

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John J. & Eileen D. Flynn :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1974 - 1976. :
_____ :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon John J. & Eileen D. Flynn, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John J. & Eileen D. Flynn
Peters Lane
Pound Ridge, NY 10576

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
18th day of January, 1984.

David Parchuck

David A. Chappell
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

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of :
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State of New York }
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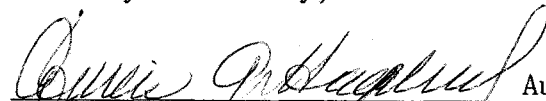
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Richard J. Bronstein, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

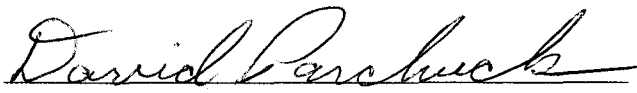
Richard J. Bronstein
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Ave.
New York, NY 10154

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
18th day of January, 1984.


pursuant to Tax Law section 174


Authorized to administer oaths

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

January 18, 1984

John J. & Eileen D. Flynn
Peters Lane
Pound Ridge, NY 10576

Dear Mr. & Mrs. Flynn:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Richard J. Bronstein
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Ave.
New York, NY 10154
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOHN J. AND EILEEN D. FLYNN	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1974	:	
through 1976.	:	

Petitioners, John J. and Eileen D. Flynn, Peters Lane, Pound Ridge, New York 10576, 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 1974 through 1976 (File No. 27688).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 19, 1983 at 9:45 A.M. with all briefs to be submitted by June 24, 1983. Petitioner appeared by Paul, Weiss, Rifkind, Wharton & Garrison, Esqs. (Richard J. Bronstein, Esq. and Paul Wachter, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether income which the Audit Division determined to be subject to unincorporated business tax was earned by petitioner as a professional engineer and thereby was exempt from such tax.

II. Whether petitioner is entitled to a refund of unincorporated business tax paid for the 1976 tax year.

FINDINGS OF FACT

1. On December 15, 1977, the Audit Division issued a Statement of Audit Changes against petitioner John J. Flynn,¹ alleging deficiencies in unincorporated business tax of \$1,518.22 plus interest, \$4,110.70 plus interest and \$1,494.00 plus interest for the 1974, 1975 and 1976 tax years, respectively. For the 1975 and 1976 tax years, the Audit Division also imposed penalties under Tax Law §685(c) of \$279.21 and \$376.03, respectively. The following explanation was provided:

"Information on hand shows the other income reported on your 1974 & 1975 returns was derived from your activities as an insurance consultant, and therefore is subject to the New York State unincorporated business tax.

Since a professional engineer is an exempt profession for unincorporated business tax purposes, you may not, for (1976) unincorporated business tax, apply the net loss resulting from this activity against the profit of your insurance consulting business."

2. On March 24, 1978, the Audit Division issued a Notice of Deficiency against petitioner alleging a total tax deficiency of \$7,122.92 for the three years at issue plus penalty and interest. A copy of the Statement of Audit Changes described in Finding of Fact "1", supra, was attached to the Notice of Deficiency.

3. Petitioner filed jointly with his wife a Form IT-201, New York State Income Tax Resident Return, for each of the years at issue. He reported business income (loss) as a "professional engineer" of \$6,283, (\$44,834) and (\$27,171) for 1974, 1975 and 1976, respectively. He also reported income as

¹ The Statement of Audit Changes and the Notice of Deficiency were issued only against John J. Flynn. Eileen D. Flynn is a party to this proceeding for the sole reason that she filed joint tax returns with her husband for the years at issue. Therefore, hereinafter the term, "petitioner", refers to John J. Flynn.

"an insurance consultant" of \$37,604, \$84,740 and \$82,480 for 1974, 1975 and 1976, respectively. Petitioner filed a 1976 unincorporated business tax return and remitted such tax in the amount of \$2,492. However, the 1976 unincorporated business tax return was unsigned. It was apparently attached to petitioner's 1976 personal income tax return. Petitioner's position is that it was due to the mistake of his accountant that he filed a 1976 unincorporated business tax return.² Petitioner's accountant testified as follows:

"(I)n 1976 I made an error in preparing the input information that went through the computer and, unfortunately because of the pressures of time in filing returns, I didn't satisfactorily check the return when it came back from the computer (to discover that an unincorporated business tax return had been prepared)."

Petitioner never filed an unincorporated business tax return prior to 1976. He asserts that he is entitled to a refund of 1976 unincorporated business tax which was paid in error.

4. Petitioner obtained a bachelor's degree in civil engineering from Villanova University in 1958 and has been licensed as a professional engineer by the State of New York Education Department since 1963. He belongs to several professional organizations including the New York State Society of Professional Engineers and the New York Association of Consulting Engineers.

5. During the years at issue, petitioner's activities were primarily in two areas of professional engineering: (1) air pollution control engineering involving the upgrading of incinerators and boilers chiefly in buildings located in New York City and (2) the rendering of engineering services to insurance companies and attorneys. Petitioner had the assistance of employees

² Petitioner testified that when he signed his 1976 New York personal income tax return, he was unaware that there was an unincorporated business tax return attached thereto. He was also unaware that his remittance of 1976 tax included unincorporated business tax.

in conducting the engineering services noted in the first category while petitioner rendered engineering services to insurance companies and attorneys primarily as an individual. Petitioner's income was segregated between these two areas by his accountant, who testified that he erroneously categorized the income in the second area on petitioner's tax returns as income earned as an "insurance consultant".

6. The income, categorized by petitioner's accountant as having been earned as an "insurance consultant", included engineering services which petitioner provided to eleven different insurance companies and to various attorneys who employed petitioner as an expert witness in the area of building construction, boilers and incinerators. The largest job in this category that petitioner had during the years at issue was for the Great American Insurance Company which hired him to perform a series of engineering inspections of the Second Avenue subway construction site, between 101st Street and 120th Street in Manhattan. Petitioner testified that "The insurance company retained me to make the structural examinations on all the buildings and to make recommendations how the buildings could be stabilized...".

Petitioner did not perform any work as an adjuster for any insurance company and did not provide advice on how to settle insurance claims. Rather, he provided engineering services which ultimately assisted various insurance companies in evaluating their claims. Petitioner further testified as follows:

"I do inspection work of fire damaged buildings primarily directed toward trying to identify whether it was an electric short, or whether it was an exploding boiler, whether it was a defective incinerator...whatever it was that produced this fire and identify it so that they have the engineering facts at least straightened out."

CONCLUSIONS OF LAW

A. That pursuant to Tax Law §703(c) and 20 NYCRR 203.11(b)(1), income from the practice of the engineering profession is exempt from the unincorporated business tax.³

B. That it is of no matter that some of petitioner's clients were insurance companies or lawyers for the purpose of determining whether petitioner is entitled to an exemption from unincorporated business tax. Rather, such determination must focus on what petitioner does, not on who his clients are or how the engineering services performed by him are ultimately used by his clients. Therefore, since petitioner, a licensed engineer, earned all of his employment income from the practice of professional engineering, we conclude that petitioner is entitled to an exemption from unincorporated business tax on all of his income from employment during the years at issue.

C. That pursuant to Tax Law §687(f), petitioner is entitled to a refund of 1976 unincorporated business tax which he paid in error as noted in Finding of Fact "3", supra.

D. That the petition of John J. and Eileen Flynn is granted.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

³ Such law and regulation provide that the practice of engineering, in which capital is not a material income producing factor and in which more than eighty percent of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual, is not subject to the unincorporated business tax. These two factors were not at issue in this proceeding.