

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
MOE MAZER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1965, and for	:	
Unincorporated Business Tax under Article	:	
23 of the Tax Law for the Years 1965, 1966	:	
and 1967.	:	

Petitioner, Moe Mazer, 46 Edgemere Drive, Searington, New York 11507, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1965, and petitions for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1965, 1966 and 1967. (File No. 00407).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 8, 1976 at 9:15 A.M. Petitioner, Moe Mazer, appeared by Melvin A. Stein, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the activities of petitioner, Moe Mazer, constitute the practice of a profession and consequently would not be deemed the conduct of an unincorporated business pursuant to section 703(c) of the Tax Law.

II. Whether the activities of petitioner, as an appraiser of damages and as an expert witness for various insurance companies, constitute the conduct of an unincorporated business subject to unincorporated business tax.

III. Whether an office in the New Jersey home of petitioner's secretary constitutes a regular place of business outside New York State.

IV. Whether petitioner, Moe Mazer, is liable for personal income tax on income reported by Mazer Store Equipment Co., Inc. for the first four months of 1965, from insurance appraisals made by petitioner as an employee, where the Notice of Deficiency was issued pursuant to section 683(d)(1).

FINDINGS OF FACT

1. Petitioner, Moe Mazer, filed a New York resident income tax return for the year 1965. Petitioner did not file any unincorporated business tax returns for the years 1965, 1966 and 1967.

2. On April 14, 1971, the Income Tax Bureau issued a Statement of Audit Changes to petitioner, Moe Mazer, for unincorporated business tax for 1965. It stated a tax due of \$1,452.76, plus a penalty (pursuant to section 685(a) of the Tax Law) of \$363.19 and interest to that date of \$435.73. Accordingly, a Notice of Deficiency totaling \$2,251.68 was issued on April 14, 1971 to petitioner, Moe Mazer.

3. On April 14, 1971, the Income Tax Bureau also issued a Statement of Audit Changes to Moe Mazer and Rachel Mazer, his wife, stating additional personal income tax due for 1965 in the sum of \$2,243.99, plus a penalty (pursuant to section 685(b) of the Tax Law) of \$112.20 and interest to that date of \$673.04. Accordingly, a Notice of Deficiency was issued on April 14, 1971 to Moe Mazer and Rachel Mazer totaling \$3,029.23. Said notice was issued five years after the return was filed.

4. On October 27, 1969, the Income Tax Bureau issued a Statement of Audit Changes to petitioner, Moe Mazer, for unincorporated business tax for the years 1966 and 1967 which stated taxes due of \$1,338.88 and \$960.31, respectively, plus a penalty (pursuant to section 685(a) of the Tax Law) of \$574.80 and interest to date of \$291.79. Accordingly, a Notice of Deficiency totaling \$3,165.78 was issued on October 27, 1969 to petitioner, Moe Mazer, for the years 1966 and 1967.

5. Petitioner, Moe Mazer, was an appraiser of losses and damage to store fixtures, primarily restaurant equipment, and he performed such services for insurance companies during the years at issue herein. Petitioner is the only "approved adjuster" listed by the New York Board of Fire Underwriters. Petitioner often appeared in court as an expert witness regarding appraisal damage. On one occasion, petitioner had sat as a commissioner on a condemnation matter in the United States District Court, Southern District of New York.

6. Petitioner, Moe Mazer, was a high school graduate with three years of college. His occupation did not require a license. He did not take any school courses or instructions to develop the skills needed in his employment.

7. Petitioner started doing appraisals in 1932. In 1963, petitioner was recommended to the New York Board of Fire Underwriters, and was listed by that board as an approved expert in his area of expertise. The board's list is used by insurance corporations throughout the country.

8. For a period covering most of the first half of 1965, petitioner was president of Mazer Store Equipment Co., Inc., a closely held, family-owned corporation with offices at 207 the Bowery, New York, New York. While in the employ of the corporation, petitioner devoted all his efforts to the business of the corporation. His primary activity was the appraisal of loss and damage to store fixtures. Checks in payment of petitioner's services, even when drawn to the petitioner, were deposited to

the corporation's account, notwithstanding the absence of petitioner's endorsement. The corporation filed a withholding tax statement which indicated that taxes and social security were withheld from petitioner's salary.

9. An Agreement dated September 30, 1960, between Mazer Store Equipment Co., Inc. and the shareholders thereof (Moe Mazer and his wife, Rachel Mazer, held 44 percent of the stock in the corporation), provided, in part, that each party to the Agreement, as long as such party is a stockholder and is employed by the corporation, is to devote his entire time and attention exclusively to the business of the corporation. Such a party could not hold any outside interests in any similar line of business.

10. Some time in the first half of 1965, petitioner ceased his employee status with the corporation and started the conduct of the appraisal business on his own. Petitioner did not comply with the provisions in the Agreement regarding the withdrawal of a shareholder, which provisions required a written offer of sale of stock to the corporation and/or the other shareholders. All agreements and consideration regarding petitioner's withdrawal from the corporation were handled verbally.

11. The April 14, 1971 statements of audit changes contained computations of additional income and unincorporated business taxes

due for 1965, based on the financial statements of Mazer Store Equipment Co., Inc. which, the Income Tax Bureau contended, showed income of \$34,114.63 from insurance appraisals for the period from January 1, 1965 to April 30, 1965. The Bureau contended that such income was income paid for the personal services of petitioner, and that the assignment of such income to the corporation by the petitioner did not alter the taxability of such income to the petitioner who performed the services. No returns or financial statements of Mazer Store Equipment Co., Inc. were offered in evidence.

12. After withdrawing from the corporation, petitioner conducted his appraisal business during the remainder of 1965 and during all of 1966 and 1967. Except for paperwork done by petitioner, Moe Mazer, at his home and the frequent court appearances which he made, most of petitioner's work was performed at the situs of the property requiring appraisal. Petitioner used the same secretary employed by the appraiser listed by the New York Board of Fire Underwriters, prior to the listing of petitioner. The secretary maintained an office in the attic of her home in New Jersey. The office had a typewriter, adding machine and a New York tie-line telephone listed to petitioner. Most calls to petitioner would be made to that telephone number. No checks showing payment of rent to the

secretary for office space were offered in evidence nor were any business-schedule forms offered indicating a deduction for office rent. In one instance, petitioner's stationary listed his home address and telephone number and another set of telephone numbers for "Secretary." On a later piece of stationary, a home address and an "office" at the secretary's address in New Jersey, together with her New Jersey telephone and the New York tie-line numbers were listed. Petitioner could be contacted by his secretary in the case of an emergency by a "beeper." The tie-line was utilized to avoid toll calls and as a convenience to outside callers, most of whom were in New York.

13. Petitioner, Moe Mazer, was advised by his accountant that he was not liable for unincorporated business tax.

CONCLUSIONS OF LAW

A. That the activities of petitioner, Moe Mazer, as an appraiser of damage and loss during the years 1965, 1966 and 1967, while requiring special knowledge and experience, 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.

B. That the aforesaid activities of petitioner, Moe Mazer, during that portion of 1965 following termination of his relationship with Mazer Store Equipment Co., Inc., and during 1966 and

1967, constituted the carrying on of an unincorporated business, and that income derived therefrom was subject to unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law.

C. That the office in the attic of the home of petitioner's secretary during the latter part of 1965, 1966 and 1967, did not constitute a regular place of business of an unincorporated business outside New York State, in accordance with the meaning and intent of section 707(a) of the Tax Law.

D. That the petitioner, Moe Mazer, was an employee of Mazer Store Equipment Co., Inc. until his departure therefrom in 1965, and that all income received and deposited to the account of the corporation was not the unincorporated business income of the petitioner, and thus not subject to unincorporated business tax.

E. That where a Notice of Deficiency is issued more than three years after the appropriate return was filed, the Income Tax Bureau has the burden of proof to show that one of the exceptions to the three-year statute of limitations is applicable. To come within the six-year assessment period (where a return has been filed) afforded by section 683(d) of the Tax Law, the Income Tax Bureau must show that amounts in excess of 25 percent of adjusted gross income stated in the return were omitted from the return, and that such amounts constitute taxable income.

F. That the Income Tax Bureau failed to meet the burden of proof set forth in Conclusions of Law "E" above in regard to the

Notice of Deficiency for personal income tax issued to Moe Mazer and Rachel Mazer, his wife, on April 14, 1971.

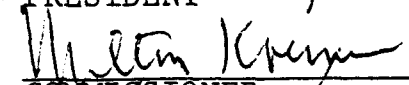
G. That the petitions of Moe Mazer are granted to the extent of cancelling the Notice of Deficiency for personal income tax due for 1965 (See Conclusions of Law "F", above); of reducing unincorporated business taxable income for the year 1965 from \$36,318.90 to \$13,879.00 and of waiving the penalty imposed pursuant to section 685(a) of the Tax Law, in that the failure to file unincorporated business tax returns for 1965, 1966 and 1967 was due to reasonable cause, and not due to willful neglect.

H. That the Income Tax Bureau is directed to cancel the Notice of Deficiency for personal income tax for 1965, to modify the Notice of Deficiency of April 14, 1971 for unincorporated business tax as provided in Conclusions of Law "G", to waive the penalty on the notices of deficiency for unincorporated business tax for 1965, 1966 and 1967, and to recompute the unincorporated business tax due, together with such interest as may be lawfully due; and, that except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York
July 29, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER