

BUREAU OF LAW

MEMORANDUM

TO: Commissioners Murphy and Macduff

FROM: Solomon Sies, Hearing Officer

SUBJECT: WARREN D. NOVAK

Petition for Redetermination of a Deficiency
or for Refund of Unincorporated Business
Taxes under Article 23 of the Tax Law for the
Year 1962

File #2-3684810

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y. on December 22, 1965. The appearances and the evidence produced were as shown in the stenographic minutes and the exhibits submitted herewith.

The issue involved herein is whether the activities of the taxpayer as a research engineer specializing in the field of electronics constitute the practice of a recognized profession so as to exempt the income derived in connection therewith from unincorporated business taxes in accordance with the provisions of Section 703(c) of the Tax Law.

The taxpayer graduated from Brooklyn Polytechnic Institute with a Bachelor's Degree in Electrical Engineering, majoring in the field of electronics. He has taken post-graduate courses at Brooklyn Polytechnic Institute, in cathode ray tube design, functions of a complex variable and advanced differential equations. He has lectured at Columbia University, Graduate School of Mechanical Engineering and has lectured on the subject of automation in the electronic industry. He is a member of the Institute of Electrical and Electronic Engineers, known as IEEE. He is also a member of the International Micrographic Congress. The taxpayer is not licensed as a professional engineer by the Education Department of the State of New York.

The taxpayer worked for General Electric Company from 1948 to 1953 in their Test Department in which he supervised the final system test of CPS (DEW Line) Radar. He was also head of the manufacturing engineering department of said company in which he invented and supervised the development of a Digitally Programmed Punch Press.

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He was also the head of the Research Department of said company and in this capacity invented and supervised the development of an Automatic Component Assembly System. He was employed by General Precision Laboratory, Pleasantville, New York, from 1953 to 1962, first as a staff member and then as a staff consultant and then as a staff assistant to the Director of Research. In connection with said positions he established a Printed Circuit Model Shop; created the Tape Technique of Printed Circuit Fabrication; invented and supervised the design and construction of the GPL Weather Briefing System used in major United States airports for weather briefing of United States international pilots. In addition, he also worked extensively in document retrieval with the development of several machine systems using microfilm and television.

The taxpayer also holds 20 patents or patents in process including the system of digital electronic positioning control, automatic component assembly system, which is an automatic machine tool programmed by computer and memory which takes into its input electronic components such as resistors, capacitors, inductors, diodes, transistors and assembles these in the correct position in a printed circuit board by fully automatic means. A number of the patents concern the field of document retrieval which is the finding of one piece of information from among many in a matter of seconds. He also invented a Wideband RF Waterload, which is assigned to the U.S. Air Force through General Electric.

The taxpayer has been self-employed since 1962 under the name of Creative Industry as a research engineer specializing in the field of electronics. At his home there was an old carriage house which he converted into an engineering office, a small model shop for generation of the experimental models and electronic laboratory, using electronic instruments to test these feasibility models, instruments such as cathode ray oscilloscopes, electronic counter, high-frequency strobe, lighting equipment, etc. The taxpayer had two employees who worked under his direct supervision to perform tests on experimental models and to build experimental models. The taxpayer testified that any patents that are granted become the property of the principal for whom he renders his services as a research engineer. The patents are always assigned to the company and he receives no royalties from the same. His contracts with his clients require that any patent developed as a result of his research become the company's patent (Minutes of Hearing, page 36). More than 80% of the gross income in the taxable year was derived from the personal services actually rendered by the taxpayer and capital was not an income producing factor.

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Section 7202, Art. 145, of the Education Law prescribes licensure and regulation of professional engineering and land surveying in order to safeguard life, health and property. Subdivision 4, Section 7201 of the Education Law defines professional engineering as follows:

"4. A person practices professional engineering, within the meaning and intent of this article, who holds himself out as able to perform, or who does perform any professional service, such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction or operation, in connection with any public or private utilities, structures, buildings, machines, equipment, process, works, or projects wherein the safeguarding of life, health or property is concerned or involved, when such professional service requires the application of engineering principles and data."

For admission to examination for license as a professional engineer, the applicant must submit evidence, among other things, that he has been graduated from a college or school of engineering registered by the department as maintaining satisfactory standards.

Art. IX of the Regulations of Commissioner of Education, deals with Engineering and Land Surveying. Section 79, thereof, refers to licensing examinations for engineering. The subjects of the professional engineering examination consist of three parts. Part I is intended to establish the applicant's competency to structurally design and supervise the construction of buildings and similar structures. Part II embraces the practical application of the basic engineering sciences, including hydraulics; thermodynamics; machine design and electrical equipment - generators and motors, transmission and distribution of electrical energy, electrical control and protection. Part III covers the more advanced and specialized professional training of engineers, as amplified and matured by study and experience. This latter part consists of five groups of questions from which the applicant may select the designated number for answer. Four of these groups comprise questions in chemical engineering, civil engineering, electrical engineering and mechanical engineering and the applicant must select questions from any one or two of these groups. He must select questions from the fifth group on engineering economics and practice.

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Electrical engineering is divided into two primary fields: (1) electrical power; and (2) electronics. The taxpayer did not perform engineering services in the field of electric power involving the design, construction or operation of high voltage electrical machinery, power lines, equipment, etc. The taxpayer graduated from Brooklyn Polytechnic Institute in 1948 with a B.S. in Electrical Engineering majoring in electronics. The electronic devices perfected as a result of taxpayer's research were completely enclosed and powered by regular 110 voltage and did not subject the operator to unusual danger to life, health or property. The taxpayer in his work as a research engineer specializing in the field of electronics is not involved with works or projects "wherein the safeguarding of life, health or property is concerned". I am of the opinion that the work performed by taxpayer does not require a professional engineering license.

The Commission in hearing determination in the Matter of Hanache (3/7/61) held that a chemist operating an analytical laboratory is not subject to unincorporated business tax although no license is required.

In the Matter of Romane (hearing determination 9/3/65) the Commission held that a bacteriological chemist performing chemical and bacteriological research was exempt from unincorporated business tax.

The instant case is to be distinguished from determination after formal hearing in case of Jack Shapiro (d. September 3, 1965). In that case the taxpayer was not licensed as a professional engineer and had no engineering degree. It was held that his activities constituted that of an electronics technician.

The instant case is also to be distinguished from formal determination in case of Marcel P. Mutin (d. April 2, 1964) where it was held that the unauthorized practice of architecture by a person not licensed to practice such profession in this State constituted the carrying on of an unincorporated business.

I am of the opinion that the activities of the taxpayer as a research engineer specializing in the field of electronics and maintaining a laboratory in connection therewith constitute the practice of an exempt profession in accordance with the provisions of Section 703 (c) of the Tax Law and that a license as a professional engineer is not a pre-requisite.

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For the reasons stated above, I recommend that the determination of the Tax Commission in the above matter be substantially in the form submitted herewith.

MAY 13 1966

SOLOMON SIES

Hearing Officer

/s/ MARTIN SCHAPIRO
Approved

/s/ SAUL HECKELMAN
Approved

(Jan. 3, 1967)

SS:nm

Encls.

SOLICITON SIES

MAY 13 1969

WARTIN COMPANY

WARTIN COMPANY

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition of

WARREN D. NOVAK

FOR RECONSIDERATION OF A DEFICIENCY
OR FOR REFUND OF UNINCORPORATED
BUSINESS TAXES UNDER ARTICLE 23 OF
THE TAX LAW FOR THE YEAR 1962.
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WARREN D. NOVAK, having filed a petition for reconsideration of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the year 1962, (File No. 2-3684910) and a hearing having been held in connection therewith at the Office of the State Tax Commission, 80 Centre Street, New York, N.Y. on the 22nd day of November, 1965 before Solomon Sles, Hearing Officer of the Department of Taxation & Finance, at which hearing the taxpayer appeared personally and was represented by Ernst & Ernst, Certified Public Accountants, by Robert A. Weiner, testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Warren D. and Doris Novak filed a New York State Income Tax Resident Return for the year 1962, in which the taxpayer Warren D. Novak reported on Schedule (A) net business income as "Engineering Consultant" in the sum of \$12,248.03; that the taxpayer Warren D. Novak did not file any unincorporated business tax return for said year on the ground that such income is exempt from unincorporated business tax under Section 701 (c), Article 23 of the Tax Law; that on March 15, 1965 the Department of Taxation and Finance issued a statement of audit charges against the taxpayer Warren D. Novak holding that his activities as an Engineering Consultant constitute the carrying on of an unincorporated business and that the income

derived therefrom was subject to unincorporated business tax pursuant to Article 23 of the Tax Law and, accordingly, issued a Notice of Deficiency in the sum of \$183.79, including tax, penalties and interest.

(2) That the taxpayer Warren C. Novak graduated from Brooklyn Polytechnic Institute with a Bachelor's Degree in Electrical Engineering in 1948, majoring in the field of electronics; that he has taken post-graduate courses at Brooklyn Polytechnic Institute in cathode ray tube design, functions of a complex variable and advanced differential equations; that he has lectured at Columbia University, Graduate School of Mechanical Engineering and has lectured on the subject of automation in the electronic industry; that he is a member of the Institute of Electrical & Electronic Engineers; that he is a member of the International Micrographic Congress; that the taxpayer is not licensed as a professional engineer by the Education Department of the State of New York.

(3) That the taxpayer was employed by General Electric Company from 1948 to 1953, first in their Test Department, in which he supervised the final systems test of GPs (D.E.W. Line) Radar and was head of the manufacturing engineering department in which he invented and supervised the development of a digitally programmed punch press; that he was also head of said company's Research Department and in this capacity invented and supervised the development of an automatic component assembly system; that he was employed by General Precision Laboratory, Division of General Precision, Inc. from 1953 to 1962 as Staff Assistant to the Director of Engineering and Staff Assistant to the Director of Research, and in connection with his activities on behalf of said employer established a Printed Circuit Model Shop, created the tape techniques of printed service fabrication, invented and supervised the design and construction

of GPL Weather Briefing System used in major U.S. Airports for weather briefing of international air flight pilots and worked extensively in documentary retrieval with the development of several machine systems using microfilm and television, and engaged in the application of fibre optics to hardcopy generations and machine tool control; that the taxpayer also holds 20 patents or patents in process including the system of digital electronic positioning control, automatic component assembly system, which is an automatic machine tool programmed by computer and memory which takes into its input electronic components such as resistors, capacitors, inductors, diodes, transistors and assembles these in correct position in a printed circuit board by fully automatic means; that a number of the patents concern the field of document retrieval which is the finding of one piece of information from among many in a matter of seconds; that he also invented a wideband RF Waterlead, which is assigned to the U.S. Air Force through General Electric.

(4) That the taxpayer has been self-employed since 1962 under the name of Creative Industry as a research engineer specializing in the field of electronics; that at his home there was an old carriage house which he converted into an engineering office, a small model shop for generation of the experimental models and electronic laboratory, using electronic instruments to test these feasibility models, instruments such as cathode ray oscilloscopes, electronic counter, high-frequency strobe, lighting equipment, etc.; that the taxpayer had two employees who worked under his direct supervision to perform tests on experimental models and to build experimental models; that the taxpayer testified that any patents that are granted become the property of the principal for whom he renders his services as a research engineer; that the patents are always assigned to the company and he receives no royalties from the same; that his contracts with his clients require that any patent developed as a result of his research become the company's patent (Minutes of Hearing, page 36);

that more than 50% of the gross income during the taxable year was derived from the personal services actually rendered by the taxpayer and capital was not an income producing factor.

Based upon the foregoing findings and all of the evidence presented herein,

The State Tax Commission hereby

DECIDES:

(A) That the activities of the taxpayer during the year in issue as a Research engineer maintaining his own laboratory for research purposes and specializing in the field of electronics constituted the practice of a recognized profession in which more than 50% of the gross income derived therefrom was derived from the personal services of the taxpayer and that capital was not an income-producing factor; that the taxpayer was therefore exempt from the imposition of unincorporated business tax in accordance with the intent and meaning of Section 703 (a), Article 23 of the Tax Law.

(B) That accordingly the tax, penalties, interest and other charges stated in the Notice of Deficiency were not lawfully due and owing; that the taxpayers' petition for a redetermination of a deficiency of unincorporated business tax is hereby granted; that the Notice of Deficiency be and the same hereby is cancelled in full.

AND IT IS SO ORDERED.

DATED: Albany, New York the 4th day of January , 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
President

/s/

JAMES R. MACDUFF
Commissioner

Commissioner