principles which have general applicability to workers' compensation statutes (State and Federal) 20 CFR, section 10.150(a).

8. Neither preliminary professional education, nor long-term training nor demonstrated skill was pre-requisite to the engagement of applicant, George Fortunato, in his representation of claimants for workers' compensation. Specialized knowledge of the principles and application of workers'

compensation statutes have been acquired by petitioner, George Fortunato, and he has developed skills which he uses in his representation (for fees) of compensation claimants before the OWCP. These fees represented more than 80% of his total income. Capital was not a factor in the production of that income.

9. Petitioner, George Fortunato, relied on the advice of Milton B. Finger, a certified public accountant who prepared petitioner's Federal and state income tax returns. Petitioner followed that advice in failing to file unincorporated business tax returns from 1968 through 1972.

10. The additional New York State income tax assessed for 1969 and 1970 was not contested.

CONCLUSIONS OF LAW

A. That the activities of petitioner, George Fortunato, as a representative of claimants for workers' compensation before the Office of Workers' Compensation Programs of the U. S. Department of Labor, although benefiting from petitioner's specialized study and knowledge in dealing with complex problems in compensation, did not constitute the practice of a profession exempt from the imposition of unincorporated business tax, in accordance with the meaning and intent of section 703(c) of the Tax Law.

While the factors for determining a professional exemption set forth in Matter of Rosenblum v. State Tax Commission, 44 A.D.

2d 69, 353 N.Y.S. 2d 544, mot. for lv. to appeal denied, 34 N.Y. 2d 518, 359 N.Y.S. 2d 1025, 316 N.E. 2d 883 are not the exclusive test for applying the professional exemption, the court stated the governing rule as follows:

"In construing a taxing statute in order to determine the scope of a statutorily prescribed exemption, however, the rule is that the exemptions are to be strictly construed and that if any ambiguity or uncertainty exists it is to be resolved in favor of the sovereign and against exemption. Matter of Aldrich v. Murphy, 42 A.D. 2d 385, 34 N.Y. 2d 384"

B. That the activities of petitioner, George Fortunato, as a compensation claimant's representative during the years 1968 through 1972 constituted the carrying on of an unincorporated business. The income therefrom was subject to unincorporated business tax, in accordance with the meaning and intent of section 703 of the Tax Law.

C. That the petitioner, George Fortunato, had reasonable cause for his failure to file unincorporated business tax returns from 1968 through 1972; therefore, the penalties assessed pursuant to sections 685(a), 685(a)(1) and 685(a)(2) of the Tax Law are waived. There is nothing in the record to indicate that the deficiency in income tax payments was negligent. Petitioner relied on his tax advisor. The penalty under section 685(b) is waived.

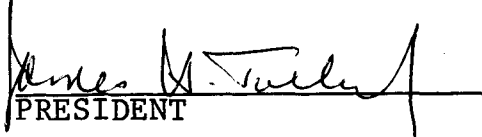
D. That the petition of George Fortunato is granted to

the extent of cancelling all penalties assessed pursuant to sections 685 of the Tax Law for the years 1968 through 1972; that the Income Tax Bureau is hereby directed to modify the notices of deficiency dated March 25, 1974 and May 20, 1974 and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

December 13, 1978


PRESIDENT


COMMISSIONER


COMMISSIONER