

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Henry Klein :
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 1976 & 1977. :
AFFIDAVIT OF MAILING

State of New York }
ss.:
County of Albany }

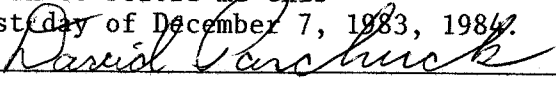
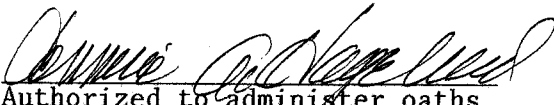
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December 7, 1983, 1984, he served the within notice of Decision by certified mail upon Henry Klein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Henry Klein
280 N. Mountain Ave.
Upper Montclair, NJ 07043

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
31st day of December 7, 1983, 1984.



Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

Conrad A. Kasper
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 31, 1984

Henry Klein
280 N. Mountain Ave.
Upper Montclair, NJ 07043

Dear Mr. Klein:

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, 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
William Lichtenstein
450 Seventh Ave.
New York, NY 10123
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HENRY KLEIN	:	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, Henry Klein, 280 North Mountain Avenue, Upper Montclair, New Jersey 07043, 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. 35404).

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 December 7, 1983 at 10:45 A.M. Petitioner appeared by William Lichtenstein, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner was engaged in the practice of architecture and therefore not subject to unincorporated business tax pursuant to section 703(c) of the Tax Law.

FINDINGS OF FACT

1. Petitioner herein, Henry Klein, timely filed New York State income tax resident returns for the years 1976 and 1977 wherein he reported business income of \$29,069.00 and \$36,495.00, respectively. No unincorporated business tax returns were filed for the years at issue.

2. On April 13, 1981, the Audit Division issued a Notice of Deficiency to petitioner for 1976 and 1977, imposing unincorporated business tax of \$2,506.03, plus penalty¹ and interest of \$1,950.44, for an alleged total due of \$4,456.47.

3. The aforementioned Notice of Deficiency was premised on a Statement of Audit Changes dated October 4, 1979, wherein the Audit Division held that the income generated from petitioner's activities as an "interior designer" was subject to unincorporated business tax.

4. During the years in question petitioner was a sole proprietor carrying on business under the name of Henry Klein Design Associates. On Federal Schedule C, Profit or (Loss) From Business or Profession, petitioner listed his principal business activity as "architect".

5. Petitioner provided his clients with detailed drawings, designs and specifications for the renovation of the client's existing building, for additions to existing buildings or for the construction of new buildings. Petitioner's clients were almost exclusively commercial enterprises, such as retail stores and restaurants. The drawings and plans which petitioner furnished his clients would detail the entire construction process including, inter alia, the design and location of all walls, ceilings, store front, how and where to run steel support beams, lighting, fixtures and where to locate steps and exits.

6. In the design of any particular renovation, addition or new construction, petitioner tried to insure that his design was both functional and that it matched the business's clientele, location and product. Approximately 60

¹ Penalties were asserted due for failure to file an unincorporated business tax return [Tax Law §722 and §685(a)(1)] and for failure to pay the unincorporated business tax when due [Tax Law §722 and §685(a)(2)].

percent of petitioner's design work involved structural elements which could not be viewed by the general public, including such things as heating, ventilation, air conditioning and electrical systems and also vertical transportation. The remaining 40 percent represented that part of the design work which could be seen by the general public. Petitioner's work did not involve interior decorating.

7. Petitioner studied architecture in Austria for approximately one year from 1945 to 1946 before he immigrated to the United States. Petitioner also studied architecture at Columbia University; however, he did not receive a degree in this field from Columbia or any other university. Petitioner is not a licensed architect with the New York State Education Department nor is he a licensed architect in any other state.

8. From 1950 to sometime in 1960, petitioner was employed by several architectural firms. In 1960, petitioner established his own design firm. Petitioner testified that pursuant to New York State Education Law he was qualified to take the test to become a licensed architect due to his years of practical experience working for other licensed architects. Petitioner never took the test to become a licensed architect since he felt a license was not necessary considering the manner in which he conducted business. The record herein does not reveal whether or not petitioner ever made application to take the licensing test.

9. Since petitioner was not a licensed architect, it was necessary for either petitioner or his client to employ the services of a licensed architect or a licensed professional engineer. Petitioner, on all jobs, utilized a licensed architect or engineer since his drawings and specifications had to have the stamp of a licensed architect or engineer in order to obtain necessary

building permits and other permits. Petitioner often used licensed architects or engineers who specialized in dealing with the building departments in the various localities where the construction was to take place. These individuals would take petitioner's plans and drawings to the building department to "file the job", get necessary permits, etc. Petitioner's plans and drawings sometimes contained too much detail for the building department and, therefore, the licensed architect or engineer would make new plans for the building department containing less detail.

10. Petitioner did not carry malpractice insurance nor was he a member of any professional societies or national or local organizations for architects or designers. Petitioner was recognized in numerous trade magazines and publications for his architectural and design work.

11. More than eighty percent (80%) of petitioner's business income was derived from his personal services and capital was not a material income producing factor in petitioner's business.

12. Petitioner did not argue nor was any evidence presented with respect to the penalties asserted for failure to file unincorporated business tax returns and for failure to pay the unincorporated business tax on time.

CONCLUSIONS OF LAW

A. That section 703(c) of the Tax Law provides that:

"The practice of law, medicine, dentistry or architecture... shall not be deemed an unincorporated business."

B. That petitioner's testimony, coupled with the documentary evidence submitted, supports that his activities and services were in all material and essential respects identical to those of an architect. It is also noted that pursuant to Education Law section 7304.2 and regulation 8 NYCRR 69.1(b),

petitioner was qualified to make application for permission to participate in the examination for licensure as an architect.


C. That for the years in question it is deemed that petitioner was engaged in business as an architect and, accordingly, the income earned from said activity is exempt from unincorporated business tax pursuant to section 703(c) of the Tax Law. (See: State Tax Commission decisions, Matter of the Petition of Robert Trenga dated April 6, 1984 and Matter of the Petition of Sal A. Claroni dated May 23, 1980.)

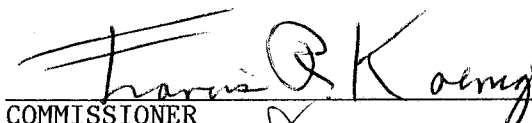
D. That the petition of Henry Klein is granted and the Notice of Deficiency dated April 13, 1981 is cancelled in its entirety.

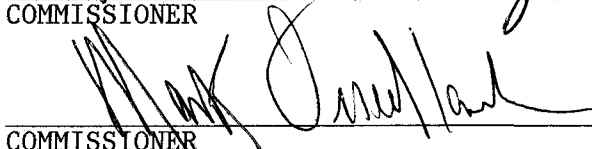
DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER