

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
MILTON STERN

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

For a Redetermination of a Deficiency or
a Refund of Unincorporated Business :
Taxes under Article ~~(8)~~ 23 of the
Tax Law for the Year(s) 1963 through :
1965.

State of New York
County of Albany

Donna Scranton, 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 19th day of May, 1976, she served the within
Notice of Decision ~~(or Determination)~~ by (certified) mail upon Milton
Stern ~~(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 Stern
312 West 34th Street
New York, New York 10001

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)~~
~~(or)~~ 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

19th day of May, 1976

Janet Mack

Donna Scranton

STATE OF NEW YORK
STATE TAX COMMISSION

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she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 19th day of May, 1976, she served the within
Notice of Decision ~~(or Determination)~~ by (certified) mail upon William
Slivka, Esq. (representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: William Slivka, Esq.
Sherman, Feigen and Slivka
292 Madison Avenue
New York, NY 10017
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.

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Janet Mack

Donna Scranton



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU

STATE CAMPUS
ALBANY, N.Y. 12227

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

DATED: Albany, N.Y.
May 19, 1976

TELEPHONE: (518) 457-3850

Mr. Milton Stern
312 West 34th Street
New York, New York 10001

Dear Mr. Stern:

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

Please take further notice that pursuant to
Section(a) 722 of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned. They
will be referred to the proper party for reply.

Very truly yours,


PAUL E. COBURN
SUPERVISING TAX CONFERENCES
HEARING OFFICER

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE TAX COMMISSION

The record of such hearing has been duly examined and considered.

ISSUE

The issue in this case relates to the professional exemption under section 703(c) of the Tax Law and more precisely, whether the petitioner, an optometrist, receives more than 80% of his gross income from personal services rendered by himself within the meaning of Regulations 20 NYCRR 203.11(b).

FINDINGS OF FACT

1. Petitioner is an optometrist with an office located at 312 West 34th Street, New York City. He employs opticians as well as other optometrists. He sells completed eye glasses which are fabricated in his office.

2. Petitioner was licensed by New York State in 1936. He has a B.S. in optometry from Columbia University and is enrolled in a doctoral program at the Optometric Center in New York City. He belongs to the American Optometric Society. Petitioner has always been self-employed and even when he started with no employees, he performed and sold his own lenses and frames.

3. Optometry is defined as the treatment of ailments of the eyes that can be corrected by refraction of glasses or lenses. Petitioner employs opticians. An optician will fill prescriptions by fitting a lense to a frame.

4. Petitioner's typical bill to a client is \$15.00 and when itemized, would show \$3.00 for the refraction and \$12.00 for the eye glasses. However, this breakdown is computed primarily for competitive purposes. Historically, optometrists have valued the eye glasses only at cost and the refraction at the remainder of the bill. By this method, the value of the refraction is at least \$10.00 or two-thirds of gross receipts.

5. In 1963, a typical year, petitioner's Federal Schedule "C" showed the following (approximately); gross receipts, \$200,000.00; cost of merchandise, \$68,000.00 (no inventory is shown); cost of labor of \$88,000.00 (including salaries of opticians of \$29,000.00; of optometrists of \$55,000.00 and of receptionists of \$4,000.00); for a cost of goods sold of \$156,000.00 and a gross profit of \$44,000.00. Other deductions (with no deductions here for salaries) totaled \$23,000.00 and net profit totaled \$21,000.00.

6. From the detailed testimony of petitioner, it is found that the receipts from the services of the optometrists in petitioner's employ are attributable to petitioner's professional activities within the meaning of Regulations 20 NYCRR 203.11(b).

7. The services of the opticians in petitioner's employ are found to be most closely associated with the fabricating of eye glasses and not with the professional work of petitioner.

8. Petitioner paid the tax and now claims refunds of \$489.49 for 1963, \$543.45 for 1964 and \$538.93 for 1965.

CONCLUSIONS OF LAW

A. Considering petitioner's activities as a whole, he does not meet the qualifications for the professional exemption in that he does not meet the 80% requirement.

The receipts for petitioner's eye glasses should include their cost of \$68,000.00 plus the opticians' salaries for a total of \$97,000.00. This is far more than 20% of the gross income of \$44,000.00 as computed on petitioner's tax return. Said receipts from the sale of eye glasses of \$97,000.00 is more than 20% of gross income even if the gross income on the return is recomputed to add in the salaries of the optometrists and receptionists to arrive at a total of \$103,000.00.

It follows that the receipts for petitioner's services as an optometrist including the services of the optometrists employed by him do not amount to 80% of his total receipts. See Regulations 20 NYCRR 203.11(b); Hewitt v. Bates 297 N.Y. 239.

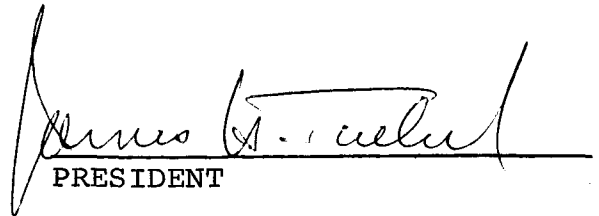
B. Petitioner will not be allowed to compute his tax on only part of his gross receipts under Regulation 20 NYCRR 203.11(b). He has not for these taxable years shown a reasonable method of identifying and segregating such receipts.


DECISION

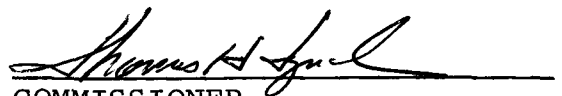
The petition is denied and the refund is denied.

DATED: Albany, New York
May 19, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER