

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Laurent Oppenheim, Jr. :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax & UBT :
under Article 22 & 23 of the Tax Law :
for the Years 1961 - 1969. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

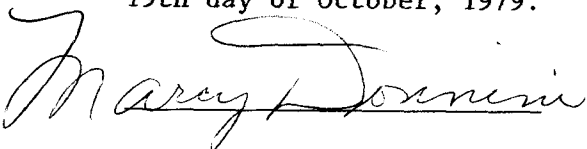
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of October, 1979, he served the within notice of Decision by mail upon Laurent Oppenheim, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

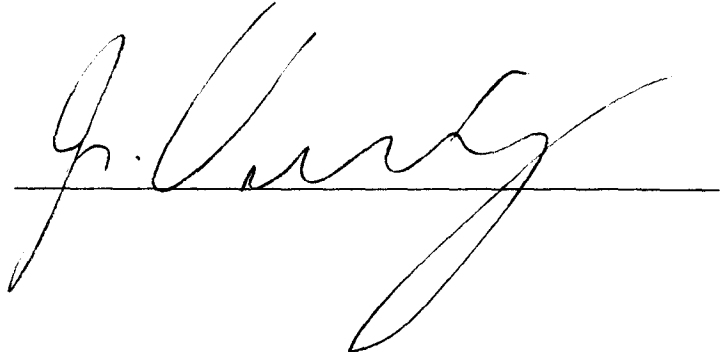
Laurent Oppenheim, Jr.
700 Park Avenue
New York, NY 10021

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
19th day of October, 1979.


Mary Dominici


J. Vredenburg

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

October 19, 1979

Laurent Oppenheim, Jr.
700 Park Avenue
New York, NY 10021

Dear Mr. Oppenheim:

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
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :

of :

LAURENT OPPENHEIM, JR. :

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 1961 through 1969.

Petitioner, Laurent Oppenheim, Jr., 700 Park Avenue, New York, New York 10021, filed petitions 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 1961 through 1969 (File No. 01356).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on September 9, 1976 at 2:00 P.M. Petitioner appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (Michael Weinstein, Esq., of counsel).

ISSUES

I. Whether the services rendered by petitioner during 1961 through 1968 were integrated and interrelated with his activities in connection with his unincorporated business, so as to subject his salary to unincorporated business tax.

II. Whether the Notice of Deficiency issued against petitioner for 1961 and 1962 was timely.

III. Whether a "Claim of Right" deduction taken by petitioner on his 1966 Federal tax return, pursuant to Section 1341 of the Internal Revenue Code, was allowable for New York State income tax purposes as a long-term capital loss carryover deduction for 1968 and 1969.

FINDINGS OF FACT

1. Petitioner, Laurent Oppenheim, Jr., filed New York State personal income tax and unincorporated business tax returns for the years 1961 through 1969.
2. On October 2, 1967, the Income Tax Bureau issued a Statement of Audit Changes against petitioner for 1961 and 1962 in the sum of \$296.62 in unincorporated business tax, plus interest of \$82.81, for a total of \$379.43. Said Statement was based on the inclusion of wages as additional unincorporated business gross income. In accordance with the aforementioned Statement, a Notice of Deficiency was issued on November 27, 1967.
3. On May 24, 1971, the Income Tax Bureau issued a Statement of Audit Changes against petitioner for the years 1963 through 1966 in the sum of \$1,234.60 in unincorporated business tax, plus interest of \$403.74, for a sum of \$1,638.34. Said Statement was based on the inclusion of wages as additional unincorporated business gross income. In accordance with the aforementioned Statement, a Notice of Deficiency was issued on May 24, 1971.
4. On May 24, 1971, the Income Tax Bureau issued a Statement of Audit Changes against petitioner for the years 1967 through 1969 for personal income and unincorporated business tax in the amount of \$3,646.39, plus interest of \$469.99, for a total of \$4,116.38. Said Statement was based on the disallowance of petitioner's New York long-term capital loss deduction for 1968 and 1969 for personal income tax purposes, together with the inclusion of wages as additional unincorporated business gross income for 1967 and 1968. In accordance with the aforementioned Statement, a Notice of Deficiency was issued on May 24, 1971.
5. The Income Tax Bureau conceded that the Notice of Deficiency dated November 27, 1967 for 1961 and 1962 was not timely issued. On May 10, 1972 it abated said Notice in full.

6. During the years 1963 through 1969, petitioner worked part-time as an industrial consultant and as such, he advised various corporations on numerous industrial problems such as corporate reorganizations. He maintained an office during the years in question in connection with his consulting activities.

7. In 1959 as part of a syndicate, petitioner bought control of Specialty Converters, a Massachusetts corporation and the predecessor of Specialty Composites Corporation, a Delaware corporation, (hereinafter "specialty"). Petitioner was elected chairman of the Board of Directors and the chief executive officer at the time of purchase and was responsible for the managerial and supervisory activities associated with such positions for the years in issue. Specialty was engaged primarily in the research and development of processes for thin sheet casting of flexible urethane foam, with the intention of licensing such processes.

8. Petitioner had no prescribed working hours with Specialty, but did spend in excess of 60% of his time fulfilling his managerial duties for said firm. Petitioner was requested to attend a certain percentage of corporate meetings during the years in question. He was covered by a group life insurance plan established by the corporation for its employees. Specialty did not provide a pension plan for its employees, but did deduct social security and Federal income taxes from petitioner's salary. New York State tax was not withheld from his salary. Specialty did pay petitioner a modest amount for office expenses attributable to his work for the corporation, which petitioner contended he included as income on his personal income tax returns.

9. As a director of Hanson-Van Winkle-Munning Co. (hereinafter "Hanson") in 1963, petitioner sold some of said corporation's stock and reported the gain as a long-term capital gain on his 1963 Federal and New York personal income tax returns. Later in said year he purchased additional Hanson stock.

10. In 1966, following litigation, it was determined that petitioner had obtained "short swing profits" in 1963, in violation of Section 16(b) of the Securities and Exchange Act and as a result, petitioner, was forced to pay over his profit from said sale to Hanson's successor corporation.

11. In accordance with Section 1341 of the Internal Revenue Code, petitioner, under the "claim of right" doctrine, was entitled to an adjustment of his 1966 Federal tax liability as a result of repaying "short swing profits" to the company's successor corporation.

12. On January 12, 1967, petitioner's then representative asked the New York State Tax Commission how petitioner should treat the repayment to Hanson's successor in 1966. In a letter dated March 9, 1967, Commissioner Joseph Murphy advised the representative that although Article 22 of the Tax Law does not specifically cover the repayment at issue, petitioner could take a deduction for New York State income tax purposes "for the year in which the amount is repaid."

13. The representative misconstrued Commissioner Murphy's reply and advised petitioner that he could treat the loss as a long-term capital loss carryover for New York State income tax purposes. Subsequently, petitioner treated the loss incurred from the repayment to Hanson's successor as a long-term capital loss carryover on his New York State income tax returns for 1968 and 1969.

CONCLUSIONS OF LAW

A. That the Notice of Deficiency issued for 1961 and 1962 was not timely issued in accordance with sections 681 and 683(d) of the Tax Law.

B. That the services rendered by petitioner during the years 1963 through 1968 were not integrated and interrelated with his activities in connection with his unincorporated business as an industrial consultant so as to constitute part of a business regularly carried on by him. Therefore, the wages received by petitioner for services rendered as an employee were exempt from unincorporated business tax, in accordance with the meaning and intent of section 703(b) of the Tax Law.

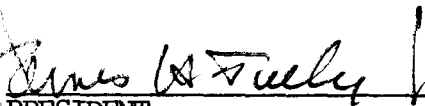
C. That under section 612 of the Tax Law, the New York State adjusted gross income of a taxpayer means his Federal adjusted gross income with specific modifications. Since petitioner took a "claim of right" deduction on his 1966 Federal income tax return, pursuant to Section 1341 of the Internal Revenue Code, he could not take (and his Federal income tax returns for 1968 and 1969 did not reflect) the long-term capital loss carryover used in calculating his New York State adjusted gross income for the aforesaid years; therefore, petitioner is precluded from taking a long-term capital loss carryover deduction in 1968 and 1969, within the meaning and intent of section 612 of the Tax Law.

D. That the petition of Laurent Oppenheim, Jr. is granted to the extent of cancelling the unincorporated business tax and the interest attributable to said tax, for the years 1961 through 1968; that the Income Tax Bureau is hereby directed to modify the notices of deficiency issued on May 24, 1971 and that, except as so granted, the petition is in all other respects denied.

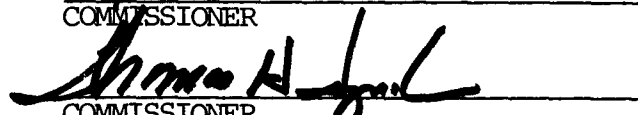
DATED: Albany, New York

OCT 19 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER