

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Markand Thakar :
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 1975 & 1976. :
: AFFIDAVIT OF MAILING

State of New York
County of Albany

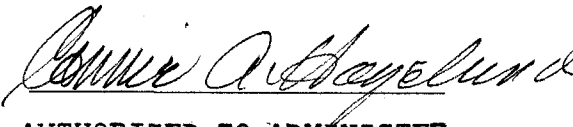
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Markand Thakar, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Markand Thakar
39 E. 72nd St.
New York, NY 10021

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 December, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

December 14, 1982

Markand Thakar
39 E. 72nd St.
New York, NY 10021

Dear Mr. Thakar:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
MARKAND THAKAR
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1975
and 1976.

DECISION

Petitioner, Markand Thakar, 39 East 72nd Street, New York, New York 10021, 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 1975 and 1976 (File No. 31328).

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 February 4, 1982 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

I. Whether petitioner's activities as a customhouse broker constituted the practice of a profession exempt from the imposition of unincorporated business tax within the scope of subsection (c) of section 703 of the Tax Law.

II. Whether petitioner's failure to file unincorporated business tax returns and pay the tax when due was premised on reasonable cause, and not willful neglect, thereby permitting the penalties asserted pursuant to sections 685(a)(1) and (a)(2) of the Tax Law to be waived.

FINDINGS OF FACT

1. Petitioner, Markand Thakar, timely filed 1975 and 1976 New York State personal income tax returns wherein he reported business income from his activities as a customhouse broker of \$11,650.00 and \$5,266.00, respectively. The 1976 return also reported a gain of \$8,700.00 from the sale of the business. Petitioner did not file unincorporated business tax returns for either of the years at issue.

2. On March 3, 1980, the Audit Division issued a Notice of Deficiency to petitioner, asserting that unincorporated business tax of \$446.40 was due, together with penalties and interest. The penalties were imposed pursuant to sections 685(a)(1), (a)(2) and (c) of the Tax Law for failure to file unincorporated business tax returns, failure to pay the unincorporated business tax when due and failure to file and pay an estimated tax, respectively.

3. The aforementioned Notice of Deficiency was based on an explanatory Statement of Audit Changes, dated June 7, 1978, wherein the Audit Division held that the income generated from petitioner's activities as a customhouse broker was subject to unincorporated business tax. Said statement also held that the gain realized from the sale of business assets, including goodwill, was subject to unincorporated business tax.

4. During the years at issue petitioner was self employed as a customhouse broker, international freight forwarder and marine insurance broker. The majority of petitioner's time and effort was spent on his customhouse brokerage activities. Mr. Thakar was licensed by the U.S. Treasury Department as a customhouse broker and by the Federal Maritime Board as a freight forwarder. In order to obtain a customhouse broker's license, petitioner was required to

pass an extensive oral examination as to customs law and regulations, and undergo an investigation dealing with his character, reputation and integrity.

5. As a licensed customhouse broker, petitioner acted as an authorized agent for his clients, to wit importers and exporters, filing the necessary papers and documents with the U.S. Customs Department so as to allow imported merchandise to clear through customs. Petitioner, on behalf of his clients, would declare the contents and value of a particular shipment, compute the tariff due, produce such documents as a certified invoice and a bill of lading and remit the correct duty to the Federal authorities. Petitioner charged his clients a fee, generally computed on a per hour basis, for the services rendered.

6. Petitioner has no formal education in the customs brokerage field, having acquired his knowledge and skill through on the job experience. He was not governed by any code of ethics nor was he required to carry malpractice insurance. Although a licensed customhouse broker conducting business as a sole proprietor could not incorporate, there were no restrictions prohibiting two or more licensed customhouse brokers from joining forces and conducting business in corporate form.

7. Capital was not a material income producing factor and more than eighty percent (80%) of the business income was derived from personal services rendered by Mr. Thakar.

8. The Audit Division assessed unincorporated business tax against petitioner for the years 1970, 1973 and 1974. For the year 1972, petitioner filed an unincorporated business tax return. Petitioner testified that he relied on his certified public accountant to prepare his tax returns.

CONCLUSIONS OF LAW

A. That petitioner's activities as a customhouse broker, freight forwarder and marine insurance broker, although requiring special skill and knowledge, did not constitute the practice of a profession within the meaning and intent of subsection (c) of section 703 of the Tax Law and 20 NYCRR 203.11 (Tower v. State Tax Commission, 257 App. Div. 1064; aff'd 282 N.Y. 407; Robinson v. State Tax Commission, 259 App. Div. 956). Accordingly, petitioner's aforementioned activities constituted the carrying on of an unincorporated business and the income derived from said activities is deemed subject to unincorporated business tax.

B. That petitioner has not shown that his failure to file unincorporated business tax returns for 1975 and 1976 and pay the tax when due was based on reasonable cause, and not willful neglect, and, therefore, the penalties asserted pursuant to sections 685(a)(1) and (a)(2) of the Tax Law are sustained. That petitioner has failed to meet his burden of proof pursuant to sections 722 and 689(e) of the Tax Law.

C. That the petition of Markand Thakar is denied and the Notice of Deficiency dated March 3, 1980 is sustained, together with such additional penalties and interest as may be lawfully due and owing.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER