

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

La Donna Swan :

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 1972 & 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 5th day of February, 1981, he served the within notice of Decision by certified mail upon La Donna Swan, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

La Donna Swan
9719 Jennings Rd.
Eden, NY 14057

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
5th day of February, 1981.

Connie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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for Redetermination of a Deficiency or a Revision :
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Unincorporated Business Tax :
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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 5th day of February, 1981, he served the within notice of Decision by certified mail upon Milton Pitterman 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. Milton Pitterman
24 Cypress Court
Williamsville, NY

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
5th day of February, 1981.

Conni P. Hagelund

J. Vredenburg

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

February 5, 1981

La Donna Swan
9719 Jennings Rd.
Eden, NY 14057

Dear Ms. Swan:

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
Milton Pitterman
24 Cypress Court
Williamsville, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LADONNA SWAN	:	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 1972 and 1973.	:	

Petitioner, LaDonna Swan, 9719 Jennings Road, Eden, New York 14057, filed a petition for redetermination of a deficiency or for refund of personal income taxes or unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1972 and 1973 (File Nos. 10347 and 10348).

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on July 15, 1977 at 9:00 A.M. Petitioner appeared personally and with her representative Milton Pitterman. The Income Tax Bureau appeared by Peter Crotty, Esq. (James J. Morris, Jr., Esq., of counsel).

ISSUES

I. Whether petitioner is subject to unincorporated business tax or exempt therefrom as a professional.

II. Whether petitioner is entitled to deduct business losses growing out of transactions conducted in her home.

FINDINGS OF FACT

1. Petitioner resides in the State of New York and conducts her business affairs under the name of Ocular Restoration Clinic, within New York State.

2. Petitioner bought and sold certain household furnishing items and collectibles through her home during the years 1972 and 1973 under the name of

Eden Associates.

3. Petitioner's home was in a zoning district in which business operation was prohibited.

4. Petitioner is engaged in a business of examining patients, analyzing facial and skull bone configuration, muscle tissue, eyeball shape, size, color and motion capabilities, reconstruction of eyeball socket, manufacture, insertion and follow-up care of artificial eyeballs, and dedicated attention or counseling of patients regarding the practical aspects of wearing such artificial eyeballs and their care as well as helping patients to cope with psychological adjustments often observed.

5. Petitioner is a pioneer in her chosen field of endeavor inspired by her own dissatisfaction with the artificial eyes available to her when she was in need. Petitioner has been involved in training and education in her field for almost forty (40) years, and petitioner has solved and/or corrected many traditional deformities and/or deficiencies earlier accepted as "the way it had to be". No college curricula was available much less a group of books from which to learn. Petitioner has developed a highly sophisticated, scientific knowledge of anatomy and the eye.

6. Photograph exhibits clearly demonstrate the remarkable results of petitioner's efforts as well as the attention to detail of physical anatomy with cosmetic appearance as a by-product.

7. Petitioner treats each patient individually and engages in long-term care and follow-up, and the artificial eyeballs each are incredibly unique and creative and designed for the respective patient for whom each is designed. Petitioner works with every patient and closely supervises each of her assistants/employees.

8. Petitioner has been instrumental in the creation, organization and operation of the American Society of Ocularists, and the society, under the guiding hand of petitioner working with a few others, has created and administered an apprenticeship program in accordance with the Standards of the U.S. Department of Labor, and more particularly, at least as intensive as programs of study for other, well-recognized professions -- namely, 750 hours of classroom instruction and five years or 10,000 hours of on-the-job apprenticeship training, much of which deals with anatomy taught by physicians.

9. Petitioner, working with the aforementioned society, attempted to create a four-year college course of professional study, but despite many contacts, each and every college felt that there were too few blinded people who might benefit from such services to warrant the establishment of such a college program.

10. Petitioner has been consulted by and works closely with Vocational Rehabilitation, State Aid projects, Veterans Administration, Attica State Prison, and numerous doctors and hospitals.

11. Petitioner's charges for services rendered are comprised of a miniscule portion for materials, and the bulk is paid for the care and service, and capital investment is not a factor in income production.

12. Petitioner frequently attends in surgery and assists the most skilled eye surgeons in how to best prepare for the ultimate insertion of a prosthetic eyeball of pleasant, matching appearance, and is a consultant on the staff of five hospitals.

13. Petitioner implants artificial eyes and other carefully designed devices over a period of three to twelve months; thereby shaping and preparing the eye socket, the nearby muscles, lids and facial tissue for the final insertion of the perfectly matching eyeball.

14. Petitioner, despite her status as "the pioneer", was not covered by a grandfather clause, and she, too, undertook to qualify for certification under the American Society of Ocularists, and she abides by the standards of conduct and ethics principles drafted to govern the actions of herself and others like herself.

15. Petitioner does not maintain an inventory of "stock eyes" for sale to patients as is done by certain companies who render no service.

16. Petitioner received two statements of audit changes dated March 31, 1975, one pertaining to Ocularist Services and the other the Eden Associates business in petitioner's home, and two IT-90 forms, Notice of Deficiency, dated November 24, 1976.

17. Petitioner filed a petition for redetermination dated January 5, 1976 in response to the aforementioned IT-90 forms.

CONCLUSIONS OF LAW

A. That petitioner's petition was timely filed with the State Tax Commission.

B. That petitioner failed to meet her burden of proof on the personal income tax items pertaining to business loss deductions in that no evidence was submitted in support thereof.

C. That section 703(c) of the Tax Law clearly is the controlling statute and states that a person engaged in "any other profession" (other than those specifically enumerated therein), in order to be exempt from the imposition of the unincorporated business tax, must earn income from professional activity to be characterized by a professed knowledge of some depth gained through a prolonged course of study and specialized instruction, practically applied to the affairs of others through teaching or advising others in the practice of the "profession", where income is unrelated to capital and when more than 80 percent of the income stems from personal services rendered by the individual.

D. That petitioner has satisfied each and every test intended or expressed in the statute in that petitioner has engaged in a prolonged course of study, has developed an indepth knowledge in the field of medical science, makes practical application of said knowledge in treating her patients and in training apprentices.

E. That petitioner has demonstrated more than finely tuned skill; in fact, petitioner conducts her affairs in far more depth and at least with as much professionalism as an optometrist, a profession clearly accorded an exemption from unincorporated business tax.

F. That petitioner has demonstrated such knowledge and professionalism that five hospitals and scores of doctors have sought her assistance and consultation in surgery and eye reconstruction, and evidentiary exhibits are part of this record attesting thereto.

G. That petitioner, at all times herein concerned, relied upon the professional advice of her accountants or attorneys.

H. That the petition of LaDonna Swan should be granted to the extent that her income from her ocularist business be exempt as a profession from the imposition of the unincorporated business tax and the Notice of Deficiency thereon dismissed; and that her petition be denied with regard to personal income tax business loss deductions and the Notice of Deficiency thereon sustained except that the penalties under section 685(c) are to be waived based upon petitioner's reliance upon her accountant in the preparation of her return.

DATED: Albany, New York

FEB 05 1981

STATE TAX COMMISSION

James A. Suel
PRESIDENT

Thomas H. Suel
COMMISSIONER

Francis R. Koling
COMMISSIONER