

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harold J. & Judith E. Farver, Jr. :
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 - 1975. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

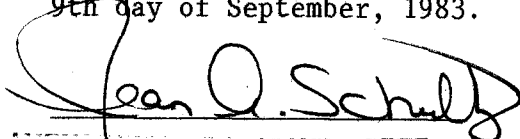
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of September, 1983, she served the within notice of Decision by certified mail upon Harold J. & Judith E. Farver, Jr., the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold J. & Judith E. Farver, Jr.
65 Edgehill Dr.
Wappingers Falls, NY 12590

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 September, 1983.



JEAN Q. SCHULL
CLERK OF THE TAX COMMISSION
SECTION 274

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

September 9, 1983

Harold J. & Judith E. Farver, Jr.
65 Edgehill Dr.
Wappingers Falls, NY 12590

Dear Mr. & Mrs. Farver:

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 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HAROLD J. FARVER, JR. AND JUDITH E. FARVER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1973	:	
through 1975.	:	

Petitioners, Harold J. Farver, Jr., and Judith E. Farver, 65 Edgehill Drive, Wappingers Falls, New York 12590, 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 through 1975 (File No. 29421).

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 10047 on May 11, 1982 at 1:15 P.M. Petitioners appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Lawrence Newman, Esq., of counsel).

ISSUES

I. Whether the activities of petitioner Harold J. Farver, Jr.¹ as a computer consultant constituted the practice of a profession within the meaning and intent of Tax Law section 703(c) and, therefore, the income from such activities is not subject to unincorporated business tax.

II. Whether the above mentioned activities of petitioner as a computer consultant were conducted outside New York.

¹ Petitioner Judith E. Farver is involved in this proceeding due solely to the filing of a joint tax return for the years 1973 through 1975. Accordingly, the use of the term petitioner hereinafter shall pertain only to Harold J. Farver, Jr.

FINDINGS OF FACT

1. Petitioner, Harold J. Farver, Jr., timely filed joint New York State Income Tax Resident Returns for the years 1973 through 1975 with his wife, Judith E. Farver. Petitioner on these returns listed his occupation as a consultant; however, he did not file unincorporated business tax returns.

2. On May 25, 1977, the Audit Division issued a Statement of Audit Changes to petitioner in which it held that petitioner's income from his "activities as a consultant is subject to the unincorporated business tax". The Audit Division claimed that unincorporated business tax of \$1,721.86, \$2,540.30, and \$3,005.36 was due for the 1973, 1974, and 1975 taxable years, respectively.

3. A Notice of Deficiency dated July 18, 1979 was issued against petitioner asserting unincorporated business tax for the 1973, 1974, and 1975 taxable years in the amount of \$7,267.52 plus penalty and/or interest of \$3,375.29.

4. Petitioner, who is a member of Phi Beta Kappa, holds a Bachelor of Arts degree cum laude in mathematics from Knox College, Galesburg, Illinois and a Masters degree in mathematics from the University of Iowa. He completed nearly all of the course work required for a Ph.D. degree in mathematics from the University of Iowa. The course work included training in statistics and computer science. Petitioner, an active member of the Mathematics Association of America, has continued his training and involvement in mathematics, computer science, and statistics.

5. During the tax years at issue, petitioner utilized his training and experience in mathematics, statistics and computer science to teach professional employees of The Service Bureau Company ("Service Bureau"), 500 West Putnam Avenue, Greenwich, Connecticut 06830, and to develop and write highly technical

materials on specialized mathematical and statistical techniques for the use of Service Bureau including materials used by salesmen to help explain its products to customers. Petitioner wrote a manual for Service Bureau concerning the practical application of the Box and Jenkins method of forecasting which utilizes complex mathematical and statistical algorithms.

6. From January through July 31, 1973, Service Bureau was located in Harrison, New York, and petitioner was supplied with an office at Service Bureau's premises in Harrison, New York. Petitioner concedes that income received from Service Bureau during this period was earned in New York. However, since August 1, 1973, petitioner performed his work for Service Bureau at its offices which were relocated from Harrison, New York to 500 West Putnam Avenue in Greenwich, Connecticut where he was provided with office space and telephone service.

7. Service Bureau was the only company with which petitioner conducted business in the United States. In Europe, petitioner did business with IBM World Trade Company ("IBM World"). He was provided with office space and secretarial service by IBM World in Europe when he was there on business. Petitioner did not do business with IBM World in the United States since it was prohibited from entering the computer service market in the United States during the tax years at issue. When it was necessary for IBM World to contact petitioner in the United States, it contacted petitioner at his office located in the premises of Service Bureau. However, petitioner testified that the number of phone calls he received from Europe or made to Europe were very small since he made arrangements with IBM for those activities he would be performing for it while in Europe.

8. The specific area within which petitioner worked for Service Bureau and IBM World was the computer services marketplace. Petitioner explained that the companies sell access to a computer over a telephone line and the use of application programs which assist customers in satisfying some analytical or planning need.

9. Petitioner was not an employee of Service Bureau or IBM World.

10. Petitioner testified that for the years at issue, he deducted "a couple hundred dollars" as a business expense for an office maintained in his home in Wappingers Falls, New York. The office consisted of a desk and filing cabinet. Petitioner testified that he did not conduct business in his home, did not maintain a business phone at his residence, and merely stored records in such office.

11. On his federal income tax returns for the years at issue, on Schedule C, "Profit or (Loss) From Business or Profession", petitioner on line D, "Business address", listed 65 Edge Hill Drive, Wappingers Falls, New York 12590. Petitioner explained that his home address was used on his tax returns as his business address for the following reasons:

- 1) The tax returns specifically prohibited the use of a post office box number, and therefore his office mailing address which was Post Office Box 4032, Greenwich, Connecticut, could not be used;
- 2) Mail sent to petitioner at his office street address, 500 West Putnam Avenue, Greenwich, Connecticut 06838 would probably not be received unless mailed in care of Service Bureau since petitioner did not lease space from the building management, rather his office was located in premises leased by Service Bureau; and
- 3) Since petitioner was in Europe for periods of up to six weeks at a time, mail sent to his home would be received by his family while mail sent to his postal box or office street address would not be received until petitioner returned to the United States.

12. Capital was not a material income producing factor in petitioner's activities.

CONCLUSIONS OF LAW

A. That Tax Law section 703(c) provides that "(t)he practice of law, medicine, dentistry or architecture, and the practice of any other profession ...shall not be deemed an unincorporated business".

B. That 20 NYCRR 203.11(b)(1)(i)² defines "other profession" as:

"For purposes of this subdivision, the 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 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. The performing of services dealing with the conduct of business itself, including the promotion of sales or services of such business and consulting services, does not constitute the practice of a profession even though the services involve the application of a specialized knowledge."

C. That in determining what activity constitutes the practice of a profession, consideration is given to the following factors: (1) a long term educational background generally associated with a degree in an advanced field of science or learning; (2) the requirement of a license; and (3) the control of the occupation by standards of conduct, ethics and malpractice liability. Matter of Rosenbloom v. State Tax Commission, 44 AD2d 69, at 71. Petitioner did not meet the criteria set forth in (2) and (3) above.

D. That the activities of petitioner, Harold J. Farver, Jr., during the tax years at issue did not constitute the practice of a profession within the

² This regulation became effective February 1, 1974 which is in the middle of the tax years at issue. However, it reflects previous policy of the Department of Taxation and Finance.

meaning and intent of Tax Law section 703(c). See Matter of Stephen Gaidos, State Tax Commission, December 5, 1980, which held that the activities of a computer consultant, although requiring special knowledge and experience, did not constitute the practice of a profession exempt from the imposition of unincorporated business tax.

E. That from August 1, 1973 through the end of 1975 taxable year, petitioner conducted his business activities outside New York and his income therefrom is not subject to tax under section 701(a) of the Tax Law. However, for the period January 1, 1973 through July 31, 1973, petitioner conducted his business activities within New York, and petitioner is liable for unincorporated business tax during such period. Petitioner conceded that he conducted his business activities for Service Bureau within New York during the period January 1, 1973 through July 31, 1973. In addition, since petitioner has not sustained his burden of proof under Tax Law sections 722 and 689(e) to show that he maintained a regular place of business outside New York, within the meaning and intent of Tax Law section 707(a), during the period January 1, 1973 through July 31, 1973, when he did business with IBM World, no allocation of income is permissible for such period.

The Audit Division is directed to recalculate petitioner's unincorporated business tax liability for the 1973 taxable year by apportioning petitioner's unincorporated business taxable income for such year between the period during which business activities were conducted in New York (seven months) and the period activities were conducted outside New York (five months). The Audit Division shall provide petitioner with an opportunity to document actual amounts earned during such periods. If he is unable to provide proper documentation, the Audit Division may simply apportion 1973 taxable year

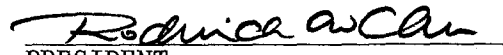
unincorporated business taxable income based upon the length of the two periods (i.e. 7/12ths of the income for the period January 1, 1973 through July 31, 1973 and 5/12ths for the period August 1, 1973 through December 31, 1973).

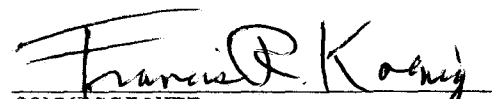
F. That the petition of Harold J. Farver, Jr. and Judith E. Farver is granted to the extent indicated in Conclusion of Law "E"; that the Audit Division is directed to modify the Notice of Deficiency dated July 18, 1979 in accordance therewith; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 09 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

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[Handwritten signature]



ALWAYS USE
YOUR ZIP CODE

Harold J. & Judith E. Farver, Jr.
65 Edgehill Dr.
~~Wappingers Falls, NY 12590~~

CERTIFIED
P 481 208 377
MAIL



300

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

September 9, 1983

Harold J. & Judith E. Farver, Jr.
65 Edgehill Dr.
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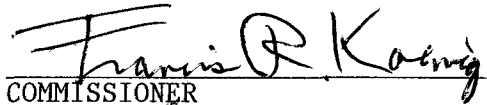
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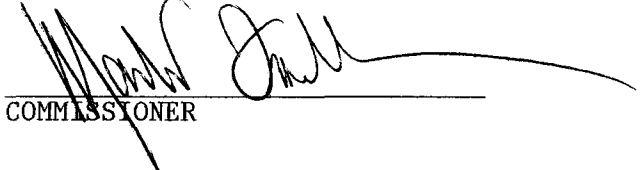
DATED: Albany, New York

STATE TAX COMMISSION

SEP 09 1983


PRESIDENT


COMMISSIONER


COMMISSIONER