

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Irving A. Aschheim :
: 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 1972, 1973 & 1974 _____

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 5th day of June, 1981, he served the within notice of Decision by certified mail upon Irving A. Aschheim, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

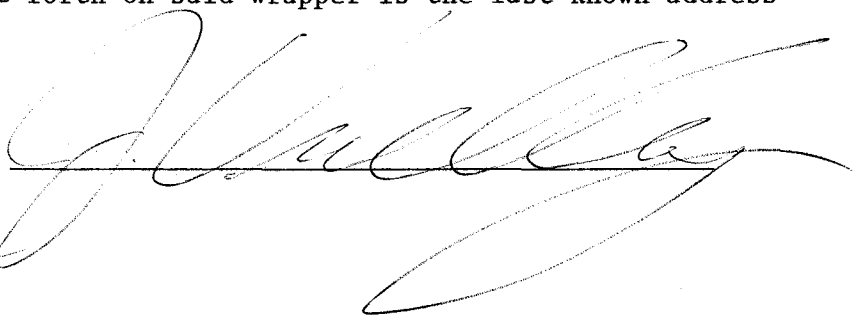
Irving A. Aschheim
Tonetta Lake Rd.
Brewster, NY 10509

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
5th day of June, 1981.

Cornelius R. Hegelund



STATE OF NEW YORK
STATE TAX COMMISSION

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Business Tax under Article 23 of the Tax Law for :
the Years 1972, 1973 & 1974

State of New York
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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 5th day of June, 1981, he served the within notice of Decision by certified mail upon Meyer Rosh 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. Meyer Rosh
Stein, Schwartz, Chesir & Rosh
565 Fifth Ave.
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 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
5th day of June, 1981.

James P. Haglund

J. Vredenburg

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

June 5, 1981

Irving A. Aschheim
Tonetta Lake Rd.
Brewster, NY 10509

Dear Mr. Aschheim:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Meyer Rosh
Stein, Schwartz, Chesir & Rosh
565 Fifth Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
IRVING A. ASCHHEIM	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1972,	:	
1973 and 1974.	:	

Petitioner, Irving A. Aschheim, Tonetta Lake Road, Brewster, New York 10509, 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 1972, 1973 and 1974 (File No. 23188).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 8, 1980 at 1:15 P.M. Petitioner, Irving A. Aschheim, appeared with Stein, Schwartz, Chesir & Rosh (Meyer Rosh, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner, an engineering consultant, is engaged in the practice of a profession thereby exempt from the imposition of unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Irving A. Aschheim, and Ilse C. Aschheim, his wife, timely filed joint New York State resident income tax returns for the years 1972 and 1973. These returns were subsequently amended to reflect petitioners' change in filing status from that of joint returns to separate returns. For the year

1974, petitioner, Irving A. Aschheim, timely filed a separate New York State resident income tax return. Petitioner did not file unincorporated business tax returns for the years at issue.

2. For the years 1972, 1973 and 1974, petitioner reported on his returns business income from his activities as a consultant. Business income totaled \$18,698.00, \$24,032.00 and \$26,041.00 for 1972, 1973 and 1974, respectively.

3. On March 24, 1978, the Audit Division issued a Notice of Deficiency against petitioner imposing unincorporated business tax of \$2,214.55, together with penalty (pursuant to sections 685(a)(1) and (a)(2) of the Tax Law) and interest. Said Notice of Deficiency was issued on the grounds that the income from petitioner's activity as a "construction consultant" was subject to unincorporated business tax.

4. From 1942 until 1972, petitioner was employed by Gibbs & Hill, Inc. (hereinafter "Gibbs"), an architectural and engineering firm engaged in the engineering, design and supervision of construction of major works, such as power generating plants, water and sewage treatment plants and electric transmission and distribution systems. Petitioner's duties as Chief Estimating Engineer included project engineering management, preparation and/or review of specifications for equipment and facilities, preparation of cost estimates, selection of plant equipment to be acquired and determination of plant and equipment layouts so as to facilitate construction, operation, maintenance and safety. In the discharge of the aforementioned duties, petitioner would employ various architectural and engineering principles and concepts.

5. Due to company policy, petitioner retired from Gibbs in 1972 at age 65. However, he continued to be associated with a subsidiary of Gibbs, Foreign Industrial Equipment Corporation (hereinafter "Foreign"), as a consultant hired

on an independent contract basis. The services performed by petitioner for Foreign during 1972, 1973 and 1974 were similiar to those performed during his years of employment with Gibbs.

6. Petitioner performed services of an engineering nature for Foreign on a per diem basis when work was available. During the years at issue, petitioner was assigned by Foreign to various power plant projects which said firm had undertaken. Petitioner, as consulting project engineer, would assume responsibility for administration of the engineering project, prepare and/or review specifications and costs, prepare operating and maintenance manuals and determine what equipment and materials were required for a particular project. In many instances, degreed and licensed professional engineers employed by Foreign were subject to petitioner's direction and supervision.

7. When not on assignment for Foreign, petitioner was free to seek work from others, however, petitioner testified that he did not actively hold himself out to the public as conducting an engineering business. With the exception of one minor job undertaken in 1972, petitioner earned all of his fees from Foreign. In 1976, petitioner was re-employed by Gibbs as a full time planning and development engineer.

8. Petitioner's educational background consists of two years of high school and three years of study in architecture and mathematics at The Mechanic's Institute. Petitioner received a Certificate of Graduation from The Mechanic's Institute in 1927.

9. Although not licensed as an engineer by the New York State Education Department, petitioner averred that based on his years of practical experience and accomplishment within his field and under a grandfather clause in Education

Law, he qualified and could have obtained an engineers license by merely making application for same. For personal reasons he chose not to obtain a license. Foreign did not require petitioner to possess an engineers license.

10. More than 80 percent of the gross income of petitioner, Irving A. Aschheim, was derived from personal services rendered by him. Capital was not an income producing factor.

11. Petitioner at all times considered himself a professional exempt from unincorporated business tax within the scope of section 703(c) of the Tax Law. At no time did petitioner's accountant suggest or mention the possibility of an unincorporated business tax obligation. At the hearing held herein, counsel for the Audit Division recommended that penalties imposed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law be cancelled for reasonable cause.

CONCLUSIONS OF LAW

A. That exemption from unincorporated business tax under section 703(c) of the Tax Law applies to those activities which constitute the practice of a profession as opposed to a purely commercial or business enterprise (Koner v. Procaccino, 39 N.Y.2d 258). That although petitioner assumed the title of consultant, in actuality he was rendering professional engineering services to an architectural and engineering firm.

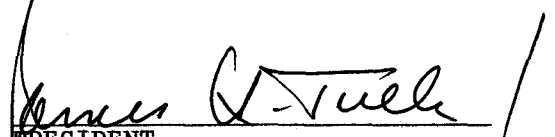
B. That the income derived by petitioner, Irving A. Aschheim, from his activities as a project engineer, constituted the practice of a profession exempt from the imposition of unincorporated business tax in accordance with the meaning and intent of section 703(c) of the Tax Law. (See State Tax Commission decision in the Matter of the Petition of Peter F. Crosby, 12-12-80).

C. That the petition of Irving A. Aschheim is granted and the Notice of Deficiency dated March 24, 1978 is hereby cancelled.

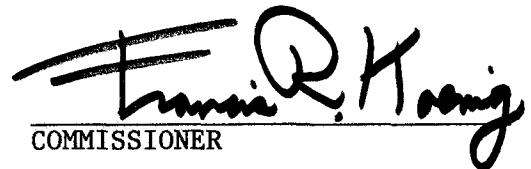
DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER