

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Arthur L. & Lena R. Giard :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income  
& Unincorporated Business Tax under Article(s) :  
22 & 23 of the Tax Law for the Years 1979 - 1981.

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State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 11th day of March, 1987, he/she served the within notice of Decision by certified mail upon Arthur L. & Lena R. Giard the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur L. & Lena R. Giard  
3170 Fancher Rd.  
Albion, NY 14411

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
11th day of March, 1987.

Janet M. Snay  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

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

March 11, 1987

Arthur L. & Lena R. Giard  
3170 Fancher Rd.  
Albion, NY 14411

Dear Mr. & Mrs. Giard:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
ARTHUR L. AND LENA R. GIARD	:	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 1979 through 1981.	:	

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Petitioners, Arthur L. and Lena R. Giard, 3170 Fancher Road, Albion, New York 14411, 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 1979 through 1981 (File No. 56481).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on September 16, 1986 at 2:45 P.M., with all evidence to be submitted by September 23, 1986. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the conferee's determination in this matter was untimely and, if so, whether the petition should therefore be granted.

II. Whether the Audit Division's answer in this matter was proper.

III. Whether the Audit Division's application of certain personal income tax prepayments to the unincorporated business tax liability asserted herein was proper.

IV. Whether petitioner Arthur L. Giard's business of aerial application or cropdusting was, during the period at issue, exempt from the imposition of the

unincorporated business tax pursuant to section 703(j) of the Tax Law, or, alternatively, section 703(c) of the Tax Law.

V. Whether reasonable cause exists for the abatement of the penalty asserted herein.

FINDINGS OF FACT

1. On July 27, 1984, following an audit, the Audit Division issued to petitioners, Arthur L. and Lena R. Giard, a Notice of Deficiency asserting additional personal income tax and unincorporated business tax due for the years 1979, 1980 and 1981 in the total amount of \$6,547.86, together with interest and penalty of \$4,639.93, for a total amount asserted due of \$11,187.79.

2. Subsequent to the issuance of the aforementioned Notice of Deficiency, the Audit Division made two adjustments in the tax asserted due herein. First, the Audit Division allowed an investment tax credit of \$1,000.00 claimed on petitioner's 1979 personal income tax returns which had been previously disallowed. Second, the Audit Division determined that petitioner Arthur L. Giard's unincorporated business income during 1980 was \$62,328.38 and not \$86,227.17 as it had previously determined. Consequently, the total tax asserted herein is \$4,591.91. The computation of such tax is summarized below.

	<u>1979</u>	<u>1980</u>	<u>1981</u>
<u>Unincorporated Business Tax</u>			
Net Income Schedule "C"	\$67,586.44	\$62,328.38	
Less: Allowance for Services	<u>5,000.00</u>	<u>5,000.00</u>	N/A
	\$62,586.44	\$57,328.38	
Less: Business Exemption	<u>5,000.00</u>	<u>5,000.00</u>	
Taxable Business Income	\$57,586.44	\$52,328.38	
 Tax Due on Above	 \$ 2,591.39	 \$ 2,093.14	

Summary of Tax Due

Personal Income Tax	\$ 6,806.23	\$ 6,136.60	\$9,363.90
Less: Investment Credit	1,000.00	--	--
Total Personal Income Tax Due	\$ 5,806.23	\$ 6,136.60	\$9,363.90
Unincorporated Business Tax Due	2,591.39	2,093.14	--
Total Tax Due	\$ 8,397.62	\$ 8,229.74	\$9,363.90
Total Prepaid	8,171.80	4,813.46	8,414.09
Net Tax Due	\$ 225.82	\$ 3,416.28	\$ 949.81

Penalties

Section 685(a)(1)	50.81	801.75	--
Section 685(a)(2)	56.46	523.29	--
	\$ 107.27	\$ 1,325.04	

3. Petitioners filed joint personal income tax returns for each of the years at issue. Petitioner Arthur Giard did not file an unincorporated business tax return for either 1979 or 1980. Petitioners filed their 1979 and 1980 personal income tax returns on May 5, 1982. Petitioners filed their 1981 personal income tax return on June 18, 1982.

4. The tax at issue herein arises solely from the Audit Division's assertion that the net business income earned by petitioner Arthur Giard was subject to unincorporated business tax during 1979 and 1980. The additional personal income tax asserted due herein results from the Audit Division's application of prepayments on petitioners' 1979 and 1980 personal income tax returns to petitioners' asserted unincorporated business tax liability.

5. At all times during the years at issue, petitioner Arthur Giard owned and operated Aero AG Service, a proprietary entity providing aerial services to farmers, including the aerial application of pesticides to control insects and disease, the aerial spreading of fertilizer and the aerial seeding of fields. All of petitioner's business income during the years at issue was derived from these activities.

6. Petitioner Lena R. Giard was not involved in the provision of aerial services by Aero AG Service.<sup>1</sup>

7. Petitioner is and was during the relevant period licensed as a Commercial Applicator of Pesticides as required by the Department of Environmental Conservation. Petitioner was also licensed by the Federal Aviation Agency as a Commercial Agricultural Aircraft Operator as also required by law.

8. Petitioner had previously received a Notice of Deficiency asserting additional personal income tax and unincorporated business tax due for the year 1974. Said notice resulted from the Audit Division's denial of a claimed investment tax credit on petitioner's purchase of a tractor which was used in the loading of chemicals, fertilizer and seed onto petitioner's aircraft for purposes of aerial application. This deficiency was premised upon the Audit Division's assertion that petitioner was not engaged in the manufacturing of goods or engaged in farming. This matter was resolved at the Tax Appeals conference level with the Audit Division conceding petitioner's entitlement to the credit in question.

9. Petitioner had also previously received a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for periods in 1978 and 1980. This notice was premised upon the Audit Division's assertion that two purchases of aircraft by petitioner were properly subject to sales tax and not exempt, as claimed by petitioner, pursuant to section 1115(a)(6) of the Tax Law. This matter was also resolved at the Tax Appeals conference level with the cancellation of the notice of determination.

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1 Accordingly, all references to petitioner hereinafter, unless otherwise stated, refer to Arthur L. Giard.

10. Penalty was asserted herein pursuant to sections 685(a)(1) and (a)(2) of the Tax Law with respect to the unincorporated business tax liability and pursuant to section 685(a)(1) with respect to the personal income tax liability.

11. At hearing, petitioners contended that the Audit Division's answer in this matter did not address certain allegations made in petitioners' perfected petition and that, therefore, the answer was defective. Petitioners contended that the purported unaddressed allegations should be deemed admitted by the Audit Division.

12. At an earlier stage in this proceeding, petitioners attended a pre-hearing conference on June 12, 1985. The conferee's determination regarding this matter was issued on August 28, 1985.

#### CONCLUSIONS OF LAW

A. That, although 20 NYCRR 601.4(c)(2) provides for a conferee's proposed resolution of a controversy, where such is warranted, within 30 days after the conference, such requirement is directory, and not mandatory, for the conferee. Accordingly, the conferee's issuance of a proposed resolution to the controversy at issue more than 30 days after the conference does not warrant the granting of the petition herein.

B. That the Audit Division's answer in this matter was in all respects proper. Petitioners' contention that the answer did not address certain allegations set forth in their perfected petition is simply unsupported by the record.

C. That inasmuch as petitioner Lena R. Giard was not involved in the provision of aerial application services, and given that the additional tax asserted due herein resulted from petitioner Arthur L. Giard's failure to file

unincorporated business tax returns for 1979 and 1980, the Audit Division improperly asserted additional tax due from petitioner Lena R. Giard.

D. That the Audit Division properly applied income tax prepayments made by petitioner Arthur L. Giard to the unincorporated business tax liability asserted herein. In this regard, it is noted that petitioners did not timely file their 1979 or 1980 personal income tax returns; their use of the estimated tax provisions on such returns was therefore improper (see Tax Law § 655).

E. That, during 1979 and 1980, Article 23 of the Tax Law imposed a tax upon "the unincorporated business taxable income of every unincorporated business wholly or partly carried on within [New York]" (Tax Law § 701[a]). Section 703(j) of the Tax Law, however, specifically excluded farming business from the definition of unincorporated business for taxable years beginning after December 31, 1978.

F. That "farming business" was defined, for purposes of Article 23, in section 703(h) of the Tax Law as a business engaged in the following:

"(1) cultivating the soil or raising or harvesting any agricultural or horticultural commodity (including the raising, shearing, feeding, caring for, training, and management of animals) on a farm;

(2) handling, drying, packing, grading, or storing on a farm any agricultural or horticultural commodity in its unmanufactured state;

(3) the planting, cultivating, caring for, or cutting of trees, or the preparation (other than milling) of trees for market."

G. That petitioner's activities as an aerial applicator (Finding of Fact "5") did not constitute a "farming business" within the meaning and intent of section 703(h) of the Tax Law. Although petitioner provided services exclusively to farmers, he nonetheless was not engaged in a farming business within the



meaning of the statute. Petitioner contracted with farmers to provide certain aerial application services; he was not engaged in farming himself. His services therefore did not fall within the ambit of section 703(h).

H. That section 703(c) of the Tax Law also excluded from the definition of an unincorporated business "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". The term "other profession" was defined, in pertinent part, for purposes of section 703(c), at 20 NYCRR 203.11(b)(1)(i) as follows:

"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".

I. That the practice of aerial application does not constitute the practice of a profession for purposes of the aforecited statute and regulation. Petitioner's work consisted of the application of skills to certain uses and not of the practice of a profession. In this regard, it is noted that petitioner did not undertake a "prolonged course of specialized instruction and study", nor did his work consist of "advising, guiding or teaching" others.

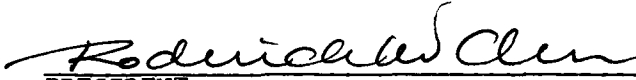
J. That inasmuch as petitioners have not shown reasonable cause for their failure to timely file personal income tax returns for the years at issue, and petitioner Arthur L. Giard has failed to show reasonable cause for his failure to file unincorporated business tax returns for 1979 and 1980, the penalties asserted due herein were proper.

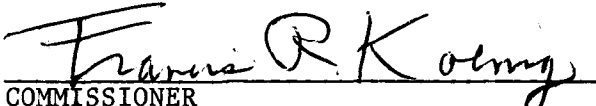
K. That the petition of Arthur L. and Lena R. Giard is granted solely to the extent set forth in Conclusion of Law "C"; that the Audit Division is directed to modify the Notice of Deficiency issued July 27, 1984, as adjusted (Finding of Fact "2"), in accordance therewith; and except as so granted, the petition is in all respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER