

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Edward C. Raney	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Year 1972 & 1973.	:	

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 Edward C. Raney, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward C. Raney  
301 Forest Dr.  
Ithaca, NY 14850

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*

*Conrad A. Hagerlund*  
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Edward C. Raney :

AFFIDAVIT OF MAILING

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 Year 1972 & 1973. :

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 Robert S. Grant, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert S. Grant  
Savings Bank Bldg., Tioga St.  
Ithaca, NY 14850

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.

David Parchuck

Joseph P. Hageman  
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Edward C. Raney  
301 Forest Dr.  
Ithaca, NY 14850

Dear Mr. Raney:

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  
Robert S. Grant  
Savings Bank Bldg., Tioga St.  
Ithaca, NY 14850  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
EDWARD C. RANEY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1972	:	
and 1973.	:	

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Petitioner, Edward C. Raney, 301 Forest Drive, Ithaca, New York 14850, 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 1972 and 1973 (File No. 14817).

A formal hearing was commenced before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 44 Hawley Street, Binghamton, New York, on May 8, 1979 at 9:00 A.M., and was continued to conclusion before the same Hearing Officer at the offices of the State Tax Commission, State Office Building Annex, 164 Hawley Street, Binghamton, New York, on September 16, 1982 at 1:15 P.M., with all briefs to be submitted by January 15, 1983. Petitioner appeared by Robert S. Grant, Esq. The Audit Division appeared on May 8, 1979 by Peter Crotty, Esq. (Paul A. Lefebvre, Esq., of counsel), and on September 16, 1982 by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether petitioner's activities during the years 1972 and 1973 constituted the practice of a profession such that the income derived therefrom was not subject to the imposition of unincorporated business tax.

II. Whether, in the event the income from petitioner's activities is determined to be subject to unincorporated business tax, petitioner is entitled to allocate such income within and without New York State.

FINDINGS OF FACT

1. On February 24, 1976, the Audit Division issued to petitioner, Edward C. Raney, a Notice of Deficiency asserting additional tax due, plus penalty and interest accrued to the date of the Notice of Deficiency, as follows:

<u>YEAR</u>	<u>DEFICIENCY</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1972	\$ 2,042.55	\$ 817.02	\$ 438.58	\$ 3,298.15
1973	30,974.35	11,770.25	4,327.74	47,072.34
Total	\$33,016.90	\$12,587.27	\$4,766.32	\$50,370.49

2. A Statement of Audit Changes, also dated February 24, 1976 and issued to petitioner, explained the basis for the above-asserted deficiency as follows:

"[t]he income from your activities is subject to the unincorporated business tax. Section 685(a)(1) & (2) penalty for failure to file and pay unincorporated business tax on time. Section 685(c) penalty for underestimation of tax."

3. Petitioner, Edward C. Raney, retired from Cornell University as a Professor of Zoology, Emeritus, on August 31, 1971, following a teaching and research career at Cornell which commenced in 1936. During his approximately thirty-five (35) years at Cornell, petitioner served (successively) as an Assistant Instructor, Assistant Professor, Associate Professor and Professor of Zoology. Petitioner's duties at Cornell involved teaching and research in the field of vertebrate zoology, with emphasis on ichthyology (the study of fish). Petitioner's scientific specialty is the study of the ecology, behavior and systematics of fish.

4. Petitioner received a Bachelor of Science degree in 1931 from State College, Slippery Rock, Pennsylvania, and both his Master of Science and his

Doctorate Degrees from Cornell in 1935 and 1938, respectively. Petitioner noted that his background of education and experience in biology may be further classified as dealing mostly (though not exclusively) with animals and, more specifically, with fish. Thus petitioner, in addition to being classified as a biologist, is also referred to as a zoologist, an ichthyologist and an aquatic biologist.

5. In addition to his academic credentials and teaching experience, petitioner has been the author or co-author of over one hundred (100) publications in his area of scientific specialty, has received several formal research appointments and has been a member of several advisory committees working in his field of study. Petitioner is a member of numerous professional societies and honorary fraternities, and has been the recipient of several research grants from both governmental agencies and private associations.

6. In or about 1966, petitioner decided to involve himself in projects concerning studies of the ecological and environmental impact surrounding the construction and operation of electrical power generating plants. These studies involved both nuclear powered generation plants, as well as hydroelectric plants and coal or oil powered plants. Prior to his retirement from Cornell, petitioner worked on the above projects during the summers and on weekends and vacation days. Petitioner worked on these projects under the name Ichthyological Associates ("Associates").

7. Petitioner was hired by various companies, usually public utilities, to give his advice concerning the type(s) of study(ies) needed or the changes necessary (such as plant site location) to solve a particular environmental problem or satisfy environmental requirements and obtain state and/or federal operating licenses for a given facility. Petitioner was also retained to

perform the actual studies, to give testimony before a study was undertaken or to testify as to the results of a study, and, on occasion, to teach seminars to employees of public utilities.

8. In most instances, the studies recommended by petitioner were carried out by petitioner and his employees, although there were instances when petitioner was retained only to recommend a study or action to be carried out by other persons not employed by or associated with petitioner. With regard to the actual field studies conducted by petitioner, the method of procedure was substantially as follows: The client posed a question relating to the ecological impact of some change of environment, particularly as it affected fish. Petitioner, often in cooperation with others studying other aspects of the ecological impact, undertook to supply the data, analyze it and give an opinion as to the impact. To do this, he first drew an outline of the areas that needed to be studied and the data that needed to be collected. This was given to the leader of a group of petitioner's employees who proceeded to collect the data for, and under the supervision of, petitioner. When the data were collected, they were organized, evaluated and interpreted by petitioner, who then wrote and when called upon, testified to his opinion based upon such analysis.

9. Petitioner employed trained personnel to physically gather data in the field (at the study site), and to identify, enumerate, quantify, record and write reports on such data. This activity was overseen by petitioner to ensure that the data gathering, testing, laboratory work, recording, reporting and statistical processes were correctly carried out so that the results of the study(ies) would be reliable and accurate.

10. During 1972, petitioner employed a total of one hundred seventeen (117) professional and non-professional persons on a full-time basis, most of

whom were salaried, but some of whom worked on a daily wage basis. Many of these employees were petitioner's former students who began working for petitioner on a part-time basis while studying for undergraduate or advanced degrees at Cornell and upon completion of their studies, went to work for petitioner on a full-time basis. In 1972, petitioner also employed one hundred forty persons on a part-time basis, most of whom were students from various colleges throughout the country working during the summer recess from school.

11. Petitioner was directly involved in hiring his employees and in setting up a job-site headquarters and laying out the field (area) of each particular study. Almost all of petitioner's employees were directly involved in the process of gathering data at the study sites.

12. Petitioner analyzed and evaluated the basic research data developed and reported by his employees, and used this information to write his reports (including summaries for business executives) on the results of each particular study. His reports would be discussed with his clients and ultimately would be presented before a commission, court or regulatory body accompanied by petitioner's testimony concerning the study and report. Petitioner assembled, edited, signed and took complete responsibility for the contents of each of his reports.

13. When petitioner was hired by a particular client to perform a substantial study, it was his practice to set up a "field headquarters" as close as possible to the study area. This headquarters was essentially a laboratory set up to allow analysis of data collected to take place at the job site. A sign showing the name Ichthyological Associates was placed outside these laboratories. Neither the telephones at these laboratories nor the laboratory facilities were used by companies other than Ichthyological Associates.



14. Petitioner did not purchase the equipment necessary to perform the studies, but rather informed the clients of what was needed. The clients would then purchase the necessary equipment as specified by petitioner and also rent, purchase or construct facilities for petitioner to use as a laboratory at the job site. A substantial amount of equipment, including boats and other vehicles, as well as microscopes and other laboratory equipment, was often required by petitioner to conduct a study. The equipment remained under the ownership of the client and did not become petitioner's property at the conclusion of a study.

15. Purchase of the above equipment by the client for petitioner's use, rather than purchase of the equipment by petitioner, was due to petitioner's lack of capital to cover the substantial cost of such equipment, as well as the need for such equipment at several study sites located in different geographical areas.

16. Petitioner's capital investment in Ichthyological Associates was limited basically to desks, files and equipment used at an office petitioner maintained in his home at 301 Forest Drive, Ithaca, New York. Petitioner had to borrow money from banks in order to cover the initial payroll expenses involved in his studies. This expense, as well as virtually all other expenses incurred by petitioner in conducting his studies, were paid by petitioner's clients. The manner of payment consisted of petitioner's submission of vouchers to the client for expenses incurred, with payment thereafter made to petitioner by check from the client.

17. Petitioner employed one bookkeeper at his home office in Ithaca, New York. The general office work of Ichthyological Associates (e.g., clerical, financial and secretarial work) was performed at this office. Petitioner also

prepared and edited his final reports at this office after obtaining study data and reports at or from the various job sites. The address and telephone number of this office is carried on the letterhead of Ichthyological Associates' stationery. Presumably, initial contact between a (prospective) client and petitioner would be made through this office.

18. Petitioner indicated that testifying was the most important aspect of his work, although this occupied less than five percent of his total working time. In addition to testifying with regard to studies he had conducted and reports thereon, petitioner was retained on occasion to give opinions with respect to the economic feasibility of conducting a particular study. He was hired at times to determine the procedure needed to obtain a license to build a large plant.

19. In addition to feasibility and/or preoperational studies, many of petitioner's studies were continued even after licenses were granted and a plant was built, as a means of continually monitoring the plant's impact on the environment. In such instances, the headquarters or lab facilities remained open, with a reduced number of employees present, for years after the initial study in accordance with the duration of the given project.

20. During the years at issue, most of petitioner's work was performed at the request of large public utilities and involved large scale projects, particularly as related to the field of nuclear energy. Petitioner also was involved in other smaller scale projects. In 1972, petitioner handled approximately twenty projects, of which approximately five to seven were classified as major scale projects for large public utilities.

21. Petitioner noted that a substantial time period may elapse before he testifies on the results of a study. In the case of a large nuclear facility,

this time period may span six to ten years, during which time data is continually gathered and yearly reports are written, discussed, edited, printed and made available.

22. Petitioner testified that during the years at issue, Ichthyological Associates performed work for only two New York clients, and that its income was derived almost exclusively from jobs performed in Pennsylvania, Delaware and New Jersey. Petitioner also noted that he spent over one-half of his working time outside of New York, and submitted a summary prepared from his diaries indicating the specific dates and places where he worked outside of his Ithaca, New York office during the years at issue. In 1972, petitioner spent 181 days working outside of Ithaca, of which 17 days were worked in an area of New York other than Ithaca. In 1973 (first three months), petitioner spent 28 days working outside of Ithaca, of which 1 day was worked in an area of New York other than Ithaca.

23. Petitioner testified that Ichthyological Associates registered with those states outside of New York in which it performed work, furnished reports to these states (where required), and withheld taxes and other amounts from the employee payrolls as was required. Employer returns and reports concerning employee wages and amounts withheld therefrom filed with the various other states by petitioner consistently reflected the Ithaca office address. No evidence was presented that petitioner filed other tax returns in or paid tax to any other jurisdictions in which work was performed.

24. Ichthyological Associates was incorporated under the laws of New York State on April 1, 1973.

25. Petitioner has never filed unincorporated business tax returns. However, petitioner testified that he was issued assessments for and did pay

(under protest) unincorporated business tax for the years 1969, 1970 and 1971, but that he received a refund on such tax paid after he filed amended personal income tax returns. Petitioner testified that this situation led him to believe he was exempt from unincorporated business tax as a professional and that this is why he filed no such returns during the years at issue.

26. Petitioner asserts that his expertise as developed through his educational training, his years of research and academic involvement in his specialized field of science and his actual field experience made him one of the few persons qualified to set up and carry out the environmental impact studies and render reliable advice and conclusions thereon. Petitioner maintains that his services were in demand because of his qualifications and that his services were rendered as a professional advising clients.

27. Petitioner submitted evidence concerning sources and allocations of all income and expenses of Ichthyological Associates during the years at issue, together with information concerning wages paid and property owned or employed by Ichthyological Associates during these years. Petitioner requests, in the event it is decided he is subject to the imposition of unincorporated business tax, that the income so subject be determined on the basis of an allocation percentage as follows:

	<u>Total</u>	<u>1972</u> <u>N.Y.S.</u>	<u>(New York)</u> <u>Percentage</u>
<u>Gross Sales From Services:</u>	\$2,028,001	\$58,313	2.8754
<u>Wages:</u>	1,362,291	37,045	2.7193
<u>Property:</u>			
Real Property Owned	11,000	11,000	
Real Property Rented	63,208	1,200	
Personal Property Owned	13,623	2,125	
<u>Total Property</u>	<u>\$ 87,831</u>	<u>\$14,325</u>	<u>16.3097</u>
Total (1972) N.Y.S. Percentage:			<u>21.9044</u>

	<u>1973 (3 mos.)</u>		<u>(New York)</u>
	<u>Total</u>	<u>N.Y.S.</u>	<u>Percentage</u>
<u>Gross Sales From Services:</u>	\$1,142,278	\$41,265	3.6125
<u>Wages:</u>	340,985	14,730	4.3198
<u>Property:</u>			
Real Property Owned	11,000	11,000	
Real Property Rented	-0-	-0-	
Personal Property Owned	2,629	2,629	
<u>Total Property</u>	<u>\$ 13,629</u>	<u>\$13,629</u>	<u>100.00</u>
Total (1973) N.Y.S. Percentage:			<u>107.9323</u>

<u>Allocation Computation</u>	<u>1972</u>	<u>1973</u>
Total of Percentages	21.9044	107.9323
N.Y.S. Percentage (divided by 3)	<u>7.3015</u>	<u>35.9774</u>
Schedule C - Net Income	\$47.137	\$573,170
x N.Y.S Allocation Percentage	.073015	.359774
<u>N.Y.S. Allocated Income</u>	<u>\$ 3,442</u>	<u>\$206,212</u>

#### CONCLUSIONS OF LAW

A. That during the years at issue herein, section 701(a) of the Tax Law imposed a tax upon the unincorporated business taxable income of every unincorporated business wholly or partly carried on within New York State. Section 703(c) of the Tax Law provided that the "[t]he practice of law, medicine, dentistry or architecture, and the practice of any other profession... shall not be deemed an unincorporated business."

B. That 20 NYCRR 203.11(b)(1)(i)<sup>1</sup> 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

<sup>1</sup> This regulation became effective February 1, 1974, which is after the tax years at issue. However, it reflects previous policy of the State Tax Commission.

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 specialized knowledge."

C. That the activities in which petitioner was involved clearly required special knowledge, experience and education, all of which petitioner possessed. It is noted that petitioner's activities did not take the form of advising client(s) as to the conduct of their business, or as to whether or not they should embark on a course of action. Rather, petitioner's service was to provide an accurate and reliable base of data and an opinion as to the anticipated results or changes to the environment occasioned by the proposed activities of the client(s) who retained petitioner's services. Finally, the results of petitioner's studies with respect to the environmental impact of the proposed activities constituted a service by which public as well as private interests were benefitted [see Tannenbaum v. State Tax Comm., 46 A.D.2d 400, (Third Dep't., 1975)]. Accordingly, the activities undertaken by petitioner Edward C. Raney during the years at issue constituted the practice of a profession within the meaning and intent of section 703(c) of the Tax Law and regulations thereunder, and thus the income derived therefrom was not subject to the imposition of unincorporated business tax (see Matter of James French Baldwin, State Tax Comm., December 3, 1975; Matter of Gerhard Levy, State Tax Comm., October 2, 1981).

D. That in view of the foregoing, Issue "II" is rendered moot.

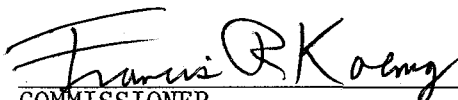
E. That the petition of Edward C. Raney is hereby granted and the Notice of Deficiency issued February 24, 1976 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER