

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Frank Whittemore :
: 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 Year 1976. :

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 14th day of August, 1981, he served the within notice of Decision by certified mail upon Frank Whittemore, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

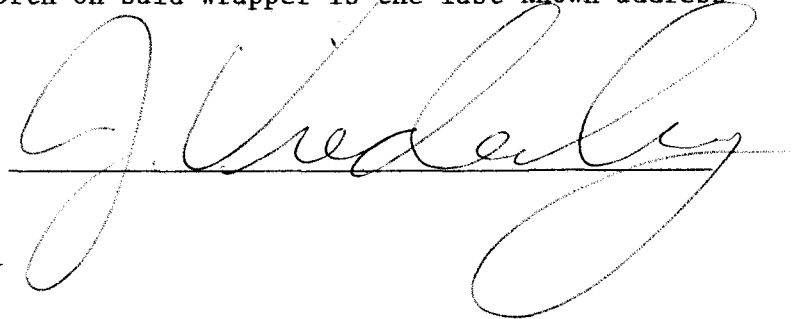
Frank Whittemore
5 Cleveland Place
Clinton, NY 13323

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
14th day of August, 1981.





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

August 14, 1981

Frank Whittemore
5 Cleveland Place
Clinton, NY 13323

Dear Mr. Whittemore:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FRANK WHITTEMORE	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business Tax	:	
under Article 23 of the Tax Law for the	:	
Year 1976.	:	

Petitioner, Frank Whittemore, 5 Cleveland Place, Clinton, New York 13323, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1976 (File No. 23472).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on May 15, 1980 at 2:45 P.M. Petitioner, Frank Whittemore, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUE

Whether petitioner's activities as a systems designer and senior computer programmer constituted the practice of a profession, within the meaning and intent of section 703(c) of the Tax Law and, therefore, not subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Frank Whittemore, filed a joint New York State income tax return with his wife for 1976. Petitioner also filed a New York State unincorporated business tax return for 1976 and reported \$247.38 of unincorporated business tax from his activity. However, he did not pay the unincorporated business tax due and gave the following explanation:

"I have received numerous conflicting opinions on the subject of this Unincorporated Business Tax. I am, therefore, seeking clarification as to whether or not I am subject to this tax."

2. On June 2, 1978, the Audit Division issued a Notice of Deficiency for 1976 against petitioner for unincorporated business tax of \$247.38, plus interest of \$23.79, for a total of \$271.17. The Notice was issued on the grounds that business income from data processing is considered derived from activities as an independent agent and is, therefore, subject to the unincorporated business tax.

3. Petitioner graduated from the University of Connecticut majoring in accounting. He was recruited by the General Electric Company in 1961. The petitioner went to work for General Electric Company on what is now referred to by them as its financial management program. This was a three-year training course which gave the participant the equivalent of a master's degree. It consisted of evening classes which participants were required to pass, and rotating job assignments so that the participants were exposed to many different areas in the financial field. Petitioner has also worked for a certified public accounting firm.

4. During the period in issue, petitioner's activities as a systems designer and computer programmer consisted of recording, classifying, summarizing and interpreting financial transactions and events in money terms and thereby providing information for problem solving. In the same manner as an accountant would design a system (i.e. books of original entry and ledgers) and prescribe procedures to be followed on paper, the petitioner does so using a computer. The petitioner would design and write the computer programs to record, classify and summarize the information needed to prepare financial statements and reports on the computer. He also interpreted the information produced by the computer so as to provide his clients with information they needed and to help them solve their problems.

CONCLUSIONS OF LAW

A. That 20 NYCRR 203.11(b)(1)(i) provides:

"[T]he term other profession includes any occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study, is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interest or welfare in the practice of an art or science founded on it. The word profession implied attainment in professional knowledge as distinguished from mere skill and the application of knowledge to uses for others as a vocation."

B. That petitioner Frank Whittemore's activities during 1976, 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 (Robert Shmaruk v. Tax Commission, 79 A.D.2d 832; see also Rosenbloom v. Tax Commission, 44 A.D. 2d 69, 353 N.Y.S. 2d 544).

C. That petitioner's activities constituted the carrying on of an unincorporated business under 703 of the Tax Law. Thus, the income derived therefrom was subject to unincorporated business tax under section 701 of the Tax Law.

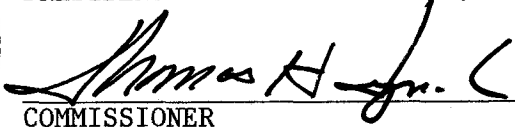
D. That the petition of Frank Whittemore is denied and the Notice of Deficiency issued on June 2, 1978 is sustained together with such interest as may be lawfully due.

DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER