

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
William J. Warren :  
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 1976 - 1979. :  
\_\_\_\_\_

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon William J. Warren, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William J. Warren  
100 Lake Ledge Dr.  
Williamsville, NY 14221

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  
28th day of September, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
William J. Warren :  
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 1976 - 1979. :  
\_\_\_\_\_

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Edward J. Schunk the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward J. Schunk  
3871 Harlem Rd.  
Buffalo, NY 14215

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  
28th day of September, 1983.

Susan Powell

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

Connie Hagelund

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

September 28, 1983

William J. Warren  
100 Lake Ledge Dr.  
Williamsville, NY 14221

Dear Mr. Warren:

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 Law 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  
Law Bureau - Litigation Unit  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Edward J. Schunk  
3871 Harlem Rd.  
Buffalo, NY 14215  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
WILLIAM J. WARREN	:	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 1976 through 1979.	:	

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Petitioner, William J. Warren, 100 Lake Ledge Drive, Williamsville, New York 14221, 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 1976 through 1979 (File No. 33284).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on March 11, 1983 at 10:30 A.M. Petitioner appeared by Edward J. Schunk, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Patricia Brumbaugh, Esq., of counsel).

#### ISSUES

I. Whether petitioner's services as a dental technician making dentures and bridgework qualified him as a professional for unincorporated business tax purposes.

II. Whether petitioner qualified for the maximum tax rate for 1978 and 1979 on New York personal service income.

III. Whether petitioner should be allowed a credit for a deduction for interest expense on a stock margin account.

IV. Whether penalties imposed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law should be waived.

FINDINGS OF FACT

1. Petitioner, William J. Warren, and his wife, Shirley, filed separate New York State income tax resident returns on combined form IT-201/208 for the years 1976 through 1979. Petitioner filed a New York State Unincorporated Business Tax Return for 1976, but did not do so for the years 1977 through 1979.

2. On December 11, 1980, the Audit Division issued a Notice of Deficiency against petitioner in the amount of \$13,124.22, plus penalty and interest of \$5,921.92, for a total due of \$19,046.14 for the year 1976. On March 20, 1981, the Audit Division issued a second Notice of Deficiency against petitioner in the same amount, plus penalty and interest of \$6,444.82, for a total due of \$19,569.04 for the years 1976 through 1979. The Notice explained that the prior notice issued on December 11, 1980 had failed to list all of the tax years for which there was determined to be a deficiency.

3. For 1976, the Audit Division, based on Federal audit adjustments, increased petitioner's income subject to tax by \$753.00 for unreported dividend income and \$22.60 for the resulting adjusted medical expense, for a total adjustment of \$775.60. The Audit Division adjusted petitioner's 1977 income by increasing dividend income by \$891.00 and \$26.73 for the resulting adjusted medical expense. For the years 1977 through 1979, the Audit Division disallowed a salary expense of \$2,600.00 per year paid by petitioner to his wife. The income of petitioner's wife was thereby reduced by the \$2,600.00 for each year. The Audit Division later conceded that the salary expense should have been allowed and, on January 14, 1982, issued a revised Statement of Personal Income

Tax Audit Changes reflecting said allowance. For 1979, the Audit Division disallowed \$1,500.00 of a capital loss deduction which disallowance resulted from separate filing by petitioner and his wife. The Audit Division also reduced the personal service income claimed by petitioner to 30 percent for 1978 and 50 percent in 1979 resulting in additional tax due for each year.

4. Petitioner attached a statement from his accountant to his returns for 1977 through 1979 stating that he considered his services as a dental technician to be those of a professional and thus not subject to unincorporated business tax. The Audit Division determined that petitioner did not qualify as a professional and computed unincorporated business tax based on petitioner's Federal Schedule C, Profit or (Loss) From Business or Profession. In computing unincorporated business tax due, the Audit Division again disallowed the \$2,600.00 salary expense paid by petitioner to his wife. This expense was later allowed and adjustments made on the Statement of Unincorporated Business Tax Audit Changes issued January 14, 1982.

5. Petitioner is a dental technician. His work primarily involves making dentures and bridgework from prescriptions supplied by dentists. To qualify for this occupation, petitioner took courses at the University of Buffalo and Ohio State University. There was no evidence indicating that petitioner received a degree from either of the aforesaid schools or whether a degree exists for his particular field of work. Furthermore, no license is required for petitioner's occupation and there is no board or association which sets standards of conduct, ethics and minimum educational levels for this field. From time to time, petitioner attends courses and seminars designed to keep dentists and technicians current on the latest techniques being employed in crown and bridge dentistry. Petitioner argued that, because of his skills,

background and education, he should be considered a professional and thus exempt from the unincorporated business tax.

6. Petitioner's clients are usually dentists who require petitioner's services in preparing crowns, bridges and dentures for their patients. Petitioner goes to the dentists' offices and assists in taking impressions from which the dentures, crowns and bridges are made. Then, working from the prescriptions dentists provide, petitioner produces the crowns and bridgework. On occasion, petitioner consults with the dentists at their office or at his laboratory regarding the problems particular patients may have with their crowns or bridgework.

7. Petitioner produces dentures in his laboratory, which is small, measuring only thirteen by sixteen feet. Petitioner has no employees other than his wife, who performs occasional clerical work. All dentures and bridgework are made personally by petitioner. Petitioner is recognized by dentists for his skill in creating dentures.

8. Petitioner maintained no beginning or end-of-year inventories since he used all of the raw materials purchased during the year. The ratio of petitioner's cost of materials to gross sales was approximately 33 percent for 1978 and 40 percent for 1979. Petitioner's depreciable equipment, not including an automobile, was valued at \$2,328.73 in 1979. His net operating profit for 1979 was \$78,664.32. Petitioner maintained that, because he personally made all of the dentures and bridgework, added significant value to the raw materials fashioned into dentures, had a low ratio of materials costs to gross receipts, and a low ratio of equipment to net profit, capital was not a material income-producing factor in his business and, therefore, all of his business income should be allowed as personal service income for maximum tax purposes.

9. During 1976, petitioner had a stock margin account from which he received dividends and for which he paid interest expenses. Petitioner omitted \$753.00 in dividends from his 1976 tax returns. The Internal Revenue Service assessed additional tax on the unreported dividends which tax petitioner paid. The Department of Taxation and Finance also included tax due on \$753.00 of unreported dividends in the notices of deficiency issued December 11, 1980 and March 20, 1981. Upon review of petitioner's records, his accountant discovered that petitioner had also failed to claim a deduction of \$1,511.00 for interest paid on the aforesaid margin account. Petitioner, therefore, filed an amended Federal return for 1976 claiming a refund. The Internal Revenue Service approved the deduction for said interest expense and refunded the appropriate amount to petitioner. Petitioner now requests that the Audit Division credit him for a deduction of \$1,511.00 for the interest expense on his margin account for 1976.

10. For taxable year 1976, petitioner filed an unincorporated business tax return and paid the tax. After analyzing petitioner's business activities and reviewing the Tax Law and regulations, petitioner's accountant advised him that, in the accountant's opinion, petitioner was a professional and, therefore, exempt from New York State Unincorporated Business Tax. Relying on the aforesaid advice, petitioner did not file unincorporated business tax returns for taxable years 1977 through 1979. Petitioner argued that his reliance on his accountant's advice was reasonable cause for his failure to file a return and pay the tax and, as a result, penalties imposed under sections 685(a)(1) and 685(a)(2) of the Tax Law should be waived.



CONCLUSIONS OF LAW

A. That section 703(c) of the Tax Law provides:

"The practice of law, medicine, dentistry or architecture, and the practice of any other profession in which capital is not a material income-producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual or the members of the partnership or other entity, shall not be deemed an unincorporated business."

B. That 20 NYCRR 203.11(b)(1)(i) provides:

"For purposes of this subdivision, the term 'other profession' includes any occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study, is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interests or welfare in the practice of an art or science founded on it. The word profession implies attainments in professional knowledge as distinguished from mere skill and the application of knowledge to uses for others as a vocation. The performing of services dealing with the conduct of business itself, including the promotion of sales or services of such business and consulting services, does not constitute the practice of a profession even though the services involve the application of a specialized knowledge."

C. That the factors which should be considered in determining what activity constitutes the practice of a profession include whether a long-term educational background generally associated with a degree in an advanced field of science or learning is required; whether there is the requirement of a license which indicates sufficient qualifications have been met prior to engaging in the occupation; and whether there is control of the occupation by standards of conduct, ethics, and malpractice liability (Rosenbloom v. State Tax Commission, 44 A.D.2d 69, mot. for lv. to app. den. 34 N.Y.2d 518).

D. That petitioner's business, although requiring a great deal of skill, does not require a degree in an advanced field of learning nor a license setting minimum qualifications. Moreover, there is no regulation or control of the occupation by standards of conduct. Petitioner's occupation involves mere

skill and the application of knowledge to uses for others as a vocation and is thus not a profession within the meaning and intent of section 703(c) of the Tax Law.

E. That section 603-A of the Tax Law, in effect during the years 1978 and 1979, provides for a maximum tax on personal service income. Section 603-A(b)(1) provides that New York personal service income means, in part, items of income includible as personal service income for purposes of section 1348 of the Internal Revenue Code.

F. That Treasury Regulation §1.1348-3(a)(1) defines earned income as "any item of gross income which is earned income within the meaning of section 401(c)(2)(C) or section 911(b)....[T]he term includes --

(D) Gains...and net earnings derived from the sale or other disposition of...property...by an individual whose personal efforts created such property (Emphasis supplied)."

Treasury Regulation 1.1348-3(a)(3) provides that "[i]f an individual is engaged in a trade or business...in which both personal services and capital are material income-producing factors, a reasonable allowance as compensation for the personal services actually rendered by the individual shall be considered earned income...".

Treasury Regulation 1.1348-3(a)(3)(ii) provides that:

"[c]apital is a material income-producing factor if a substantial portion of the gross income of the business is attributable to the employment of capital in the business, as reflected, for example, by a substantial investment in inventories, plant, machinery or other equipment."

G. That, although capital was a material income-producing factor, petitioner employed no assistants in his production of dentures and bridgework and all of his sales were of property created by his personal efforts (see Treasury Regulation 1.1348-3(a)(3)(iii)). Therefore, petitioner's business income

qualified as personal service income under said Regulation and should have been accorded 100 percent maximum tax treatment under section 603-A(b)(1) of the Tax Law.

H. That since petitioner demonstrated that he had an interest expense which he failed to deduct on his 1976 return, he is entitled to a deduction of \$1,511.00 for said interest expense for 1976.

I. That inasmuch as petitioner erroneously, but in good faith and on the advice of his accountant, believed that, as a dental technician, he was exempt as a professional from the requirement to file unincorporated business tax returns, reasonable cause for failure to file existed within the meaning and intent of sections 685(a)(1) and 685(a)(2) of the Tax Law and the penalties imposed for late filing and payment of unincorporated business tax are hereby cancelled.

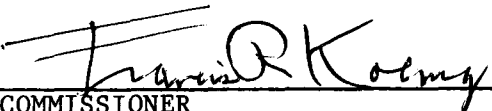
J. That the petition of William J. Warren is granted to the extent indicated in Findings of Fact "3" and "4" and Conclusions of Law "G", "H" and "I"; that the Audit Division is directed to modify the notices of deficiency issued December 11, 1980 and March 20, 1981 accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER