

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Louis H. Taxin :
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 1971 - 1973. :

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 13th day of May, 1983, he served the within notice of Decision by certified mail upon Louis H. Taxin, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis H. Taxin
91 Brite Ave.
Scarsdale, NY 10583

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
13th day of May, 1983.

David Parchuck

Annice A. Highland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

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Business Tax under Article 23 of the Tax Law for :
the Years 1971 - 1973. :

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 13th day of May, 1983, he served the within notice of Decision by certified mail upon Louis Sternbach the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis Sternbach
Louis Sternbach & Co.
6 E. 43rd St.
New York, NY 10017

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
13th day of May, 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

May 13, 1983

Louis H. Taxin
91 Brite Ave.
Scarsdale, NY 10583

Dear Mr. Taxin:

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
Louis Sternbach
Louis Sternbach & Co.
6 E. 43rd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LOUIS H. TAXIN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1971,	:	
1972 and 1973.	:	

Petitioner, Louis H. Taxin, 91 Brite Avenue, Scarsdale, New York 10583, 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 1971, 1972 and 1973 (File No. 23022).

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 June 2, 1981 at 9:15 A.M. Petitioner Louis H. Taxin appeared by Louis Sternbach, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner's activities as a consultant constituted the carrying on of an unincorporated business thereby subjecting the income derived from said activities to unincorporated business tax.

II. Whether petitioner, if determined to be conducting an unincorporated business, may exclude from 1973 unincorporated business gross income the sums of \$1,500.00, purported to represent a director's fee, and \$6,640.00, the alleged amount of deferred compensation earned by petitioner as an employee.

III. Whether petitioner, if determined to be conducting an unincorporated business, may deduct from business gross income a portion of employee business expenses.

IV. Whether petitioner's failure to file unincorporated business tax returns for the years at issue was due to 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, Louis Taxin, timely filed New York State personal income tax returns for the years 1971, 1972 and 1973 wherein he reported miscellaneous or other income of \$14,266.63, \$21,199.96 and \$36,049.97, respectively. He did not file unincorporated business tax returns for said years.

2. On June 26, 1978 the Audit Division issued to petitioner a Notice of Deficiency asserting that for the years 1971, 1972 and 1973 unincorporated business tax of \$1,957.08 was due, together with interest and penalties. The Notice of Deficiency was based on a Statement of Audit Changes, originally dated April 4, 1977, wherein it was held that petitioner's "...activities as a consultant constitute the carrying on of an unincorporated business and the income derived from this source is subject to the unincorporated business tax...". The Audit Division computed the tax due using total business income figures of \$11,666.63 for 1971, \$19,999.96 for 1972 and \$30,249.99 for 1973. The aforementioned total business income figures were computed by subtracting from reported miscellaneous or other income director's fees and/or trustee's commissions of \$2,600.00, \$1,200.00 and \$5,800.00 for 1971, 1972 and 1973, respectively.

3. During the years at issue petitioner received consultant fees from four sources in the years and amounts indicated below:

<u>SOURCE</u>	<u>1971</u>	<u>1972</u>	<u>1973</u>
Kenrich Corp.	\$ 9,166.63	\$14,999.96	\$14,166.66
Chronetics, Inc.	2,500.00		
Royal Operating Corp.		5,000.00	
Royal Business Funds Corp.			16,083.31
Total	<u>\$11,666.63</u>	<u>\$19,999.96</u>	<u>\$30,249.97</u>

The services provided by petitioner to the abovementioned corporations were in the nature of advising them on areas of finance, business, bank loans and mergers. None of the principals exercised any supervision or control over petitioner's activities, nor was there any arrangement as to the division of his time and efforts. Petitioner was free to work for or represent other principals.

4. Prior to February 1, 1970, petitioner was president and chief executive officer of Royal Business Funds Corporation (hereinafter "Royal"). Effective February 1, 1970, he ceased being president and chief executive officer and became a consultant to Royal. As compensation for his consultive services, petitioner was to receive \$20,000.00 per year, payable in equal monthly installments commencing on February 1, 1970 and ending on March 31, 1973. Due to his retirement from Royal, petitioner was also entitled to receive deferred compensation in the sum of \$29,900.00, payable in 36 equal monthly installments of \$830.00 each, commencing on April 1, 1973 and continuing through March 31, 1976.

5. During the calendar year 1973 petitioner received wages of \$22,470.00 from Royal and other miscellaneous income from Royal of \$16,083.31. The wage income was reported on Withholding Tax Statement, Form IT-2102, while the miscellaneous income was reported on Federal Form 1099-MISC. Petitioner

contends that the \$16,083.31 of miscellaneous income received from Royal in 1973 includes a \$1,500.00 director's fee and \$6,640.00 in deferred compensation (\$830.00 X 8) and that said amounts should not be included in unincorporated business gross income. It has been substantiated by documentary evidence that the \$1,500.00 director's fee was included in the \$16,083.31 miscellaneous income, however, no documentary evidence or testimony was adduced to substantiate that the deferred compensation of \$6,640.00 was included in said miscellaneous income reported on Federal Form 1099 MISC.

6. During the years at issue petitioner claimed an adjustment to income in the nature of employee business expenses. Said expenses totaled \$7,746.49 for 1971, \$6,382.10 for 1972 and \$6,534.85 for 1973. Petitioner argues that if determined to be subject to unincorporated business tax, that a portion of the employee business expenses should be allocated to unincorporated business gross income based on a percentage determined by placing miscellaneous income over the total of miscellaneous income and wage income. (For the purposes of this decision the total of miscellaneous income and wage income shall be referred to as "total earned income".)

7. "Total earned income" for the year 1971 amounted to \$44,641.63, said amount also included director's fees of \$2,600.00, while "total earned income" for 1972 and 1973 totaled \$46,200.00 and \$70,326.00, respectively. Claimed employee business expenses for the year 1971 included a deduction of \$1,400.00 for travel expenses directly attributable to directorships. No amounts were separately stated for travel expenses directly attributable to directorships for the years 1972 and 1973.

8. Petitioner asserts that if held subject to unincorporated business tax that the late filing and late payment penalties should be cancelled since he

holds that reasonable cause existed for failure to file said returns. In 1930 petitioner graduated from Columbia Law School, however, he opted for a career in business, rather than engaging in the practice of law. Throughout the next 40 years petitioner held numerous jobs in the business community with important and demanding responsibilities. Petitioner holds that his legal training was of paramount importance in the discharge of his duties as a businessman and later as a consultant and, for this reason, he believed his miscellaneous income from consulting activities constituted the practice of a profession exempt from unincorporated business tax. Petitioner has consistently filed his personal income tax returns in a timely fashion and has utilized the services of a professional accountant in the preparation his returns.

CONCLUSIONS OF LAW

A. That petitioner's activities as a consultant constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law and, accordingly, the income derived from said activities is subject to unincorporated business tax.

B. That the \$1,500.00 director's fee received by petitioner from Royal in 1973 does not constitute taxable income for unincorporated business tax purposes within the meaning and intent of section 703(b) of the Tax Law. That the \$6,640.00 of deferred compensation earned by petitioner as an employee of Royal and paid in 1973 is not taxable income for unincorporated business tax purposes, however, petitioner has failed to sustain the burden of proof under sections 722 and 689(e) of the Tax Law to show that the \$6,640.00 was included in the \$16,083.31 of miscellaneous income reported on Federal Form 1099-MISC. Accordingly, unincorporated business gross income for the year 1973 is reduced by \$1,500.00, from \$30,249.97 to \$28,749.97.

C. That a portion of the employee business expenses are attributable to petitioner's unincorporated business activities and are allocated to said activities based on a percentage determined by placing unincorporated business gross income over "total earned income". However, for the year 1971, \$1,400.00 of employee business expenses were designated as travel expenses directly attributable to exempt directorship income and, accordingly, these expenses are not allocable, nor is directorship income to be included in the denominator in computing the allocation percentage for the year 1971. The following chart indicates the allocation percentages and the amount of expenses allowed as deductions:

<u>YEAR</u>	<u>ALLOCATION FACTOR</u>	<u>ALLOCABLE EXPENSES</u>	<u>DEDUCTIBLE EXPENSES</u>
1971	27.8% (11,667/42,042)	\$6,346.49	\$1,764.32
1972	41.6% (19,200/46,200)	\$6,382.10	\$2,654.95
1973	40.9% (28,750/70,326)	\$6,534.85	\$2,672.75

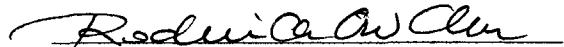
D. That petitioner's failure to file unincorporated business tax returns for the years at issue was due to reasonable cause and not willful neglect and, therefore, the penalties asserted pursuant to sections 685(a)(1) and (a)(2) are cancelled.

E. That the petition of Louis H. Taxin is granted to the extent indicated in Conclusions of Law "B", "C" and "D" and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 18 1983


PRESIDENT


COMMISSIONER


COMMISSIONER