

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
John Strougo	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Years 1976 - 1979.	:	

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 10th day of November, 1983, she served the within notice of Decision by certified mail upon John Strougo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Strougo
4190 Fieldstone Road
Riverdale, NY 10471

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
10th day of November, 1983.

Martha L. Brunelle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John Strougo :
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 - 1979. :

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 10th day of November, 1983, she served the within notice of Decision by certified mail upon Lewis I. Septimus the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lewis I. Septimus
Zelon, Septimus & Co.
450 Seventh Ave.
New York, NY 10001

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
10th day of November, 1983.

Martha L. Sennelle

Connie Hagelund

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

November 10, 1983

John Strougo
4190 Fieldstone Road
Riverdale, NY 10471

Dear Mr. Strougo:

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
Lewis I. Septimus
Zelon, Septimus & Co.
450 Seventh Ave.
New York, NY 10001
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOHN STROUGO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1976,	:	
1977, 1978, and 1979.	:	

Petitioner, John Strougo, 4190 Fieldstone Road, Riverdale, New York 10471, 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, 1977, 1978, and 1979. (File No. 34864).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 23, 1983 at 1:15 P.M. Petitioner appeared by Lewis J. Septimus, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUES

I. Whether petitioner's activities as a real estate broker constitute a profession within the meaning and intent of section 703(c) of the Tax Law and the income therefrom is thus not subject to unincorporated business tax.

II. Whether, if said activities do not constitute a profession, income from certain real estate transactions entered into by petitioner was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, John Strougo, and his wife, Carol, filed joint New York State income tax resident returns for the years 1976 and 1977 and they filed separately on combined New York State income tax resident returns for the years 1978 and 1979. Petitioner did not file unincorporated business tax returns for any of the years in issue.

2. On July 23, 1981, the Audit Division issued a Notice of Deficiency against petitioner in the amount of \$54,614.41¹ plus penalty of \$23,623.14 and interest of \$1,050.22 for a total due of \$79,287.77 for the years 1976, 1977, 1978, and 1979. On January 19, 1981 the Audit Division had issued two statements of audit changes explaining that petitioner's activities as a real estate broker were subject to unincorporated business tax.

3. Petitioner, during the years in issue, was a real estate broker. New York State requires that real estate brokers be licensed and sets minimum criteria for licensure. Said criteria include one year of real estate salesperson's experience or two years of equivalent real estate experience, and completion of a course of study in real estate approved by the Secretary of State. Applicants who are not attorneys must also pass a written examination.

4. During each of the years in issue, petitioner filed a Federal Schedule C, Profit or (Loss) From Business or Profession listing his business activity as "sales" and the product as "real estate" with the business name John C. Strougo Realty Associates. The only business records which petitioner maintained were a checking account and a monthly income worksheet. Petitioner was involved in several real estate transactions wherein he bought a piece of real estate

¹ Included in the amount of \$54,614.41 is \$16,762.14 of personal income tax. Petitioner did not raise an issue with reference to the imposition of the personal income tax. Therefore, it has been assumed to be conceded.

and resold it on the same date at a higher price with a wraparound mortgage. Petitioner held eight or nine mortgages in this fashion and the gains and interest income received from said transactions were deposited in his business checking account. There was no separation, in said account, of the income received from the aforesaid transactions and other income received from petitioner's business, nor were amounts received or the time expended on the wraparound mortgage transactions separately stated on any of the limited records of the business. Petitioner also maintained rental properties, the income from which was also commingled with other business income. Petitioner reported all of the gains, interest income and rental income from the aforesaid real property as business income on his Federal Schedule C for each of the years in issue.

5. On audit, the Audit Division decided that petitioner owed unincorporated business tax on the income from his real estate business including income from the aforementioned wraparound mortgage transactions and the rental properties. The auditor determined the unincorporated business income to be the net profit as reported by petitioner on his Federal Schedule C.

6. Petitioner maintained that, as a real estate broker, he was a professional and thus not subject to unincorporated business tax. Alternatively, petitioner argued that, even if he was subject to the tax, the income received from the wraparound mortgage transactions and the rental property should not be included as unincorporated business income since said properties were held for his own account and were solely personal income not business income. Petitioner's representative alleged that the income in issue was included on petitioner's Federal Schedule C by mistake and should properly have been reported as personal interest income and rental income on his Federal return.

7. Petitioner offered no testimonial or documentary evidence to support any of his arguments with respect to the reasons for depositing all the income in issue in his business account or why he reported all of the income as business income on his Federal tax return. The only evidence offered was a worksheet listing the properties on which petitioner held wraparound mortgages or which he held for rent.

CONCLUSIONS OF LAW

A. That section 703(a) of the Tax Law defines unincorporated business to mean "any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity...". Section 703(c) provides:

"The practice of law, medicine, dentistry or architecture, and the practice of any other profession in which capital is not a material income-producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual or the members of the partnership or other entity, shall not be deemed an unincorporated business."

B. That 20 NYCRR 203.11(b)(1)(i) provides:

"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 the factors which should be considered in determining what activity constitutes the practice of a profession include whether a long-term educational background generally associated with a degree in an advanced field of science or learning is required; whether there is the requirement of a

license which indicates sufficient qualifications have been met prior to engaging in the occupation; and whether there is control of the occupation by standards of conduct, ethics, and malpractice liability (Rosenbloom v. State Tax Commission, 44 A.D.2d 69, mot. for lv. to app. den. 34 N.Y.2d 518).

D. That, although petitioner's qualification as a real estate broker required passing an examination and licensure, there is no requirement of a long-term educational background or a degree in an advanced field of learning. Petitioner's activities involve mere application of knowledge to uses for others as a vocation and thus do not constitute a profession within the meaning and intent of section 703(e) of the Tax Law (see Lawrence E. Rack, State Tax Commission, September 28, 1979; W. Raymond Miller, State Tax Commission, November 28, 1980).

E. That section 703(d) of the Tax Law provides that an individual or other unincorporated entity, except a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall not be deemed engaged in an unincorporated business solely by reason of the purchase and sale of property for his own account. Section 703(e) provides that an owner of real property who merely holds, leases or manages said property shall not be deemed engaged in an unincorporated business.

F. That sections 703(d) and 703(e) create "exemption[s] which [are] strictly construed against the taxpayer and to which the taxpayer has the burden of establishing entitlement" (citation omitted) (Peck v. New York State Tax Commission, 81 A.D.2d 938). The limited evidence available supports the conclusion that petitioner was buying, selling and renting property in the ordinary course of his real estate business rather than merely holding, leasing or managing said property within the meaning of the exemptions of sections


703(d) and 703(e). Absent more sufficient evidence, petitioner has failed to meet the burden of establishing that the aforesaid activities are not subject to unincorporated business tax.

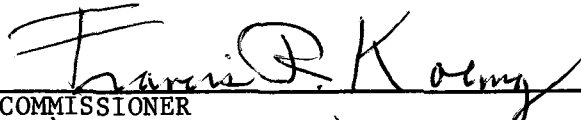
G. That the petition of John Strougo is denied and the Notice of Deficiency issued July 23, 1981 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983


PRESIDENT


COMMISSIONER


COMMISSIONER