

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J. R. Elyachar :
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 1969, 1970, 1972, 1973 & 1974. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon J. R. Elyachar, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. R. Elyachar
Ruradan Farms
Buckhout Rd.
East White Plains, NY 10604

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
28th day of September, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE TAX COMMISSION

of

AFFIDAVIT OF MAILING

State of New York
County of Albany

Hirschell E. Levine
Eisner & Lubin
250 Park Ave.
New York, NY 10077

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.

Susan Powell

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

Comm. on Agriculture

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

September 28, 1983

J. R. Elyachar
Ruradan Farms
Buckhout Rd.
East White Plains, NY 10604

Dear Mr. Elyachar:

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) 690 & 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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Hirschell E. Levine
Eisner & Lubin
250 Park Ave.
New York, NY 10077
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
J. R. ELYACHAR	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1969,	:	
1970, 1972, 1973 and 1974.	:	

Petitioner, J. R. Elyachar, Ruradan Farms, Buckhout Road, East White Plains, New York 10604, 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 1969, 1970, 1972, 1973 and 1974 (File Nos. 29048 and 29049).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 22, 1982 at 10:00 A.M. Petitioner appeared by Eisner & Lubin, C.P.A.'s (Hirschell E. Levine, C.P.A. and Lawrence S. Albert, C.P.A.). The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner's income from real estate management is subject to unincorporated business tax.

II. If so, whether the services performed by petitioner for certain corporations are so interrelated and interconnected with his activities as a real estate manager as to subject the salary income from said services to unincorporated business tax.

III. Whether the penalties imposed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law should be abated.

FINDINGS OF FACT

1. Petitioner, J. R. Elyachar, timely filed New York State income tax resident returns for 1969, 1970, 1972, 1973 and 1974.¹ On each said return, he listed his occupation as "Executive". He reported business income for each year. There was no indication of the type of business for 1969 and 1970; for 1972, 1973 and 1974, the type of business was listed as "Real Estate". Attached to each return were a number of wage and tax statements from various corporations. Petitioner did not file unincorporated business tax returns for the years at issue.

2. On September 24, 1979, the Audit Division issued to petitioner a revised Statement of Audit Changes which subjected petitioner's business and salary income to unincorporated business tax. Said Statement provided the following explanation:

"The income from your activities as real estate management is subject to the Unincorporated Business Tax as previously determined by a Tax Commission Hearing dated September 10, 1976."²

Your statements with respect to abatement of penalty have been examined; however, penalty is sustained, since reasonable cause has not been established for abatement. As a result of a prior hearing..., taxpayer was cognizant of the fact that he was subject to Unincorporated Business Tax; and he had sufficient time before April 1977 issuance of IT-38 (original Statement of Audit Changes) to file."

Accordingly, on January 4, 1980, two notices of deficiency were issued to petitioner, one notice asserting unincorporated business tax of \$26,570.85, plus penalty and interest of \$26,006.02, for a total of \$52,576.87 for tax years 1969, 1970, 1972 and 1973 and the other notice asserting unincorporated

¹ The 1969, 1970 and 1972 returns were filed jointly with petitioner's wife, Jean Elyachar.

² A decision of the State Tax Commission was rendered for tax years 1963 to 1968 and 1971 on September 10, 1976. The hearing was on May 5, 1976. (finding of fact #3).

business tax of \$9,248.70, plus penalty and interest of \$8,104.15, for a total of \$17,352.85 for tax year 1974.

3. On September 10, 1976, the Tax Commission rendered a decision which determined that petitioner's income received by him from his real estate corporations constituted income from his regular business as a real estate manager and did not constitute compensation as an employee or fiduciary exempt from unincorporated business tax, and further, that income received by petitioner for the management of the real estate interests of the corporations in which he was a stockholder constituted receipts from his regular business of real estate management and did not constitute income received as an owner, lessee or fiduciary of real estate exempt from unincorporated business tax.

4. On August 17, 1977, in a letter to the Income Tax Bureau, petitioner claimed he did not receive the Tax Commission Decision dated September 10, 1976 and thus he was prevented from pursuing his rights. Petitioner did not attend the hearing held on October 22, 1982 to testify with reference to his activities listed as "Real Estate" or to his duties for the corporations from which he received salaries.

5. Petitioner's representatives submitted a letter dated February 3, 1970 from the Income Tax Bureau referencing a petition for redetermination of a deficiency for tax years 1960 and 1961. The letter stated, "We have reviewed the above years and have cancelled the Notice of Deficiency dated December 9, 1963." The letter cancelled a Notice of Deficiency which imposed unincorporated business tax on wages received by petitioner as being business connected and includible in petitioner's business income. Petitioner's representatives claimed that the above letter is relevant because, according to their knowledge, the activities of the petitioner were basically the same in those years.

6. Petitioner claimed that the penalties should be waived since he relied on the advice of a certified public accountant and the cancellation of the tax for 1960 and 1961. During the years 1959 through 1961, petitioner filed unincorporated business tax returns for his activities in managing real estate.

CONCLUSIONS OF LAW

A. That the burden of proof in this case is upon the petitioner (sections 689(e) and 722 of the Tax Law).

B. That an owner of real property, a lessee, or a fiduciary shall not be deemed engaged in an unincorporated business solely by reason of holding, leasing, or managing real property (section 703(e) of the Tax Law). Income from petitioner's activities listed as "Real Estate" is not exempt from unincorporated business tax under section 703(e) of the Tax Law, since the properties managed were owned by corporations and not by petitioner as an individual. (Harry Wasserman and Evelyn Wasserman, State Tax Commission, October 22, 1982.)

C. That the performance of services by an individual as an employee or as an officer or director of a corporation shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such an individual (section 703(b) of the Tax Law). Petitioner has not shown that the services performed in earning his salary income from certain real estate corporations were not interrelated and interconnected with his business activities as a real estate manager. Accordingly, the salary income from said services is deemed to constitute part of his regular business income and is, therefore, subject to unincorporated business tax.

D. That petitioner has not sustained his burden of proof to show he is not subject to unincorporated business tax.

E. That penalties imposed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law are sustained, since petitioner has not shown he had reasonable cause in not filing unincorporated business tax returns and for not paying the taxes due thereon.

F. That the petition of J. R. Elyachar is denied and the notices of deficiency are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983


PRESIDENT


COMMISSIONER


COMMISSIONER