

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of

John T. Nicholas :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Personal Income & UBT :  
under Article 22 & 23 of the Tax Law  
for the Year 1973. :

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 26th day of November, 1979, he served the within notice of Decision by certified mail upon John T. Nicholas, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John T. Nicholas  
428 South Main St.  
North Syracuse, NY 13212

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  
26th day of November, 1979.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of

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for Redetermination of a Deficiency or a Revision :  
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Personal Income & UBT :  
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for the Year 1973. :

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 26th day of November, 1979, he served the within notice of Decision by certified mail upon Leon Rosenberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

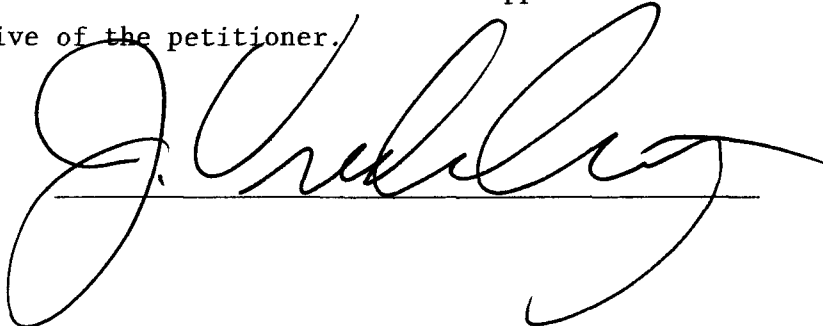
Mr. Leon Rosenberg  
c/o Gluck & Tobin  
570 North Broad St.  
Elizabeth, NJ 07208

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  
26th day of November, 1979.

Joanne Knapp



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

November 26, 1979

John T. Nicholas  
428 South Main St.  
North Syracuse, NY 13212

Dear Mr. Nicholas:

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 & 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  
Leon Rosenberg  
c/o Gluck & Tobin  
570 North Broad St.  
Elizabeth, NJ 07208  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|---|---|----------|
| In the Matter of the Petition             | : |          |
|   | : |          |
| of  | : |          |
|   | : |          |
| JOHN T. NICHOLAS                          | : | 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 | : |          |
| Year 1973.                                | : |          |

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Petitioner, John T. Nicholas, 428 South Main Street, North Syracuse, New York 13212, 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 year 1973 (File No. 19336).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 8, 1979 at 1:15 P.M. Petitioner appeared by Leon Rosenberg, PA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the petitioner's activities were that of an engineer, a profession exempt from the unincorporated business tax.

II. Whether the petitioner was a resident of New York State during the year 1973.

FINDINGS OF FACT

1. Petitioner, John T. Nicholas, filed a New York State Income Tax Nonresident Return for 1973 and an Unincorporated Business Tax Return which indicated the kind of business to be that of a sales engineer. He also filed Internal Revenue Service Form 3468, computation of investment credit, and

claimed a Federal investment credit of \$296.03 on his New York State Personal Income Tax Return.

2. The Income Tax Bureau issued a Statement of Audit Changes against petitioner, John T. Nicholas, on which the investment credit was disallowed since the assets were not used in the production of goods by manufacturing, processing, assembling, etc. pursuant to section 606(a) of the Tax Law. In addition, the Bureau contended that the petitioner maintained a permanent place of abode within New York State and spent more than 183 days within the State and therefore, considered him to be a resident of New York for income tax purposes. It also imposed a penalty, pursuant to section 685(c) of the Tax Law, for underpayment of estimated taxes. On April 14, 1977, the Income Tax Bureau issued a Notice of Deficiency for \$915.43 in personal income tax, plus penalty of \$183.43 and interest of \$205.78, for a total due of \$1,304.64.

3. On July 5, 1977, the Income Tax Bureau received a petition from John T. Nicholas, seeking a redetermination of the deficiency and requesting a refund of unincorporated business tax paid in the amount of \$1,344.89 on the grounds that the activities of an engineer constituted the practice of a profession exempt from the unincorporated business tax.

4. Pursuant to a contract dated November 15, 1972 between the petitioner and Automatic Switch Company of Florham Park, New Jersey, petitioner agreed to act as an engineering and sales consultant, in the capacity of an independent contractor for the Western New York State counties. Petitioner conducted business under the name of John T. Nicholas Associates during the year 1973 with a business address at 106 South Bay Road, North Syracuse, New York, and worked for only one principal, Automatic Switch Company (hereafter called Automatic). The services rendered by him involved working and consulting with engineers doing electrical and mechanical engineering on projects that required

automatic switch and valve products.

5. Petitioner is not a licensed engineer but is a specialist in his field of automatic switch and valve products with many years of experience. Petitioner attended Brooklyn Tech, Brooklyn Poly Tech and Pratt Institute. He majored in mechanical engineering with a minor in electrical engineering.

6. Petitioner's contract with Automatic states in part, that "consultant (petitioner) will render to Automatic and the customers of Automatic in the sales area such application, engineering and sales assistance and advice as necessary to enable Automatic to produce, sell and maintain such standard and/or special equipment as may from time to time be adapted or adaptable to the individual requirements of such customers, and to enable such customers to derive the fullest benefits from existing equipment in the field of new products of Automatic. The consultant agrees to supply Automatic, upon request, with complete reports of accounts called on, response of customers or prospective customers and any other information in regard to such activities as may be requested by Automatic. The consultant agrees to provide facilities, adequate in the opinion of Automatic, to carry out the application, engineering and sales activities covered by this Agreement. The consultant also agrees to abide by Automatic's application engineering and sales policies."

7. Petitioner was domiciled at 620 Holly Hill Drive, Brielle, New Jersey, but maintained an apartment in the Syracuse, New York area for his convenience. The petitioner also owned a gasoline service station in the Syracuse area so as to insure him gasoline during the gasoline crisis. Petitioner presented no evidence as to the amount of time he spent in New York State.

#### CONCLUSIONS OF LAW

A. That although the petitioner's activities required the technical knowledge of a mechanical and electrical engineer, the activities actually

performed by him were in the nature of selling, and the engineering services rendered were directly attributed to his selling activities. Accordingly, the petitioner's business income from the Automatic Switch Company did not constitute income from the practice of a profession within the meaning and intent of section 703(c) of Article 23 of the Tax Law and that such income is subject to the unincorporated business tax in accordance with section 701 of the Tax Law.

B. That the petitioner has failed to sustain the burden of proof imposed under section 689(e) of the Tax Law to establish that he did not maintain a permanent place of abode in this state and that he did not spend less than 183 days of the taxable year in this state.

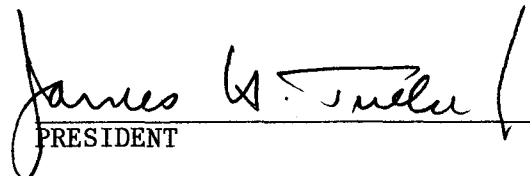
C. That petitioner, John T. Nicholas, is taxable as a resident, (although domiciled outside New York State) in accordance with section 605(a)(2) of the Tax Law.

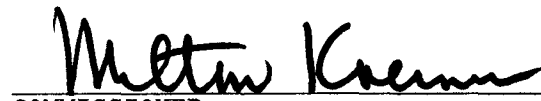
D. That the petition of John T. Nicholas is denied and the Notice of Deficiency issued April 14, 1977 is sustained, together with such additional interest as may be lawfully owing.


DATED: Albany, New York

NOV 26 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER