

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

October 9, 1979

Robert Shmaruk
19 Ehret Dr.
Monsey, NY 10952

Dear Mr. Shmaruk:

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(s) 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Sincerely,

STATE TAX COMMISSION

cc: Petitioner's Representative
Herbert Glassberg
15 Chestnut St.
Spring Valley, NY 10977
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Robert Shmaruk :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Unincorporated Business Tax :

under Article 23 of the Tax Law

for the Years 1968 - 1970. :

State of New York

County of Albany

Jay Vredenburg, 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 9th day of October, 1979, he served the within notice of Decision by certified mail upon Robert Shmaruk, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Shmaruk

19 Ehret Dr.

Monsey, NY 10952

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
9th day of October, 1979.

Mary Doucine

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Robert Shmaruk :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Unincorporated Business Tax :

under Article 23 of the Tax Law

for the Years 1968 - 1970. :

State of New York

County of Albany

Jay Vredenburg, 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 9th day of October, 1979, he served the within notice of Decision by certified mail upon Herbert Glassberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Herbert Glassberg
15 Chestnut St.
Spring Valley, NY 10977

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
9th day of October, 1979.

Marcy Dominici

J. Shmaruk

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROBERT SHMARUK	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business Tax :	:	
under Article 23 of the Tax Law for the	:	
Years 1968, 1969 and 1970.	:	

Petitioner, Robert Shmaruk, 19 Ehret Drive, Monsey, New York 10952, 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 1968, 1969 and 1970 (File No. 15738).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 1, 1978 at 10:45 A.M. Petitioner appeared by Herbert Glassberg, Public Accountant. The Income Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner's activities in the development, design and implementation of electronic data processing systems during 1968, 1969 and 1970 constituted the practice of a profession.

II. Whether penalties were properly imposed against petitioner for his failure to file unincorporated business tax returns for 1968, 1969 and 1970.

FINDINGS OF FACT

1. Petitioner, Robert Shmaruk, and his wife, Barbara Shmaruk, timely filed New York State income tax resident returns for 1968, 1969 and 1970. Petitioner did not file unincorporated business tax returns for said years.

2. On February 26, 1973, the Income Tax Bureau issued a Statement of Audit Changes against petitioner for the years at issue, on the grounds that his activities constituted the carrying on of an unincorporated business, and that the income derived therefrom was subject to unincorporated business tax. Accordingly, the Bureau issued a Notice of Deficiency to petitioner on February 26, 1973 for \$3,513.69 in unincorporated business and personal income tax, plus \$968.10 in penalty and \$635.73 in interest, for a total due of \$5,117.52. Petitioner conceded that the \$532.14 in personal income tax due was correct; this amount is not at issue and, in fact, has been paid by him.

3. Petitioner contended that he was a self-employed freelance computer systems engineer who was engaged primarily in designing and installing the programs used in computers. He was responsible for testing the systems which he installed, in order to ascertain whether or not they were functioning properly. If necessary, he made changes and updated the systems when required. He further contended that all of his income was derived from personal services, and that capital was not a material income-producing factor.

4. Petitioner never studied engineering at the university level.

5. Petitioner contended that he and his accountant discussed whether or not he was subject to unincorporated business tax, and that they decided that he was exempt from said tax on the grounds that he was a professional.

6. Petitioner reported that the business income which he reported on his income tax return was derived from his activities as a "programmer", although his accountant referred to him as a "computer programming consultant" when corresponding with the Income Tax Bureau.

CONCLUSIONS OF LAW

A. That petitioner, Robert Shmaruk's activities during 1968, 1969 and 1970, although requiring special knowledge, did not constitute the practice of

a profession, within the meaning and intent of section 703(c) of the Tax Law.

B. That petitioner's activities during 1968, 1969 and 1970 constituted the carrying on of an unincorporated business under section 703 of the Tax Law; thus, the income derived therefrom was subject to unincorporated business tax under section 701 of the Tax Law.

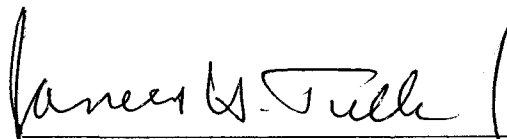
C. That the Income Tax Bureau properly imposed penalties pursuant to sections 685(a), 685(a)(1) and 685(a)(2) of the Tax Law for his failure to file unincorporated business tax returns for 1968, 1969 and 1970.

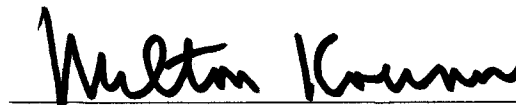
D. That the petition of Robert Shmaruk is denied and the Notice of Deficiency issued on February 26, 1973 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

OCT 9 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER