

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Karl F. Hueglin	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Years 1973 & 1974.	:	

State of New York
County of Albany

Connie Hagelund, 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 9th day of April, 1982, she served the within notice of Decision by certified mail upon Karl F. Hueglin, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Karl F. Hueglin
25 Central Dr.
Plandome, NY 11030

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 April, 1982.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Karl F. Hueglin :
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 1973 & 1974 :
_____:

State of New York
County of Albany

Connie Hagelund, 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 9th day of April, 1982, she served the within notice of Decision by certified mail upon Douglas Greenwood the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Douglas Greenwood
1517 Franklin Ave.
Mineola, NY 11501

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 April, 1982.

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

April 9, 1982

Karl F. Hueglin
25 Central Dr.
Plandome, NY 11030

Dear Mr. Hueglin:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Douglas Greenwood
1517 Franklin Ave.
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
KARL F. HUEGLIN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1973	:	
and 1974.	:	

Petitioner, Karl F. Hueglin, 25 Central Drive, Plandome, New York 11030, 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 1973 and 1974 (File No. 22328).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 1, 1981 at 10:30 A.M. Petitioner appeared by Douglas Greenwood, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq. of counsel).

ISSUES

I. Whether petitioner's activities as a scenic designer constitute the practice of a profession and are thus not deemed to be an unincorporated business.

II. Whether a portion of petitioner's income during the years 1973 and 1974 was income earned from services as an employee which services are not deemed to be an unincorporated business.

III. Whether there is reasonable cause to justify the cancellation of the penalties imposed.

FINDINGS OF FACT

1. Petitioner, Karl F. Hueglin and his wife, Marjorie Hueglin, filed joint New York income tax resident returns for the years 1973 and 1974. On each return petitioner's occupation was listed as "designer".

2. In a letter dated November 23, 1976, the Audit Division requested Karl F. Hueglin and Marjorie Hueglin to supply certain information regarding their income for the years 1973 and 1974. The first question in this letter requested that Mr. and Mrs. Hueglin "[d]escribe the exact nature of activities carried on with respect to the business and/or miscellaneous income". In response to this question, Mr. Hueglin wrote that he designed sets for television commercials and then supervised their construction.

3. On June 7, 1977 the Audit Division issued a Statement of Audit Changes which asserted unincorporated business tax liability against Mr. and Mrs. Hueglin on the ground that Karl Hueglin's activities as a designer for television commercials was subject to such tax. This Statement of Audit Changes, in addition to asserting certain penalties, also asserted liability for New York State personal income tax on the basis that Mr. and Mrs. Hueglin failed to subtract the amount of New York State income tax claimed as a deduction on their Federal income tax return from Federal itemized deductions. Thereafter, the foregoing amount asserted as a deficiency of personal income tax was paid.

4. On March 27, 1978 the Audit Division issued a Notice of Deficiency together with a revised explanatory Statement of Audit Changes which deleted the assertion of personal income tax liability. The revised Statement of Audit Changes continued to assert the previous unincorporated business tax liability against Karl F. Hueglin as well as the prior penalty against Karl F. Hueglin for the year 1973 for underpayment of estimated unincorporated business tax. A

penalty was also asserted against Karl F. Hueglin for the years 1973 and 1974 for his failure to file and pay unincorporated business tax. The total liability asserted on March 27, 1978 including penalties and interest was \$7,366.26.

5. Starting at the age of seventeen, petitioner worked in an apprenticeship program in scenic design in various capacities. Petitioner's formal education includes: two years of intermittent study at Columbia University; approximately two years of study with Woodman Thompson; close to a year of study at the Art Students League; and at least a year of study at the New York School of Interior Design. In addition, when petitioner first started as a scenic designer, he read extensively.

6. Petitioner has been a member of United Scenic Artists ("the Union") since 1951. In order to become a member of the Union, one had to pass a two-day examination which covered all aspects of costumes, scenery, technical production and scenery painting. Since taking this examination, petitioner has taken a few courses in history and sketching.

7. Petitioner has worked in each of the media. When he first started in 1953, he designed shows for television. Subsequently, petitioner has worked on theatrical productions, movies, feature films and industrial films. However, the petition reveals that petitioner is primarily engaged in designing sets for television commercials.

8. Petitioner's duties include preparing a sketch for a particular production. The preparation of this sketch may involve considerable research of a particular time period or location. Upon acceptance of his sketch by his superior, petitioner prepares detailed drawings from which painters and carpenters work. Thereafter, petitioner supervises the construction of the set. Although

petitioner may suggest to his superior who should be hired to construct a set, these individuals are not employed by petitioner.

9. In order to work as a scenic designer on the East Coast, one must be a member of the Union. It is the industry practice that a producer have a contract with the Union. This contract sets a minimum rate of pay. However, a scenic designer is free to negotiate a higher rate of pay. A scenic designer's pay from a particular job is determined by the number of days it takes to perform the task assigned and the producer's daily rate. Everyone in the industry, to petitioner's knowledge, gets about the same rate of pay which is above the Union minimum.

10. Most of petitioner's work is derived from referrals based upon his reputation. However, petitioner has obtained work through the Union. Petitioner also incurs entertainment expenses in order to obtain work.

11. During the years at issue petitioner worked on a free lance basis. Some producers would deduct withholding and social security taxes from petitioner's pay and others would not. Whether taxes would be withheld from petitioner's pay for a certain job would depend on the desires of a particular producer. However, petitioner's relationship with a producer who withholds taxes and deducts social security is exactly the same as his relationship with a producer who does not withhold taxes or deduct social security.

12. More than eighty percent of petitioner's income is derived from petitioner's activities as a scenic designer. Capital is not a material factor in producing petitioner's income.

13. Petitioner has a Keogh plan and maintains an office in his home.

14. In 1959, petitioner's Union advised its members that it had been successful in tax litigation in having scenic designers classified as a

profession and that this activity was not subject to unincorporated business tax.

CONCLUSIONS OF LAW

A. That section 703(c) of the Tax Law provides:

"(c) Professions.--The practice of law, medicine, dentistry or architecture, and the practice of any other profession in which capital is not a material income producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual or the members of the partnership or other entity, shall not be deemed an unincorporated business."

B. That 20 NYCRR 203.11(b)(1)(iv), added February 1, 1974 (during one of the periods at issue) provides as follows:

"(iv) Musicians and artists are also recognized as professions (sic) by the State Tax Commission. However, an activity which, for example, consists of executing drawings or illustrations for commercial advertising purposes, or the production of musical or dramatic shows, or the creation of advertising set to music is not a professional activity since it deals with the conduct of business itself."

C. That petitioner's activities as a scenic designer for television commercials dealt with the conduct of business itself and was not a professional activity. Therefore, the income derived therefrom is subject to unincorporated business tax (see Matter of Koner v. Procaccino, 39 N.Y.2d 258, 263). Since it is not possible to determine from the record what portion of petitioner's income was derived from petitioner's activities as a scenic designer for television commercials, all of petitioner's income derived from his services as a scenic designer is subject to unincorporated business tax.

D. That petitioner has failed to sustain his burden of proof of establishing that those producers who withheld taxes from his pay exercised that degree of direction and control over him so as to constitute him their employee with regard to that income within the meaning of section 703(b) of the Tax Law.

E. That petitioner acted with reasonable cause rather than willful neglect in not filing unincorporated business tax returns for the years 1973 and 1974; therefore, the penalties asserted pursuant to sections 685(a)(1) and 685(a)(2), by virtue of section 722 of the Tax Law, are cancelled. The penalty asserted pursuant to section 685(c), by virtue of section 722 of the Tax Law, was proper.

F. That except as set forth in Conclusion of Law "E", the petition of Karl F. Hueglin is denied and the Notice of Deficiency issued March 27, 1978 is sustained.

DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION

James H. Tulle

PRESIDENT

Francis R. Koenig

COMMISSIONER

Mark J. Smith

COMMISSIONER