

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

FERGUS D. O'CONNELL

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Unincorporated Business :  
Taxes under Article (X) 23 of the :  
Tax Law for the Year(s) or Period(s) :  
1967, 1968 and 1969

State of New York  
County of Albany

John Huhn , being duly sworn, deposes and says that  
he is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 16th day of March , 1978 , he served the within  
Notice of Decision by (certified) mail upon Fergus D. O'Connell

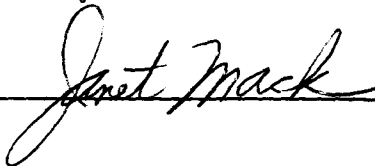
~~XXXXXXXXXXXXXXXXXXXX~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Fergus D. O'Connell  
19 Sherwood Drive  
Huntington, NY 11743

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 Postal Service within the State of New York.

That deponent further says that the said addressee is the ~~XXXXXXXXXXXXXXXXXXXX~~  
~~XXXXXXXX~~ petitioner herein and that the address set forth on said wrapper is the  
last known address of the ~~XXXXXXXXXXXXXXXXXXXX~~ petitioner.

Sworn to before me this

16th day of March , 1978.

  
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STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

Fergus D. O'Connell

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Unincorporated Business :  
Taxes under Article(§) 23 of the :  
Tax Law for the Year(s) or Period(s) :  
1967, 1968 and 1969

State of New York  
County of Albany

John Huhn , 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 16th day of March , 1978 , she served the within  
Notice of Decision by (certified) mail upon Norman Parker  
(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Norman Parker  
95 No. Park Avenue  
Rockville Centre, NY 11570  
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 Postal Service within the State of New York.

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

16th day of March , 1978.

Janet Mack

John Huhn



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

March 16, 1978

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

Fergus D. O'Connell  
19 Sherwood Drive  
Huntington, NY 11743

Dear Mr. O'Connell:

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 **(§) 722** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

Joseph Chyrywat  
Hearing Examiner

cc: Petitioner's Representative  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
FERGUS D. O'CONNELL : DECISION  
for Redetermination of a Deficiency or :  
for Refund of Unincorporated Business :  
Tax under Article 23 of the Tax Law for:  
the Years 1967, 1968 and 1969. :  
:

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Petitioner, Fergus D. O'Connell, 19 Sherwood Drive, Huntington, New York, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1967, 1968 and 1969 (File No. 00368).

A small claims hearing was held before Joseph A. Milack, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 21, 1977 at 1:15 P.M. The petitioner appeared by Norman Parker, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Louis Senft, Esq., of counsel).

ISSUE

Whether petitioner's activities during the years 1967, 1968 and 1969 constituted the carrying on of a profession exempt from unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Fergus D. O'Connell, and his wife filed New York State income tax resident returns for the years 1967, 1968 and 1969. Petitioner did not file New York State unincorporated business tax returns for said years.

2. During the years 1967, 1968 and 1969, petitioner represented one principal, Robert J. Harder, Inc. (a contracting firm) which installed acoustical ceilings, partitions, resilient flooring, elevated floors, etc. Petitioner was paid on a commission basis by said principal for contracts obtained by it as a result of petitioner's efforts. Petitioner was not compensated unless his principal obtained a contract.

3. In the pursuit of business for his principal, petitioner consulted with architects on the use, design and nature of construction materials. He computed detailed cost estimates of the various jobs based on drawings. He also negotiated and submitted the construction contracts to his principal along with the required technical information. After the contracts had been obtained through his efforts, petitioner oversaw the progress of the subject construction.

4. On November 29, 1971, the Income Tax Bureau issued a Notice of Deficiency against petitioner in the sum of \$2,937.84, on the grounds that the income he received from his activities during the years 1967, 1968 and 1969 was subject to unincorporated business tax.

5. Petitioner contended that his activities during the years 1967, 1968 and 1969 constituted the carrying on of a profession and that as such, the income derived therefrom was exempt from the imposition of unincorporated business tax.

6. Petitioner received a Bachelor of Arts degree in civil engineering from New York University; however, he was not a licensed engineer during the period in issue.

7. Petitioner's education in this field facilitated his acquisition of construction contracts, although it was not a prerequisite for his sales activities.

8. Petitioner consulted with architects and engineers, relative to construction materials and their use and design; however, such consultation did not meet the engineering experience requirement for obtaining an engineering license.

9. Petitioner testified that during the years in issue he was self-employed, that he did not have an employment contract with his principal and that he did not consider himself an employee of his principal. He further testified that during the years in issue he filed Federal schedules "C", that he had a retirement plan ("Keogh" plan) for the self-employed, that he was not reimbursed for business expenses by his principal and that he claimed such expenses on Federal schedules "C".

#### CONCLUSIONS OF LAW

A. That although petitioner utilized his knowledge of the field of engineering to facilitate his acquisition of contracts

for his principal, his sales activities did not constitute the carrying on of a profession within the meaning and intent of section 703(c) of the Tax Law.

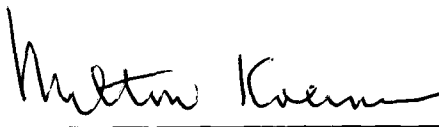
B. That the income petitioner received during the years 1967, 1968 and 1969 constituted income from a regular business carried on by him; thus, it was subject to unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

C. That the petition of Fergus D. O'Connell is denied and the Notice of Deficiency issued on November 29, 1971 is sustained, together with such interest as may be lawfully due.

DATED: Albany, New York

STATE TAX COMMISSION

March 16, 1978

  
PRESIDENT  
COMMISSIONER  
COMMISSIONER