

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Richard J. Mullin

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 1974 & 1975.

State of New York  
County of Albany

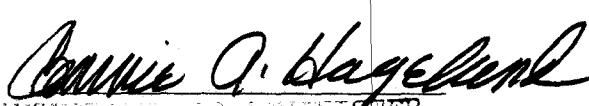
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of September, 1982, he served the within notice of Decision by certified mail upon Richard J. Mullin, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard J. Mullin  
6881 Woodchuck Hill Rd.  
Fayetteville, NY 13066

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  
8th day of September, 1982.

  
AUTHORITY TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
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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 8th day of September, 1982, he served the within notice of Decision by certified mail upon Victor Chini the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Victor Chini  
Chini & Chini  
915 State Tower Bldg.  
Syracuse, NY 13202

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  
8th day of September, 1982.

*Cherie C. Haglund*  
CHERIE C. HAGLUND  
CLERK OF THE TAX COMMISSION  
SECTION 174

*J. Vredenburg*

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

September 8, 1982

Richard J. Mullin  
6881 Woodchuck Hill Rd.  
Fayetteville, NY 13066

Dear Mr. Mullin:

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  
Victor Chini  
Chini & Chini  
915 State Tower Bldg.  
Syracuse, NY 13202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

RICHARD J. MULLIN

DECISION

for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Years 1974  
and 1975.

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Petitioner, Richard J. Mullin, 6881 Woodchuck Hill Road, Fayetteville, New York 13066, 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 1974 and 1975 (File No. 27137).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on December 10, 1980 at 1:15 P.M. Petitioner Richard J. Mullin appeared with Victor Chini, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner's activities as a real estate consultant for the years 1974 and 1975 constituted the practice of a profession and therefore exempt from unincorporated business tax under section 703(c) of the Tax Law.

II. Whether petitioner is subject to penalties under sections 685(a)(1) and 685(a)(2) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Richard J. Mullin, timely filed joint New York State income tax resident returns for 1974 and 1975 with his wife, Ann B. Mullin. On

said returns, he reported business income earned as a real estate appraiser. Petitioner did not file unincorporated business tax returns for said years.

2. On April 10, 1979, the Audit Division issued a Notice of Deficiency against petitioner for the years 1974 and 1975 together with an explanatory Statement of Audit Changes on which was stated:

"As the information requested was insufficient to make a determination our assessment for unincorporated business tax is based on information available on your returns.

Section 697 of the New York State Tax Law gives us the authority to request information relative to an audit matter.

Penalty is imposed under Section 685(a)(1) and (a)(2) for failure to file and pay unincorporated business tax."

Accordingly, the Notice imposed unincorporated business tax of \$2,555.85, plus penalties and interest of \$1,872.80, for a total due of \$4,428.65.

3. Petitioner held a Bachelor of Science degree in Real Estate Economics from Syracuse University and continued his education on the graduate level at Syracuse University in Urban Economics. Petitioner has successfully completed Real Estate Appraisal courses sponsored by the American Institute of Real Estate Appraisers. During the years at issue, many universities and colleges offered baccalaureate, master and doctorate degrees in real estate and specializations such as appraising.

4. The petitioner's work experience from which petitioner gained certain knowledge necessary in order to perform the work being done during the years at issue was as follows:

February 1958 - May 1963

Employed by the Pomeroy Organization, Inc., a major Syracuse real estate brokerage firm. Became experienced in property management, leasing, commercial and industrial sales as well as having the responsibility for most real estate appraisal assignments.

May 1963 - June 1969

Self-employed as an independent real estate fee appraiser, consultant and broker in Syracuse, New York. Qualified as an expert witness on real estate valuation before the New York State Supreme Court, the New York State Court of Claims and other courts. Clients included banks, insurance companies, industrial corporations, attorneys and individuals. Types of properties appraised included single and multifamily dwellings, apartment houses, vacant land, gasoline service stations, commercial and industrial properties, farms, subdivisions, rights-of-way and others.

May 1965 - June 1969

Self-employed as a Land Developer and General Contractor building architecturally designed single family homes on speculation and contract in the Fayetteville (Syracuse), New York area. Second home constructed was published in House & Home magazine.

July 1969 - June 1970

Employed by Bausch & Lomb, Inc. of Rochester, New York as the Manager of the Real Estate Department. Was responsible for all real estate matters for all property owned or leased by the company in the United States.

July 1970 - December 1971

Employed by Sectional Structures, Inc. of Oswego, New York as the Director of Housing. Was responsible for all marketing aspects for this industrialized housing producer, and personally sold in excess of six million dollars worth of modular housing.

December 1971 - July 1972

Employed by Stirling Homex Corporation of Avon, New York. Was in charge of the marketing program for Homex's high rise apartment building participation in HUD's "Operation Breakthrough" program. Also participated in the marketing of low rise modular housing for other federal and conventionally financed projects.

July 1972 - December 1972

Self-employed as a Real Estate and Housing Consultant to the Philadelphia Regional Office of the Department of Housing and Urban Development, the New York State Urban Development Corporation and other clients. Co-ordinated the placement of industrialized housing in Pennsylvania after the June 1972 flood for HUD, and assisted UDC in the start up of their disaster relief program in New York's Southern Tier.

January 1973 - April 1974

Employed by Midland Research Corporation as an Assistant Vice President. Was in charge of all real estate consulting and appraisal services to government related agencies. Engaged as the Real Estate Consultant to the Elmira, New York Urban Renewal Agency and the Corning, New York Urban Renewal Agency. Acted as

a real estate consultant and appraiser throughout New York and Pennsylvania.

May 1974 through the years at issue

Self-employed as a Real Estate Consultant, Appraiser and Broker in Syracuse, New York. Is the consultant to the Elmira, Corning, Olean and Newark, New York Urban Renewal Agencies. Is engaged in consulting and appraisal services to State and Federal agencies, corporations, banks, attorneys and private individuals.

5. Petitioner is a member of various professional organizations, such as The American Society of Real Estate Counselors, and the Society of Real Estate Appraisers. As a member the petitioner is controlled by standards of conduct and ethics as prescribed by the societies. That in the instant case petitioner is only one of five people in upstate New York who was eligible for membership in the American Society of Real Estate Counselors. However, no governmental body within New York State requires appraisers or counselors to be a member of either or both societies.

6. On several occasions petitioner was invited as a guest lecturer at universities. He also gave seminars to New York State Supreme Court Judges concerning real estate matters. In addition, he has assisted attorneys in preparation of their cross-examination of witnesses in cases involving real estate valuations.

7. In the telephone directory, petitioner lists himself as a real estate consultant. The petitioner advises clients relative to real estate condemnation, real estate investment analysis, and governmental agency requirements concerning real estate. Petitioner also negotiates on behalf of urban renewal agencies for purchase of property that otherwise would be scheduled for condemnation. The petitioner assists in mortgage financing and advises large corporations how to establish employee transfers relative to housing. Although petitioner has a

real estate brokerage license for New York and Pennsylvania, he was not engaged in brokerage activity. The petitioner testified in part:

"A residence broker has only one purpose -- to sell the property; a commercial broker is engaged in selling or leasing the property. These brokerages rarely get involved in the financial end of the transaction; they merely bring in the buyer and seller. Accordingly, the broker has an interest in the property being sold. He is paid a commission only if a sale is made."

Petitioner did not charge on a commission basis. Rather he charged on an hourly or per diem basis plus expenses.

8. During the years at issue, petitioner was engaged primarily in providing real estate counseling services to various governmental agencies. In 1974 and 1975 the petitioner received from such agencies \$45,634.80 and \$48,520.00 respectively.

9. Petitioner relied on the advice of a certified public accountant that he was a professional and therefore was not subject to the unincorporated business tax.

#### CONCLUSIONS OF LAW

A. That the term "other professions" 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 interests or welfare in the practice of an art or science founded on it. The word profession implies attainments in professional knowledge as distinguished from mere skill and the application of knowledge to uses for others as a vocation (20 NYCRR 203.11(b)(1)(i)).

B. That petitioner's education and prior work experience as enumerated in Findings of Fact "3" and "4" supra, enabled him to perform his activities as a real estate consultant at a level which involved a high degree of skill and



ability. Nonetheless, the performance of said activities did not result from a professed knowledge of some department of science or learning. Accordingly, petitioner's activities as a real estate consultant did not constitute the practice of a profession within the meaning and intent of section 703(c) of the Tax Law and 20 NYCRR 203.11.

C. That the income derived from petitioner's activities as a real estate consultant is subject to the unincorporated business tax pursuant to section 701 of the Tax Law and 20 NYCRR 201.1.

D. That petitioner's failure to file unincorporated business tax returns for the years at issue was due to reasonable cause and not due to willful neglect. Therefore, the penalties imposed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law are cancelled.

E. That the Audit Division is hereby directed to modify the Notice of Deficiency dated April 10, 1979 to be consistent with the decision rendered herein; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 08 1982

STATE TAX COMMISSION

**ACTING**

PRESIDENT

COMMISSIONER

COMMISSIONER