

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph P. McNally : 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 1976 & 1977. :

State of New York
County of Albany

David Parchuck, 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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Joseph P. McNally, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph P. McNally
656 Waters Edge
Valley Cottage, NY 10989

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
11th day of February, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

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State of New York
County of Albany

David Parchuck, 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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Bernard Dolgin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard Dolgin
60 East 42nd St., Rm. 557
New York, NY 10165

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
11th day of February, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

February 11, 1983

Joseph P. McNally
656 Waters Edge
Valley Cottage, NY 10989

Dear Mr. McNally:

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
Bernard Dolgin
60 East 42nd St., Rm. 557
New York, NY 10165
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOSEPH P. MCNALLY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1976	:	
and 1977.	:	

Petitioner, Joseph P. McNally, 656 Waters Edge, Valley Cottage, New York 10989, 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 1976 and 1977 (File No. 33240).

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 1:15 P.M. Petitioner, Joseph P. McNally, appeared with Bernard Dolgin, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner's activities in the field of document analysis, verification and authentication 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, Joseph P. McNally, timely filed New York State resident income tax returns for the years 1976 and 1977 wherein he reported business income generated from his activities as an "Examiner of Questioned Documents". Reported business income totaled \$37,369.00 for 1976 and \$45,100.00 for 1977. Petitioner did not file unincorporated business tax returns for either of the years at issue.

2. On January 22, 1981 the Audit Division issued a Notice of Deficiency to petitioner for the years 1976 and 1977, asserting additional personal income due of \$271.00 and additional unincorporated business tax due of \$3,535.02, for a total tax due of \$3,806.02. Said Notice also included penalties for failure to file unincorporated business tax returns on time and failure to pay the unincorporated business tax when due, plus interest. Petitioner does not contest the additional personal income tax due of \$271.00 and, in fact, has paid said tax due together with the interest applicable thereto. Accordingly, the personal income tax due will not be addressed hereinafter.

3. During the years at issue petitioner, a sole proprietor, was engaged in business as an examiner of questioned documents, an occupation which is more commonly known as a handwriting expert. Petitioner received fees from various clients primarily for services rendered in the nature of examination and verification of the authenticity of signatures. He would also receive fees for giving expert testimony in various courts of law.

4. Petitioner joined the New York City Police Department in 1940 and was assigned to the Police Laboratory as a trainee in the document identification section. The training program for document analysis was a two-year internship where petitioner studied under the tutelage of previously qualified experts.

Through a case study approach, petitioner was trained in the examination and comparison of handwriting, signatures, handprinting and typewriting. He was also trained to examine documents for alterations, eradications and falsifications. Petitioner utilized photography, microscopes, fine line measurements, varied light application and chemical processes in the performance of the aforementioned duties.

5. Petitioner's career with the New York City Police Department spanned a thirty-two (32) year period from 1940 to 1972. During this period, petitioner worked almost exclusively in the document identification section of the Police Laboratory. In 1972, petitioner retired and went into private practice as a handwriting expert.

6. During the years at issue petitioner performed the majority of his services for governmental agencies and he estimates that more than 50 percent of his business income was derived from said governmental agencies. Petitioner's other clients were primarily financial institutions.

7. Petitioner is a member of several professional groups in the field of document identification, such as the American Academy of Forensic Sciences, American Society of Questioned Document Examiners, International Association for Identification, American Society for Testing and Materials - Forensic Science Section and American Board of Forensic Document Examiners, Inc.

8. The American Board of Forensic Document Examiners, Inc. has certified petitioner as a "Diplomate of the American Board of Forensic Document Examiners". In order to obtain certification, an individual must:

- a) possess an earned baccalaureate degree,
- b) have two years of full-time training in a forensic document laboratory,

- c) have two years of independent document work in a forensic document laboratory,
- d) have references from three certified forensic document examiners,
- e) be engaged in the full-time practice of forensic document examination,
- and
- f) pass both an oral and written examination.

9. The American Board of Forensic Document Examiners, Inc. has promulgated a code of ethics which all members must adhere to and has also defined forensic document examination as:

"...the practice of the application of document examination to the purposes of the law." Said examination "...relates to the identification of handwriting, typewriting, the authenticity of signatures, alterations in documents, the significance of inks and papers, photocopying processes, writing instruments, sequence of writings and other elements of a document in relation to its authenticity or spuriousness."

10. Petitioner is accepted nationwide as an expert in document identification and he has testified in numerous courts of law throughout the United States as to his findings. Mr. McNally has lectured on the subject of document identification at various colleges, private groups and governmental agencies. The Antioch School of Law in Washington, D.C. offers both a Baccalaureate and Masters degree in document identification.

11. There are no Federal or New York State regulatory bodies which govern or oversee the occupation of handwriting expert. There is no license which is issued to a handwriting expert nor is there any statute or regulation which prohibits petitioner from conducting business in corporate form. Petitioner carries no malpractice insurance.

12. Capital was not a material income producing factor and more than 80 percent of the business income was derived from personal services actually rendered by petitioner.

13. Petitioner at all times relied on his certified public accountant to prepare his returns. At the hearing held herein, petitioner's accountant testified that, in his opinion, petitioner's activities were that of a professional exempt from the imposition of unincorporated business tax and, for this reason, no unincorporated business tax returns were prepared. Petitioner's personal income tax returns have been prepared and filed in a timely fashion.

CONCLUSIONS OF LAW

A. That section 703(c) of the Tax Law provides, inter alia, that income received from the practice of law, medicine, dentistry or architecture or from the practice of any other profession is exempt from unincorporated business tax. That 20 NYCRR 203.11(b)(1)(i) 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."

B. That petitioner's activities as a handwriting expert during the years at issue, although requiring special skill and knowledge, 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(b)(1)(i).

In Rosenbloom v. State Tax Commission, 44 A.D.2d 69, mot. for lv. to app. den. 34 N.Y.2d 518, the court listed four factors to consider when determining if an activity constituted the practice of a profession. These factors are:

1. long-term educational background generally associated with a degree in an advanced field of science or learning;
2. the requirement of a license;
3. control of the occupation by standards of conduct, ethics and malpractice liability; and
4. the barrier to carrying on the occupation as a corporation.

In the instant matter there are no licensing requirements for a handwriting expert nor are his activities governed by any Federal or New York State regulatory bodies. Additionally, there are no strict educational requirements for handwriting experts and there exists no professional responsibility as to his findings (i.e. no malpractice liability). See Costa et al. v. State Tax Commission, 67 A.D.2d 1074 and cases cited therein.

C. That petitioner's failure to file unincorporated business tax returns for the years 1976 and 1977 and pay the tax when due was based on reasonable cause and not willful neglect. Accordingly, the penalties assessed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law are cancelled.

D. That the petition of Joseph P. McNally is granted to the extent indicated in Conclusion of Law "C" supra, and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 11 1983

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER