

MEMORANDUM

TO : STATE TAX COMMISSION

FROM : MR. ROOK

SUBJECT: GORDON SILVER v. STATE TAX COMMISSION
ARTICLE 78 PROCEEDING

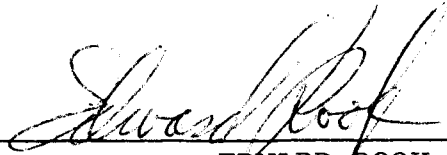
Please refer to Mr. Heckelman's memorandum of August 22, 1973, and my memorandum of August 29, 1973.

There is general agreement between Mr. Coburn, Mr. Heckelman and Asst. Attorney General McHale that the above case is controlled by Kahn & Jacobs which was affirmed by the Court of Appeals after this decision was rendered.

The taxpayer is clearly a highly qualified engineer in a field for which no license is required. Kahn & Jacobs establishes the rule that the lack of a license does not control.

Since my memorandum of August 29, 1973, Soliciter General Toch has agreed that the matter should be disposed of by entering into a stipulation consenting to granting the relief sought in the petition without costs. The case has been adjourned to October 12, 1973.

If you agree, kindly indicate your approval on this memorandum and I will execute the consent on behalf of the Tax Commission.



EDWARD ROOK
SECRETARY TO THE STATE TAX COMMISSION

September 11, 1973

Approved 9/12/73
Commissioner Milton Koenig
Alfred H. Knaack 9/13/73
Approved
Stanley 9/17/73

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

GORDON SILVER

For a Redetermination of a Deficiency or
a Refund of Unincorporated Business
Taxes under Article(s) 23 of the
Tax Law for the (Year(s) 1963, 1964 and :
1965

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

MARTHA FUNARO, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 14th day of February, 1973, she served the within
Notice of Decision (or Determination) by (certified) mail upon GORDON SILVER

(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows:

Gordon Silver
16 Shotgun Lane
Levittown, New York 11756

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) 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

14th day of February, 1973.

Lynn Wilson

Martha Funaro



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A
STATE CAMPUS

ALBANY, N. Y. 12227

AREA CODE 518

457-2655, 6, 7

STATE TAX COMMISSION

NORMAN F. GALLMAN, PRESIDENT

A. BRUCE MANLEY

MILTON KOERNER

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK

SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

DATED: Albany, New York
February 14, 1973

Gordon Silver
16 Shotgun Lane
Levittown, New York 11756

Dear Mr. Silver:

Please take notice of the **DECISION** of
the State Tax Commission enclosed herewith.

Please take further notice that pursuant to **section 722 of**
the Tax Law any proceeding in court to review an adverse decision
must be commenced within **4 months** after
the date of this notice.

Any inquiries concerning the computation of tax due or refund allowed
in accordance with this decision or concerning any other matter relat-
ing hereto may be addressed to the undersigned. These will be referred
to the proper party for reply.

Very truly yours,


Paul B. Coburn

HEARING OFFICER

cc Petitioner's Representative
Law Bureau

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---------------------------------------|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| GORDON SILVER | : | DECISION |
| for Redetermination of Deficiency or | : | |
| for Refund of Unincorporated Business | : | |
| Tax under Article 23 of the Tax Law | : | |
| for the Years 1963, 1964 and 1965. | : | |

Petitioner, Gordon Silver, has filed a petition for redetermination of deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1963, 1964 and 1965. (File No. 34767219). A formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on May 22, 1972, at 1:45 P.M. Petitioner appeared pro se. The Income Tax Bureau appeared by Saul Heckelman, Esq., (Solomon Sies, Esq., of Counsel).

ISSUE

Did petitioner, Gordon Silver's activities as an aeronautical engineer and consultant during the years 1963, 1964 and 1965 constitute the practice of a profession?

FINDINGS OF FACT

1. Petitioner, Gordon Silver, and his wife filed New York State income tax resident returns for the years 1963, 1964 and 1965. He did not file New York State unincorporated business tax returns for said years.

2. On February 19, 1968, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Gordon Silver, imposing unincorporated business tax in the sum of \$1,265.71, upon the income received by him from his activities as an aeronautical engineer and

consultant during the years 1963, 1964 and 1965 and accordingly issued a Notice of Deficiency in the sum of \$1,496.06.

3. Petitioner, Gordon Silver, received a degree in architecture from the University of Pennsylvania. Between 1943 and 1951, he was employed as an aeronautical engineer by Fairchild Corporation and Republic Aviation Corporation. In 1951, he became an engineering consultant in the aircraft field specializing in aircraft structural engineering, design, and analysis. He has written technical articles for journals in his field.

4. In 1953, petitioner, Gordon Silver, was designated by the Civil Aeronautics Administration as an air safety representative authorized to act as a structural designated engineering representative. This certificate was renewed annually by the Civil Aeronautics Administration and its successor agency, The Federal Aviation Administration. As a structural engineering representative he

"... may approve, within the limits of his appointment, structural engineering drawing lists, data relating to strength, flutter prevention measures, materials and processes used in structural application and other related structural application and other related structural considerations, provided these items have been determined to comply with pertinent FAR. Such authority is applicable to both new and modified models except that basic load analysis and overall test programs for new models may not be approved by Designated Engineering Representatives."

Department of Transportation, Federal Aviation Administration Type Certification Handbook 8110.4, sec. 194(a).

5. Petitioner, Gordon Silver, has been retained as an aeronautical engineer and consultant by Fairchild Space and Defence Systems, Aero Trades, Inc., Cuttler-Hammer, Inc., Singer-General Precision, Inc., American Machine and Foundry, Inc., Universal Oil Products, and other large corporations in the aviation field.

6. Petitioner, Gordon Silver, during the years 1963, 1964 and 1965, was not licensed as a professional engineer by the State of New York in accordance with the provisions of Article 145 of the Education Law.

7. The services performed by petitioner, Gordon Silver, during the years 1963, 1964 and 1965 in connection with structural design and analysis related to aircraft modifications required the application of engineering principles and data and was concerned with and involved the safeguarding of life, health and property.

8. More than 80% of petitioner, Gordon Silver's business income during the years 1963, 1964 and 1965 was derived from personal services rendered. Capital was not a material income producing factor.

CONCLUSIONS OF LAW

A. That the business activities of petitioner, Gordon Silver, during the years 1963, 1964 and 1965 constituted the practice of professional engineering in accordance with the meaning and intent of former section 7201(4) of the Education Law.

B. That since petitioner, Gordon Silver, during the years 1963, 1964 and 1965 was not licensed as a practicing professional engineer pursuant to former section 7206 of the Education Law, his business activities did not constitute the practice of a profession exempt from the imposition of the unincorporated business tax in accordance with the meaning and intent of section 703(c) of the Tax Law.

C. That the aforesaid business activities of petitioner, Gordon Silver, during the years 1963, 1964 and 1965 constituted the carrying on of an unincorporated business and his income derived therefrom was subject to the unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law.


D. That the petition of Gordon Silver is denied and the Notice of Deficiency issued February 19, 1968, is sustained.

DATED: Albany, New York
February 14, 1973

STATE TAX COMMISSION



COMMISSIONER



COMMISSIONER



COMMISSIONER