

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Alfred Oppenheimer

:

:

: 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 :
Years 1971, 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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Alfred Oppenheimer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alfred Oppenheimer
107 Cresthill Rd.
Yonkers, NY 10710

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
6th day of November, 1981.

Cornelia A. Haysland

J. Vredenburg

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

November 6, 1981

Alfred Oppenheimer
107 Cresthill Rd.
Yonkers, NY 10710

Dear Mr. Oppenheimer:

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 Petition	:	
	:	
of	:	
	:	
ALFRED OPPENHEIMER	:	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 1971 and 1972.	:	

Petitioner, Alfred Oppenheimer, 107 Cresthill Road, Yonkers, New York 10710, 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 1971 and 1972 (File No. 19528).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 25, 1981 at 9:15 A.M. Petitioner Alfred Oppenheimer appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether the collection of an amount contended to be an overstatement of estimated tax paid for the year 1971 is barred by the period of limitations and/or laches.

II. Whether petitioner's activities as an electrical and lighting designer constitute the practice of an exempt profession pursuant to section 703(c) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Alfred Oppenheimer, timely filed New York State income tax resident returns for the years 1971 and 1972 on which petitioner reported business income from his activities as an electrical designer. In addition, petitioner reported estimated tax payments of \$1,500.00 for the year 1971. Petitioner did not file unincorporated business tax returns for the years 1971 and 1972.

2. On June 27, 1977, the Audit Division issued a Notice of Deficiency for the years 1971 and 1972 for \$2,475.00, plus interest of \$774.99, along with an explanatory Statement of Audit Changes originally issued on July 31, 1975 on which the income derived from petitioner's activities as an electrical designer was held subject to the unincorporated business tax. Also, additional personal income tax of \$500.00 was imposed on its determination that estimated tax payments reported by the petitioner for the year 1971 exceeded the amount shown by the Audit Division's records.

3. Petitioner protested the length of time the Audit Division took in notifying him of an alleged discrepancy between the estimated tax on the Audit Divisions records and estimated tax payments shown on the return. Petitioner argued that his records are routinely discarded after three years and, therefore, the evidence establishing estimated tax payments of \$1,500.00 was no longer available.

4. The Audit Division reconstructed from its computer records petitioner's 1971 estimated tax account as follows:

Credit from 1970 Return	\$ 25.50
1st payment	224.50
2nd payment	250.00
3rd payment	250.00
4th payment	250.00
Total 1971 Estimated Tax Payments	<u>\$1,000.00</u>

Petitioner claimed estimated tax payments of \$1,500.00 on his 1971 New York State Income Tax Resident Return. Petitioner's 1970 and 1972 tax returns indicated total estimated tax payments of \$1,000.00.

5. Petitioner, Alfred Oppenheimer, was a self-employed individual during the years 1971 and 1972 rendering services as a designer of lighting and electrical systems. He was usually retained by consulting engineers and/or architects to conduct surveys, analyze electrical needs, and develop written plans with designs and specifications of electrical systems for buildings in the institutional and commercial field. These designs and specifications were utilized and incorporated into the services rendered by the consulting engineers and/or architects who had retained petitioner's services.

6. Encompassed in petitioner's services are the design and specifications of lighting and power systems, electrical distribution systems, control facilities, security systems and electrical heating systems. Petitioner's experience has made him fully familiar with requirements of various governmental agencies, such as FHA, GSA, UDC, U.S. Post Office, Corps of Engineers, and the N.Y. State and City housing authorities.

7. Petitioner does not have a college degree or any formal education in engineering or electrical designing. He obtained his skills and expertise through on the job training and approximately 25 years of experience. Sometime in 1967 or 1968, petitioner applied to the New York State Education Department for admission to an examination to become a licensed professional engineer. In lieu of a degree, the State Education Department required petitioner to demonstrate at least twelve years of practical experience which they described as;

"Practical experience in engineering work to be considered of a grade and character satisfactory to the State Board for Engineering and Land Surveying shall be such as to require the intensive application of engineering principles in the

practical solution of engineering problems. This work shall predicate a knowledge of engineering mathematics, physical and applied sciences, properties of materials and the fundamental principles of engineering design. It shall be broad in scope and of such nature as to develop and mature the applicant's engineering knowledge and judgment."

8. Petitioner established the practical experience needed and was granted admission to an examination for a licensed professional engineer. However, his efforts to pass the examination administered by the State Education Department were unsuccessful. Accordingly, petitioner did not call himself an electrical engineer, and chose the label of "electrical and lighting designer", although the character of the services rendered were in the nature of electrical engineering.

9. Petitioner submitted a number of letters, and reference forms from architects and professional engineers licensed by the State Education Department confirming petitioner's skills and knowledge in the field of engineering and certifying that in their opinion;

- (a) petitioner acquired at least a knowledge and background in engineering equal to that of an engineering college graduate.
- (b) petitioner acquired four years of satisfactory engineering experience beyond the Engineering Baccalaureate college level.
- (c) petitioner demonstrated an increasing knowledge of the engineering field and assumed increasing responsibility for engineering works.
- (d) no reservations existed with regard to petitioner's engineering ability, professional conduct and moral character.

10. Petitioner is listed as a member of staff of "readily available experts in most phases of Engineering and Planning" at a prestigious engineering firm located in the City and State of New York.

11. Capital is not a material income producing factor and more than 80 percent of petitioner's income is derived from services actually rendered by him.

CONCLUSIONS OF LAW

A. That section 681(d) of the Tax Law provides that a mathematical error includes an overstatement of estimated tax payments; and section 682(a) of the Tax Law provides, in part, that the amount of tax "which a return would have shown to be due, but for a mathematical error, shall be deemed to be assessed on the date of filing of the return". Accordingly, section 683(a) of the Tax Law, which provides that a tax shall be assessed within three years after the return was filed, is not applicable since the disputed \$500.00 at issue is deemed to have been assessed on the date the New York State Income Tax Resident Return for the year 1971 was filed. In addition, it is noted that the State cannot be estopped from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority. (Matter of McMahan v. State Tax Commission, 45 A.D. 2d 624, 360 N.Y.S. 2d 495)

B. That petitioner, Alfred Oppenheimer, was properly notified as required by section 681(d) of the Tax Law that \$500.00 of tax is due and has been assessed; and that such notice is not considered as a Notice of Deficiency for purposes of sections 681, 687(f), and 689(b) of the Tax Law, nor shall such assessment or collection be prohibited by the provisions of section 681(c) of the Tax Law.

C. That petitioner's occupation, gained by a prolonged course of specialized experience in the electrical engineering field which resulted in attainments in professional knowledge, constitutes the practice of a profession within the meaning and intent of section 703(c) of the Tax Law and the income derived

therefrom during the years 1971 and 1972 is not subject to the unincorporated business tax.

D. That the petition of Alfred Oppenheimer is granted to the extent that the Notice of Deficiency issued June 27, 1977 is cancelled without prejudice to the assessment of \$500.00 mentioned in paragraph "B" of this decision. Such assessment remains outstanding and is due along with such interest as may be lawfully owing.

E. That except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER